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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

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Presidential Documents

Title 3—

The President

Memorandum of May 16, 2018

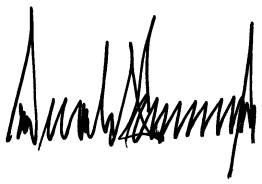
Delegation of Authorities Under Section 1244(c) of the National Defense Authorization Act for Fiscal Year 2018

Memorandum for the Secretary of State[,] the Secretary of the Treasury[,] the Secretary of Defense[,] the Secretary of Commerce[, and] the Director of National Intelligence

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of State, in coordination with the Secretary of the Treasury, the Secretary of Defense, the Secretary of Commerce, and the Director of National Intelligence, the functions and authorities vested in the President by section 1244(c)(1)–(4) of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91).

The delegations in this memorandum shall apply to any provisions of any future public law that are the same or substantially the same as the provision referenced in this memorandum.

The Secretary of State is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, May 16, 2018

[FR Doc. 2018–13440
Filed 6–20–18; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9450; Product Identifier 2016–NE–25–AD; Amendment 39–19317; AD 2018–13–05]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. Turboprop and Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Honeywell International Inc. (Honeywell) TPE331 turboprop and TSE331 turboshaft engines. This AD was prompted by recent reports of failures of the direct drive fuel control gears and bearings in the hydraulic torque sensor gear assembly, part number (P/N) 3101726–3. This AD requires initial and repetitive engine oil filter sampling and analysis of the affected engines and inspections of certain hydraulic torque sensor gear assemblies. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective July 26, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 26, 2018.

ADDRESSES: For service information identified in this final rule, contact Honeywell International Inc., 111 S 34th Street, Phoenix, AZ 85034–2802; phone: 800–601–3099; internet: *https://myaerospace.honeywell.com/wps/portal.* You may view this service information at the FAA, Engine and Propeller Standards Branch, Policy and Innovation Division, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9450.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9450; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for the Docket Operations (phone: 800–647–5527) is Docket Operations, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Los Angeles ACO Branch, FAA, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Honeywell International Inc. TPE331 turboprop and TSE331 turboshaft engines. The NPRM published in the **Federal Register** on September 13, 2017 (82 FR 42957). The NPRM was prompted by recent reports of failures of the direct drive fuel control gears and bearings in the hydraulic torque sensor gear assembly, P/N 3101726–3. The NPRM proposed to require initial and repetitive engine oil filter sampling and analysis of the affected engines. The NPRM also proposed to require inspection of the hydraulic torque sensor gear assemblies that do not meet oil filter inspection requirements and improved component overhaul procedures that would remove from service, by attrition, certain P/N hydraulic torque sensor gear assemblies. We are issuing this AD to address the unsafe condition on these products.

Comments

We gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Revise Compliance Time for Resampling

The National Agricultural Aviation Association (NAAA) commented that additional compliance time may be required for oil filter analysis resampling beyond the 25 hours time-in-service proposed by the NPRM. The NAAA noted that the engine may re-enter service after oil sampling. Therefore, the 25 hours time-in-service may be exceeded prior to the operators receiving notification from the laboratory that performed the oil filter analysis.

We agree that the proposed compliance time may have resulted in operators exceeding the 25 hours time-in-service before receiving the results of the oil filter analysis. We, therefore, revised the requirement time for resampling in this AD to 25 hours time in service after receiving notification from the accredited laboratory performing the oil filter analysis. We determined that allowing this additional time in service will improve the quality of the sample. We also clarified that if an inspection or resample is required, then the inspection must occur within 5 days after receiving notification from the laboratory that performed the oil filter analysis.

Request To Revise Compliance Time for Initial Sample

Honeywell requested that we increase the compliance time for obtaining an oil filter sample from 150 to 200 hours. Honeywell commented that Honeywell Service Bulletin (SB) TPE331–72–0180 indicates a 200-hours compliance time for TPE331–10 operators with at least 800 operating hours per year. Honeywell noted that this compliance time coincides with scheduled maintenance intervals for operators.

We disagree. We are attempting to detect impending torque sensor failures using set response times and reduced oil filter sampling and analysis intervals. We find, therefore, that the 150-hour compliance time meets the safety objectives of this AD. Further, we did not receive any comments from part 121

or part 135 operators indicating a concern with the inspection interval of 150 hours. We did not change this AD.

Request To Revise Number of Resampling Tests

NAAA and Copperstate Turbine Engine Company commented that a single resampling allowance that may lead to a gearbox inspection is too stringent. They indicated that oil filter resampling experience has shown that multiple resampling tests may be necessary. NAAA commented that the source of the contamination may not always be the material caused by the torque sensor failure. In this situation, NAAA indicated that another resampling, without the inspection, may be warranted. NAAA commented that the sample analysis should guide maintenance personnel in the proper direction without having to tear down an engine unnecessarily.

We partially agree. We agree that some wear elements, such as silver and aluminum, found during the initial oil filter analysis could permit more than one resampling before a required gearbox inspection. We also agree because these elements or alloys may not cause accelerated wear and possible failure of the torque sensor assembly. We disagree with changing the AD because the commenters have not produced evidence that the presence of certain elements may not contribute to the failure of the torque sensor. We will consider AMOC requests to allow additional oil filter resamples before requiring a gearbox inspection provided we receive acceptable technical justification. We did not change this AD.

Request To Update Service Information

Honeywell requested that we revise our reference to the service bulletin to refer to the latest revision.

We agree. We updated the reference in the Other Related Service Information paragraph in this AD to Revision 38 of Honeywell SB TPE331–72–0180.

Request To Clarify Differences Paragraph

Honeywell requested that we clarify the ''Differences Between This Proposed AD and the Service Information'' section in the NPRM.

We disagree. The referenced paragraph does not exist in the final rule and the compliance requirements were clearly defined in the NPRM. We did not change this AD.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

We reviewed Honeywell Service Information Letter (SIL) P331–97, Revision 11, dated July 23, 2008. The SIL describes procedures for conducting the spectrometric oil and filter analysis program to sample and analyze metal particles in the engine lubricating system. 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

We reviewed the improved procedures and limitations in the Honeywell Torque Sensor Gear Assembly Overhaul Manual with Illustrated Parts List, 72–00–17, Revision 10, dated October 31, 2013, for the TPE331 and TSE331 torque sensor gear assemblies. We also reviewed Honeywell's TPE331 Line Maintenance Training Manual which provides guidance for obtaining oil filter samples. In addition, we reviewed Honeywell SBs TPE331–72–0402, Revision 6, dated November 26, 1997; TPE331–72–0403, Revision 5, dated January 20, 1989; TPE331–72–0404, Revision 8, dated September 13, 2016; TPE331–72–0823, Revision 3, dated September 13, 1996; TSE331–72–5003, Revision 3, dated January 20, 1989; and TPE331–72–0180, Revision 38, dated August 15, 2017. The SBs address the inspection intervals for the oil and filter analysis for the affected TPE331 and TSE331 engines.

Costs of Compliance

We estimate that this AD affects 3,831 engines installed on airplanes of U.S. registry. We estimate the following costs to comply with this AD:

We estimate that 3,831 engines will require a records review to determine if they have an affected hydraulic torque sensor gear assembly installed.

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Records review	1 work-hour × $85 per hour = $85	$0	$85	$325,635

We estimate that 2,542 engines operating under Parts 121 or 135 and 544 engines operating under Part 91 will be required to perform oil filter sampling and analysis.

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Oil filter sampling and analysis: Part 91 operators.	4 work-hours × $85 per hour = $340	$844	$1,184	$644,096 per year.
Oil filter sampling and analysis: Part 121 and 135 operators.	1 work-hour × $85 per hour = $85	211	296	$752,432 per year.

We estimate that 242 engines will require that the hydraulic torque sensor gear assembly be overhauled during the first year of inspection.

ESTIMATED OVERHAUL COSTS

Action	Labor cost	Parts cost	Cost per product
Replace or overhaul hydraulic torque sensor gear assembly	10 work-hours × $85 per hour = $850	$10,000	$10,850

We estimate that 217 engines will require hydraulic torque sensor gear assembly inspection after an unacceptable oil filter analysis during the first year of inspection.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspect and reassemble hydraulic torque sensor gear assembly	5 work-hours × $85 per hour = $425	$3,000	$3,425

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW, Washington, DC 20591. ATTN: Information Collection Clearance Officer, AES–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):

2018–13–05 Honeywell International Inc. (Type Certificate previously held by AlliedSignal, Garrett Engine Division; Garrett Turbine Engine Company; and AiResearch Manufacturing Company of Arizona): Amendment 39–19317; Docket No. FAA–2016–9450; Product Identifier 2016–NE–25–AD.

(a) Effective Date

This AD is effective July 26, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Honeywell International Inc. (Honeywell) TPE331–1, –2, –2UA, –3U, –3UW, –5, –5B, –6, –6A, –8, –10, –10AV, –10N, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UR model turboprop and TSE331–3U turboshaft engines with hydraulic torque sensor gear assemblies, part numbers (P/Ns) 3101726–1, –2, or –3, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7210, Turbine Engine Reduction Gear.

(e) Unsafe Condition

This AD was prompted by recent reports of failures of the direct drive fuel control gears and bearings in the hydraulic torque sensor gear assembly, P/N 3101726–3. We are issuing this AD to prevent failure of the hydraulic torque sensor gear assembly. The unsafe condition, if not addressed, could result in failure of the hydraulic torque sensor gear assembly, in-flight shutdown, and reduced control of the airplane.

(f) Compliance

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

(g) Oil Filter Sampling and Analysis

(1) Obtain an initial engine oil filter sample of the affected engines within 150 hours time in service after the effective date of this AD. You can find guidance for obtaining oil filter samples in Honeywell's engine training manuals; for example, see the TPE331 Line Maintenance Training Manual.

(2) Submit the engine oil filter sample within 3 days of sampling to an ISO/IEC 17025-accredited laboratory capable of performing analysis using ASTM D5185, Standard Test Method for Multielement Determination of Used and Unused Lubricating Oils and Base Oils by Inductively Coupled Plasma Atomic Emission Spectrometry (ICP–AES). You can find a list of Honeywell-authorized laboratories capable of performing this analysis in paragraph 1.D.(10) of Honeywell Service Information Letter (SIL) P331–97, Revision 11, dated July 23, 2008.

(3) Perform an oil filter analysis for wear metals and evaluate filter contents using paragraphs 1.D.(4) and (5) of Honeywell SIL P331–97, Revision 11, dated July 23, 2008. Guidelines for interpreting analysis results can be found in paragraph (8) of Honeywell SIL P331–97.

(4) For those engines where the oil filter analysis indicates the need for an inspection or resample, as specified in Figures 1, 2 or 3 of the Honeywell SIL P331–97, Revision 11, dated July 23, 2008, accomplish the following:

(i) If Figures 1, 2, or 3 indicate an inspection is required, within 5 days after receiving notification from the laboratory that performed the analysis, inspect the torque sensor gear assembly using paragraph (g)(4)(iii) of this AD.

(ii) If Figures 1, 2, or 3 indicate a resample is required, perform a repeat oil filter sample and analysis, within 25 hours time in service after receiving notification from the laboratory that performs the analysis to evaluate for wear metals in accordance with paragraphs (g)(1), (2) and (3) of this AD.

(A) If the resample indicates a second resample or inspection is required, within 5 days after receiving notification from the laboratory that performed the analysis, inspect the hydraulic torque sensor gear assembly using paragraph (g)(4)(iii) of this AD.

(B) Reserved.

(iii) Inspect the hydraulic torque sensor gear assembly using the following steps:

(A) Remove bearings, P/Ns 358893–1, 3103035–1, 3103585–1 or 70100168–1, from the assembled spur gear and fuel control drive gearshaft and inspect or replace. Guidance for performing the inspection can be found in Section 70–00–00, Standard Practices of the applicable TPE331 engine maintenance manual. For example, see paragraph 5., ''Bearing Inspection,'' on pages 11–12 of Honeywell Maintenance Manual 70–00–00, TPE331–10 (Report No. 72–00–27), dated February 29, 2000.

(B) Visually inspect the gearshaft teeth for scoring, pitting, chipping, metal deposits or corner breakage. Visual defects on gear teeth are acceptable if defects cannot be felt using a 0.031 inch diameter stylus. No corner breakage is allowed.

(5) Thereafter, repeat the steps identified in paragraphs (g)(1) through (4) of this AD every additional 150 hours time in service after last oil filter sampling.

(6) For any hydraulic torque sensor gear assembly that fails the inspection required by paragraph (g) of this AD, remove the affected hydraulic torque sensor gear assembly and, before further flight, replace with a part eligible for installation.

(h) Hydraulic Torque Sensor Gear Assembly Overhaul

After the effective date of this AD, do not use the Honeywell Torque Sensor Gear Assembly Overhaul Manual with Illustrated Parts List, 72–00–17, Revision No. 9, dated, July 20, 1992, or earlier versions, to overhaul TPE331 or TSE331 hydraulic torque sensor gear assemblies, P/Ns 3101726–1, –2, or –3.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO 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 (j) of this AD.

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

(j) Related Information

For more information about this AD, contact Joseph Costa, Aerospace Engineer, Los Angeles ACO Branch, FAA, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Honeywell Service Information Letter P331–97, Revision 11, dated July 23, 2008.

(ii) Reserved.

(3) For Honeywell service information identified in this AD, contact Honeywell International Inc., 111 S 34th Street, Phoenix, AZ 85034–2802; phone: 800–601–3099; internet: *https://myaerospace.honeywell.com/wps/portal.*

(4) You may view this service information at FAA, Engine and Propeller Standards Branch, Policy and Innovation Division, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7759.

(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 June 14, 2018.

Robert J. Ganley,

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

[FR Doc. 2018–13266 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0333]

RIN 165–AA00

Safety Zones; Marine Events Held in the Captain of the Port Long Island Sound Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing nine temporary safety zones for fireworks displays within the Captain of the Port (COTP) Long Island Sound (LIS) Zone. This temporary final rule is necessary to provide for the safety of life on navigable waters during these events. Entry into, transit through, mooring or anchoring within these limited access areas is prohibited unless authorized by the COTP LIS.

DATES: This rule is effective without actual notice from June 21, 2018 through July 15, 2018. For the purposes of enforcement, actual notice will be used from May 27, 2018, through June 21, 2018.

ADDRESSES: To view documents mentioned in this preamble as being

available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0333 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, contact Petty Officer Amber Arnold, Prevention Department, Coast Guard Sector Long Island Sound, telephone (203) 468–4583, email *Amber.D.Arnold@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
LIS Long Island Sound
NPRM Notice of Proposed Rulemaking
NAD 83 North American Datum 1983

II. Background Information and Regulatory History

This rulemaking establishes nine safety zones for fireworks displays. Each event and its corresponding regulatory history are discussed below.

50th Birthday Party Fireworks is a first time marine event with no regulatory history.

Fairfield Aerial Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.16). This event has been included in this rule due to deviation from the cite date.

City of Stamford Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.12). This event has been included in this rule due to deviation from the cite date.

City of West Haven Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.13). This event has been included in this rule due to deviation from the cite date.

Madison Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.38). This event has been included in this rule due to deviation from the cite date.

Village of Asharoken Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.24). This event has been included in this rule due to deviation from the cite position.

City of Norwich July Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.11). This event has been included in this rule due to deviation from the cite date.

City of Middletown Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.9). This event has been included in this rule due to deviation from the cite date.

Riverfest Fireworks is a recurring marine event with regulatory history and is cited in 33 CFR 165.151(7.23). This event has been included in this rule due to deviation from the cite date.

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a NPRM with respect to this rule because doing so would be impracticable and contrary to the public interest. The event sponsors were late in submitting marine event applications. These late submissions did not give the Coast Guard enough time to publish an NPRM, take public comments, and issue a final rule before these events take place. It is impracticable to publish an NPRM because we must establish these safety zones by May 27, 2018. Thus, waiting for a comment period to run is also contrary to the public interest as it would inhibit the Coast Guard's mission to keep the ports and waterways safe.

Under 5 U.S.C. 553(d)(3), and for the same reasons stated in the preceding paragraph, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this temporary rule under authority in 33 U.S.C. 1231. The COTP LIS has determined that the safety zones established by this temporary final rule are necessary to provide for the safety of life on navigable waterways before, during and after these scheduled events.

IV. Discussion of the Rule

This rule establishes nine safety zones for nine fireworks displays. The location of these safety zones are as follows:

FIREWORKS DISPLAYS SAFETY ZONES

1 50th Birthday Party Fireworks	Location: Waters of Long Island Sound off Canfield Island, Norwalk, CT in approximate position 41°05′40.66″ N, 073°22′53.34″ W (NAD 83).
2 Fairfield Aerial Fireworks	Location: Waters of Jennings Beach, Fairfield, CT in approximate position 41°08′22″ N, 073°14′02″ W (NAD 83).
3 City of Stamford Fireworks	Location: Waters of Fisher's Westcott Cove, Stamford, CT in approximate position 41°02′09.56″ N, 073°30′57.76″ W (NAD 83).
4 City of West Haven Fireworks	Location: Waters of New Haven Harbor, off Bradley Point, West Haven, CT in approximate position 41°15′07″ N, 072°57′26″ W (NAD 83).
5 Madison Fireworks	Location: Waters of Long Island Sound off Madison Beach, Madison, CT in approximate position 41°16′03.93″ N, 072°36′15.97″ W (NAD 83).
6 Village of Asharoken Fireworks	Location: Waters of Northport Bay, Asharoken, NY in approximate position, 40°55′54.04″ N, 073°21′27.97″ W (NAD 83).
7 City of Norwich July Fireworks	Location: Waters of the Thames River, Norwich, CT in approximate position, 41°31′16.835″ N, 072°04′43.327″ W (NAD 83).
8 City of Middletown Fireworks	Location: Waters of the Connecticut River, Middletown Harbor, Middletown, CT in approximate position 41°33′44.47″ N, 072°38′37.88″ W (NAD 83).
9 Riverfest Fireworks	Location: Waters of the Connecticut River, Hartford, CT in approximate positions, 41°45′39.93″ N, 072°39′49.14″ W (NAD 83).

This rule prevents restricts vessel movement within the areas specifically designated as a safety zone to reduce the safety risks associated with specific marine events. Vessels are prohibited from entering, transiting, mooring, or anchoring with the safety zones during the period of enforcement of each safety zone unless authorized by the COTP or designated representative.

The Coast Guard will notify the public and local mariners of these safety zones through appropriate means, which may include, but are not limited to, publication in the **Federal Register**, the Local Notice to Mariners, and Broadcast Notice to Mariners.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

The Coast Guard determined that this rulemaking is not a significant regulatory action for the following reasons: (1) The enforcement of these safety zones will be relatively short in duration, lasting at most two hours; (2) persons or vessels desiring to enter these safety zones may do so with permission from the COTP LIS or a designated representative; (3) these safety zones are designed in a way to limit impacts on vessel traffic, permitting vessels to navigate in other portions of the waterway not designated as a safety zone; and (4) the Coast Guard will notify the public of the enforcement of this rule via appropriate means, such as via Local Notice to Mariners and Broadcast Notice to Mariners to increase public awareness of these safety zones.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit these regulated areas may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator. Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Orders 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This temporary rule involves the establishment of nine temporary safety zones. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration (REC) supporting this determination will be available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your

message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T01–0333 to read as follows:

§ 165.T01–0333 Safety Zones; Marine Events held in the Captain of the Port Long Island Sound Zone.

(a) *Location.* This section will be enforced at the locations listed for each event in Table 1 to this section.

(b) *Enforcement period.* This rule will be enforced on the dates and times listed for each event in Table 1 to this section.

(c) *Definitions.* The following definitions apply to this section: A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the COTP Long Island Sound to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. ''Official patrol vessels'' may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP Long Island Sound. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(d) *Regulations.* (1) The general regulations contained in § 165.23 apply.

(2) In accordance with the general regulations in § 165.23, entry into or movement within these zones is prohibited unless authorized by the COTP Long Island Sound.

(3) Any vessel given permission to deviate from these regulations must comply with all directions given to them by the COTP Long Island Sound, or a designated representative.

(4) Any vessel given permission to enter or operate in these safety zones must comply with all directions given to them by the COTP Long Island Sound or a designated representative.

(5) Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed.

(6) The regulated area for all fireworks displays listed in Table 1 to this section is that area of navigable waters within a 1000 foot radius of the launch platform or launch site for each fireworks display.

TABLE 1 TO § 165.T01–0333—FIREWORKS EVENTS

1	50th Birthday Party Fireworks Display	• Date: May 27, 2018. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Long Island Sound off Canfield Island, Norwalk, CT in approximate position 41°05′40.66″ N, 073°22′53.34″ W (NAD 83).
2	Fairfield Aerial Fireworks	• Date: July 2, 2018. • Rain Date: July 7, 2018. • Time: 8:00 p.m. to 10:30 p.m. • Location: Location: Waters of Jennings Beach, Fairfield, CT in approximate position 41°08′22″ N, 073°14′02″ W (NAD 83).
3	City of Stamford Fireworks	• Date: July 6, 2018. • Rain Date: July 7, 2018. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Fisher's Westcott Cove, Stamford, CT in approximate position 41°02′09.56″ N, 073°30′57.76″ W (NAD 83).
4	City of West Haven Fireworks	• Date: July 3, 2018. • Rain Date: July 5, 2018. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of New Haven Harbor, off Bradley Point, West Haven, CT in approximate position 41°15′07″ N, 072°57′26″ W (NAD 83).
5	Madison Fireworks	• Date: July 3, 2018. • Rain Date: July 6, 2018. • Time: 9:00 p.m. to 10:00 p.m. • Location: Waters of Long Island Sound off Madison Beach, Madison, CT in approximate position 41°16′03.93″ N, 072°36′15.97″ W (NAD 83).
6	Village of Asharoken Fireworks	• Date: July 4, 2018. • Rain Date: July 5, 2018. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Northport Bay, Asharoken, NY in approximate position, 40°55′54.04″ N, 073°21′27.97″ W (NAD 83).
7	City of Norwich July Fireworks	• Date: July 6, 2018. • Rain Date: July 8, 2018. • Time: 9:00 p.m. to 10:30 p.m. • Location: Waters of the Thames River, Norwich, CT in approximate position, 41°31′16.835″ N, 072°04′43.327″ W (NAD 83).
8	City of Middletown Fireworks	• Date: July 7, 2018. • Rain Date: July 8, 2018.

TABLE 1 TO § 165.T01–0333—FIREWORKS EVENTS—Continued

9 Riverfest Fireworks	• Time: 9:00 p.m. to 10:30 p.m. • Location: Waters of the Connecticut River, Middletown Harbor, Middletown, CT in approximate position 41°33′44.47″ N, 072°38′37.88″ W (NAD 83). • Date: July 14, 2018. • Rain Date: July 15, 2018. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Connecticut River, Hartford, CT in approximate positions, 41°45′39.93″ N, 072°39′49.14″ W (NAD 83).

Dated: May 24, 2018.

K.B. Reed,

Captain, U. S. Coast Guard, Captain of the Port Long Island Sound.

[FR Doc. 2018–13344 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–0389]

Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Navy Pier Southeast Safety Zone within the Chicago Harbor for multiple firework events during June and September 2018. This action is necessary and intended to ensure the safety of life and property on navigable waters prior to, during, and immediately after firework displays. During the enforcement periods listed below, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated representative.

DATES: The regulation in 33 CFR 165.931 will be enforced at the time specified below in **SUPPLEMENTARY INFORMATION** during the months of June and September 2018.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT John Ramos, Waterways Management Division, Marine Safety Unit Chicago, U.S. Coast Guard; telephone (630) 986–2155, email *D09-DG-MSUChicago-Waterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL listed in 33 CFR 165.931, on June 26, 2018 from 9:10 p.m. until 9:25 p.m., September 7, 2018 from 10:00 p.m. until 10:10 p.m., and September 20, 2018 from 8:30 p.m. until 8:40 p.m. This safety zone encompasses all waters of Lake Michigan within Chicago Harbor bounded by coordinates beginning at 41°53′26.5″ N, 087°35′26.5″ W; then south to 41°53′7.6″ N, 087°35′26.3″ W; then west to 41°53′7.6″ N, 087°36′23.2″ W; then north to 41°53′26.5″ N, 087°36′24.6″ W; then east back to the point of origin (NAD 83). Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated on-scene representative.

This notice of enforcement is issued under authority of 33 CFR 165.931 and 5 U.S.C. 552 (a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of the above-specified enforcement periods of this safety zone via Broadcast Notice to Mariners and Local Notice to Mariners. The Captain of the Port Lake Michigan or a designated on-scene representative may be contacted via Channel 16, VHF–FM or at (414) 747–7182.

Dated: May 29, 2018.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. 2018–13339 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–0382]

Safety Zone; Southern California Annual Fireworks for the San Diego Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for the Sea World Fireworks on the waters of Mission Bay, CA, on September 1 through 2, 2018. This safety zone is necessary to provide for the safety of the participants, spectators, official vessels of the events, and general users of the waterway. Our regulation for the Southern California annual fireworks for the San Diego Captain of the Port Zone identifies the regulated area for the events. During the enforcement period, no spectators shall anchor, block, loiter in, or impede the transit of official patrol vessels in the regulated area without the approval of the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 165.1123, Table 1, Item 7, will be enforced from 8:30 p.m. through 10:30 p.m. on September 1 through September 2, 2018.

FOR FURTHER INFORMATION CONTACT: If you have questions on this publication, call or email Lieutenant Junior Grade Briana Biagas, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone 619–278–7656, email *D11MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the regulations in 33 CFR 165.1123 for a safety zone for the Sea World Fireworks on the waters of Mission Bay, CA, in 33 CFR 165.1123, Table 1, Item 7 of that section, from 8:30 p.m. through 10:30 p.m. on September 1 through 2, 2018. This action is being taken to provide for the safety of life on navigable waterways during the fireworks events. Our regulation for Southern California annual fireworks events for the San Diego Captain of the Port Zone identifies the regulated area for the events. Under the provisions of 33 CFR 165.1123, a vessel may not enter the regulated area, unless it receives permission from the Captain of the Port, or his designated representative. Spectator vessels may safely transit outside the regulated area but may not anchor, block, loiter, or impede the transit of participants or official patrol vessels. The Coast Guard may be assisted by other Federal, State, or Local

law enforcement agencies in enforcing this regulation.

This document is issued under authority of 33 CFR 165.1123 and 5 U.S.C. 552(a). In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, a Safety Marine Information Broadcast on VHF–FM radio, and local advertising by the event sponsor.

If the Captain of the Port or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

Dated: May 25, 2018.

J.R. Buzzella,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2018–13343 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–0252]

Safety Zone; Milwaukee Harbor, Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone on the Milwaukee Harbor, Milwaukee, WI for annual fireworks displays in the Captain of the Port Lake Michigan zone at specified times from June 27, 2018 through September 8, 2018. This action is necessary and intended to ensure safety of life on navigable waterways before, during and after this event. During the enforcement period, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated representative.

DATES: The regulations in 33 CFR 165.935 will be enforced at the times specified below in **SUPPLEMENTARY INFORMATION** from June 27, 2018 through September 8, 2018.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email marine event coordinator MSTC Kaleena Carpino, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI telephone (414) 747–7148, email *D09-SMB-SECLakeMichgan-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Milwaukee Harbor Safety Zone listed in 33 CFR 165.935 at the following times, for the following events.

(1) *Summerfest Fireworks* on June 27, 2018 from 9:30 p.m. to 10:30 p.m.

(2) *Festa Italiana Fireworks* on July 20, 21, and 22, 2018 from 10:30 p.m. to 11:30 p.m.

(3) *German Fest Fireworks* on July 27 and 28, 2018 from 10:30 p.m. to 11:30 p.m.

(4) *Indian Summer Fireworks* on September 8, 2018 from 10 p.m. to 11 p.m.

This action is being taken to provide for the safety of life on navigable waterways of the Milwaukee Harbor, Milwaukee, WI. This safety zone will encompass the waters of Lake Michigan within Milwaukee Harbor including the Harbor Island Lagoon enclosed by a line connecting the following points: Beginning at 43°02′00″ N, 087°53′53″ W; then south to 43°01′44″ N, 087°53′53″ W; then east to 43°01′44″ N, 087°53′25″ W; then north to 43°02′00″ N, 087°53′25″ W; then west to the point of origin. (NAD 83). Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated on-scene representative.

This notice of enforcement is issued under authority of 33 CFR 165.935; Safety Zones, Milwaukee Harbor, Milwaukee, WI, and 5 U.S.C. 552 (a). In addition to this publication in the **Federal Register**, the Coast Guard plans to provide the maritime community with advance notification for the enforcement of this safety zone via Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port Lake Michigan or a representative may be contacted via Channel 16, VHF–FM or at (414) 747–7182.

Dated: May 29, 2018.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. 2018–13338 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–0165]

Safety Zone; Annual Events Requiring Safety Zones in the Captain of the Port Lake Michigan Zone—Holiday Celebration Fireworks

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone on the Kewaunee River in Kewaunee, WI for the Holiday Celebration Fireworks on July 3, 2018. This action is necessary and intended to ensure safety of life on navigable waters immediately prior to, during, and after the fireworks display. During the enforcement period, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated representative.

DATES: The regulations in 33 CFR 165.929 will be enforced for safety zone (e)(52), Table 165.929, from 9:30 p.m. through 9:45 p.m. on July 3, 2018.

FOR FURTHER INFORMATION CONTACT: If you have questions on this document, call or email marine event coordinator, MSTC Kaleena Carpino, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI; telephone (414) 747–7148; email *D09-SMB-SECLakeMichigan-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Holiday Celebration Fireworks safety zone listed as item (e)(52) in Table 165.929 of 33 CFR 165.929 from 9:30 p.m. through 9:45 p.m. on July 3, 2018 on all waters of Kewaunee Harbor and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°27.481′ N, 087°29.735′ W (NAD 83). Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated on-scene representative.

This notice of enforcement is issued under authority of 33 CFR 165.929, Safety Zones; Annual events requiring safety zones in the Captain of the Port Lake Michigan zone, and 5 U.S.C. 552(a). In addition to this publication in the **Federal Register**, the Coast Guard plans to provide the maritime community with advance notification

for the enforcement of this safety zone via Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port Lake Michigan or a representative may be contacted via Channel 16, VHF–FM or at (414) 747–7182.

Dated: May 29, 2018.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2018–13341 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1519 and 1552

[EPA–HQ–OARM–2018–0165; FRL–9979–24–OARM]

Acquisition Regulation: Removal of EPA Mentor Protégé Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is taking direct final action to amend the EPA Acquisition Regulation (EPAAR) by removing Mentor-protégé clause requirement and the corresponding provision and clause, ''Mentor Protégé Program'' and ''Procedures for Participation in the EPA Mentor Protégé Program''.

DATES: This final rule is effective on September 19, 2018 without further notice, unless EPA receives adverse comment by July 23, 2018. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2018–0165, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Shakethia Allen, Policy, Training, and Oversight Division, Acquisition Policy and Training Service Center (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–5157; email address: *allen.shakethia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This direct final rule makes the following changes to 48 CFR parts 1519 and 1552: (1) Remove 1519.203, Mentor-protégé, (2) clause 1552.219–70, Mentor Protégé Program, and (3) provision 1552.219–71, Procedures for Participation in the EPA Mentor Protégé Program.

II. General Information

A. Why is EPA using a direct final rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. Any parties interested in commenting must do so at this time.

B. Does this action apply to me?

EPAAR 1519.203 and corresponding clause and provision, respectively, 1552.219–70 and 1552.219–71 apply to all contractors who hold a current contract with EPA which includes these clauses.

C. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

III. Background

The U.S. Environmental Protection Agency Mentor-Protégé Program was established to stimulate small disadvantaged businesses (SDBs) and women-owned small businesses (WOSBs) participation in Agency contracts. Prime contractors (mentors) provide technical and managerial support to SDBs or WOSBs subcontractors (protégés).

The Small Business Jobs Act of 2010 and the National Defense Authorization Act for Fiscal Year 2013 provided authority for the Small Business Administration (SBA) to establish mentor-protégé programs for all small businesses. Rather than creating separate programs for each constituency—Service Disabled Veteran Owned Businesses, Women Owned Small Businesses, Historically Underutilized Business Zones—the SBA chose to create a single, all-inclusive mentor-protégé program modeled on the successful mentor-protégé program available to participants in its 8(a) program. SBA's mentor protégé program is federal wide, so EPA can use it instead of managing its own program.

EPA will use SBA's program to reduce redundancy and increase efficiencies.

IV. Statutory and Executive Orders Reviews

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

This action is not a ''significant regulatory action'' under the terms of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) and therefore, not subject to review under the E.O..

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* No information is collected under this action.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impact of this rule on small entities,''small entity''is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action removes a current EPAAR provision and does not impose requirements involving capital investment, implementing procedures, or record keeping. This rule will not have a significant economic impact on small entities.

D. 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. This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA 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'' is 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.'' This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications as specified in Executive Order 13175.

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

Executive Order 13045, entitled ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children.

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

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

This final rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28335, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995 (NTTAA)

Section 12(d) (15 U.S.C. 272 note) of NTTAA, Public Law 104–113, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

Executive Order 12898 Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this final rulemaking will not have disproportionately high and adverse

human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rulemaking does not involve human health or environmental effects.

K. Congressional Review

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. EPA will use SBA's federal wide mentor protégé program instead of managing its own program.

List of Subjects in 48 CFR Parts 1519 and 1552

Environmental protection, Government procurement, Reporting and recordkeeping requirements, Small businesses.

Dated: May 16, 2018.

Kimberly Patrick,

Director, Office of Acquisition Management.

For the reasons stated in the preamble, 48 CFR parts 1519 and 1552 are amended as set forth below:

PART 1519—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for part 1519 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

1519.203 [Removed and reserved]

■ 2. Section 1519.203 is removed and reserved.

PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 1552 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

1552.219–70 [Removed and reserved]

■ 4. Section 1552.219–70 is removed and reserved.

1552.219–71 [Removed and reserved]

■ 5. Section 1552.219–71 is removed and reserved.

[FR Doc. 2018–13349 Filed 6–20–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 383, 384, and 391

[Docket No. FMCSA–2018–0152]

RIN 2126–AC18

Extension of Compliance Dates for Medical Examiner's Certification Integration

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: FMCSA amends its regulations to delay the compliance date from June 22, 2018, to June 22, 2021, for several provisions of its April 23, 2015 Medical Examiner's Certification Integration final rule. This action is being taken to provide FMCSA additional time to complete certain information technology (IT) system development tasks for its National Registry of Certified Medical Examiners (National Registry) and provide the State Driver's Licensing Agencies (SDLAs) sufficient time to make the necessary IT programming changes after upgrades to the National Registry.

DATES:

Effective Date: This interim final rule is effective June 21, 2018.

Public Comment Period: Comments must be received on or before August 20, 2018.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2018–0152 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments, including collection of information comments for the Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, by telephone at 202–366–4001, or by email at *fmcsamedical@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Rulemaking Documents

A. Submitting Comments

If you submit a comment, please include the docket number for this interim final rule (Docket No. FMCSA–2018–0152), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2018–0152, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the

comment period and may change this interim final rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is customarily not made available to the public by the submitter. Under the Freedom of Information Act, CBI is eligible for protection from public disclosure. If you have CBI that is relevant or responsive to this interim final rule it is important that you clearly designate the submitted comments as CBI. Accordingly, please mark each page of your submission as ''confidential'' or ''CBI.'' Submissions designated as CBI and meeting the definition noted above will not be placed in the public docket of this interim final rule. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, 1200 New Jersey Avenue SE, Washington, DC 20590. Any commentary that FMCSA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2018–0152, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

C. 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.transportation.gov/privacy.*

D. Advance Notice of Proposed Rulemaking (ANPRM) or Negotiated Rulemaking Not Required

Under 49 U.S.C. 31136(g), added by section 5202 of the Fixing America's Surface Transportation or FAST Act, Public Law 114–94, 129 Stat. 1312, 1534 (Dec. 4, 2015), FMCSA is required either to proceed with negotiated rulemaking or to publish an ANPRM for any major rulemaking, unless the Agency finds good cause that an ANPRM is impracticable, unnecessary, or contrary to the public interest. FMCSA has determined that this interim final rule is not major; therefore, neither an ANPRM nor a negotiated rulemaking is required.

II. Executive Summary

A. Purpose and Summary of the Major Provisions

This interim final rule delays the compliance date for several provisions in the Medical Examiner's Certification Integration final rule (80 FR 22790, Apr. 23, 2015) from June 22, 2018, to June 22, 2021. Specifically, it postpones, through June 22, 2021, the provisions for: (1) FMCSA to electronically, transmit from the National Registry to the SDLAs, driver identification information, examination results, and restriction information from examinations performed for holders of commercial learner's permits (CLPs) or commercial driver's licenses (CDLs) (interstate and intrastate); (2) FMCSA to electronically transmit to the SDLAs medical variance information for all commercial motor vehicle (CMV) drivers; (3) SDLAs to post on the Commercial Driver's License Information System (CDLIS) driver record the driver identification, examination results, and restriction information received electronically from FMCSA; and (4) motor carriers to no longer be required to verify that CLP/CDL drivers were certified by a certified medical examiner (ME) listed on the National Registry.

B. Benefits and Costs

This rule results in neither costs nor benefits but aligns the compliance dates with the date when the IT systems will be ready and, thus, when the costs and benefits estimated in the 2015 final rule can be realized.

III. Legal Basis for the Interim Final Rule

The legal basis of the 2015 final rule, set out at 80 FR 22791–22792, also serves as the legal basis for this interim final rule. Brief summaries of the relevant legal bases for the actions taken in this interim final rule are set out below.

A. Authority Over Drivers Affected

Drivers Required To Obtain a Medical Examiners Certificate (MEC)

FMCSA is required by statute to establish standards for the physical qualifications of drivers who operate CMVs in interstate commerce for non-excepted industries (49 U.S.C. 31136(a)(3) and 31502(b)). Subject to certain limited exceptions,[1] FMCSA has fulfilled the statutory mandate by establishing physical qualification standards for all drivers covered by these provisions (49 CFR 391.11(b)(4)). Such drivers must obtain, from an ME, a certification indicating that the driver is physically qualified to drive a CMV (49 CFR 391.41(a), 391.43(g) and (h)). FMCSA is also required to ensure that the operation of a CMV does not have a deleterious effect on the physical condition of drivers (49 U.S.C. 31136(a)(4)).

Drivers Required To Obtain a CDL

The authority for FMCSA to require an operator of a CMV to obtain a CDL is based on 49 U.S.C. 31302 and the authority to set minimum standards for the testing and fitness of such operators rests on 49 U.S.C.31305.

B. Authority To Regulate State CDL Programs

Under 49 U.S.C. 31311 and 31314, FMCSA has authority to prescribe procedures and requirements the States must follow when issuing CDLs (see, generally, 49 CFR parts 383 and 384). In particular, under section 31314, in order to avoid loss of certain Federal-aid highway funds otherwise apportioned under 23 U.S.C. 104(b), each State must comply with the requirement in 49 U.S.C. 31311(a)(1) to adopt and carry out a program for testing and ensuring the fitness of individuals to operate CMVs consistent with the minimum standards prescribed by FMCSA under 49 U.S.C. 31305(a) (*see also* 49 CFR 384.201).

C. Authority To Require Reporting by MEs

FMCSA has authority under 49 U.S.C. 31133(a)(8) and 31149(c)(1)(E) to require MEs on the National Registry to obtain information from CMV drivers regarding their physical health, to record and retain the results of the physical examinations of CMV drivers, and to require frequent reporting of the information contained on the MECs they issue. Section 31133(a)(8) gives the Agency broad administrative powers (specifically ''to prescribe recordkeeping

[1] *See* 49 CFR 390.3(f) and 391.2.

and reporting requirements'') to assist in ensuring motor carrier safety and driver health (Sen. Report No. 98–424 at 9 (May 2, 1984)). Section 31149(c)(1)(E) authorizes a requirement for electronic reporting of certain specific information by MEs, including applicant names and numerical identifiers as determined by the FMCSA Administrator. Section 31149(c)(1)(E) sets minimum monthly reporting requirements for MEs and does not preclude the exercise by the Agency of its broad authority under section 31133(a)(8) to require more frequent and more inclusive reports.[2] In addition to the general rulemaking authority in 49 U.S.C. 31136(a), the Secretary of Transportation is specifically authorized by section 31149(e) to ''issue such regulations as may be necessary to carry out this section.''

Authority to implement these various statutory provisions has been delegated to the Administrator of FMCSA (49 CFR 1.87(f)).

IV. Background

A. Regulatory History

In 2008, FMCSA issued the Medical Certification Requirements as Part of the Commercial Driver's License (CDL) final rule (73 FR 73096, Dec. 1, 2008). This rule established requirements for CDL drivers to provide MEC information to SDLAs for posting on the driver record. Then the National Registry of Certified Medical Examiners final rule was issued to establish the National Registry and require that MEs listed on the National Registry perform all physical examinations of CMV drivers and issue MECs to them (77 FR 24104, Apr. 20, 2012). The provisions of these final rules are now in effect.

The Medical Examiner's Certification Integration final rule adopted a number of changes in the procedures for the preparation, recording, and utilization of Medical Examination Report Forms and MECs for CMV drivers (80 FR 22790, Apr. 23, 2015; 80 FR 35577, Jun. 22, 2015). Some of those changes, such as the specific forms to be used by MEs to record the results of physical examinations and to certify CMV drivers as physically qualified, are already in effect.[3]

But several provisions were adopted with a compliance date of June 22, 2018, a delay of 3 years, primarily to allow the SDLAs and FMCSA sufficient time to develop, test and install the necessary IT infrastructure to implement them. The final rule required MEs to report results of all CMV drivers' physical examinations performed (including the results of examinations where the driver was found not to be qualified) to FMCSA by midnight (local time) of the next calendar day following the examination. The reporting included results on all CMV drivers who are required to be medically certified to operate in interstate commerce, not only those who hold or apply for CLPs or CDLs. The reported results would be of any examinations performed in accordance with the Federal Motor Carrier Safety Regulations (FMCSRs), as well as those in accordance with any applicable State variances (which will be valid for intrastate operations only). For holders of CLPs/CDLs (interstate and intrastate), FMCSA stated that it would electronically transmit from the National Registry to the SDLAs the driver identification, examination results, and restriction information. The SDLAs would in turn be required to post this information to the CDLIS driver record. The Agency also said it would electronically transmit medical variance information for all CMV drivers to the SDLAs. If the information transmitted so required, the SDLAs were required to change the driver's certified status on the CDLIS driver record and/or begin a downgrade of the CLP/CDL. Motor carriers, enforcement personnel, and other interested parties would be permitted to rely on the medical certification information on the CDLIS driver record and would no longer be permitted to rely on the original paper MEC as proof of medical certification.

The 2015 final rule also adopted new provisions based on the new reporting requirement for MEs that would invalidate any existing MEC held by a CMV driver whenever the driver failed a new physical qualification examination. If the driver involved was a CLP/CDL holder, such invalidation would be electronically transmitted from the National Registry to the SDLAs for the SDLA to change the certified status on the CDLIS driver record and/or begin a downgrade of the CLP/CDL.

B. Recent Developments

As the compliance date of June 22, 2018, draws nearer, FMCSA has reluctantly concluded that it will not be able to electronically transmit MEC information from the National Registry to the SDLAs by that date. Further, the SDLAs will not be able to electronically receive the MEC information from the National Registry for posting to the CDLIS driver record, as intended by the Medical Examiner's Certification Integration final rule. Although the Agency has initiated the IT development work to enhance the National Registry to enable the Agency to electronically transmit MEC information and medical variances to the States, along with the programming code the States would need to implement changes to their IT systems to receive the data, none of this work will be completed in time to meet the June 22, 2018 compliance date. Under these circumstances, neither the Agency nor the stakeholders would be able to rely on the CDLIS driver record as official proof of medical certification, unless drivers continue to provide the original paper MEC to the SDLAs, as is being done presently. All of the functions regarding electronic transmission of data that were to be implemented on June 22, 2018, are dependent upon the development and implementation of the IT infrastructure that will not be available on June 22, 2018. For this reason, FMCSA decided to extend the compliance date to June 22, 2021, to ensure that the SDLAs have sufficient time once the final specifications are released to make the necessary IT programming changes.

V. Discussion of the Interim Final Rule

This interim final rule is effective immediately and establishes, for most provisions in the 2015 final rule, a new compliance date of June 22, 2021. The specific provisions impacted by this change are listed in the Section-by-Section discussion below. This delayed compliance date means that through June 21, 2021:

- Certified MEs must continue issuing MECs to qualified CLP/CDL applicants/holders;
- CLP/CDL applicants/holders must continue ensuring that the SDLA receives a copy of their MEC;
- Motor carriers must continue verifying that drivers were certified by an ME listed on the National Registry; and
- SDLAs must continue processing paper copies of MECs they receive from CLP/CDL applicants/holders.

It should be noted that the compliance date in today's rule remains as June 22, 2018, for the requirement for MEs to report results of all CMV driver physical examinations performed (including the results of examinations where the driver was found not to be qualified) to FMCSA by midnight (local time) of the next calendar day following the examination. In other words, except for the ME reporting requirement, this

[2] The provisions of section 31149(c)(1)(E) have been amended by section 32302(c)(1)(A) of Moving Ahead for Progress in the 21st Century, Public Law 112–141, 126 Stat. 405 (July 6, 2012) (''MAP–21'').

[3] Judicial review of this aspect of the 2015 final rule was dismissed for lack of standing in *Owner Operator Indep. Drivers Ass'n* v. *United States DOT,* 878 F.3d 1099, 1102 (8th Cir. 2018) (rehearing and rehearing en banc) denied Apr. 2, 2018).

interim final rule continues the status quo for another 3 years. The details for these requirements can be found in the preambles of all three of the prior final rules, or in the current regulatory text in 49 CFR parts 383, 384 and 391.

As noted above, FMCSA is not delaying the requirement for MEs performing physical examinations of CMV drivers to report results of all CMV drivers' physical examinations (including the results of examinations where the driver was found not to be qualified) to FMCSA by midnight (local time) of the next calendar day following the examination, since several MEs already submit such results more frequently than monthly. Having the MEs begin submitting reports by midnight (local time) of the next calendar day following the examination also allows FMCSA to begin electronically transmitting this important safety data to each State when that State is ready to receive the information, thereby providing States additional flexibility to implement the provisions of this rulemaking at their own pace. FMCSA believes some States may be prepared to receive this data ahead of the June 22, 2021, date to take advantage of the efficiencies and added security the new process affords.

When FMCSA is ready to begin electronically transmitting MEC information from the National Registry, and an SDLA is ready to begin receiving this information electronically from the National Registry, FMCSA will work with the SDLA involved on the most appropriate means to use such electronic transmissions. FMCSA states that, under such circumstances, electronic transmission of the MEC information may be an acceptable means for CDL and CLP holders to satisfy the requirement of providing the MEC to the SDLA. In order to avoid any uncertainty, provisions are being added to the appropriate regulations stating that, in case of a conflict between the medical certification information provided electronically by FMCSA and information on a paper version of the MEC, the electronic record will be controlling. On the other hand, the provisions in the regulations governing the handling of these matters under the current procedures will remain in effect through June 21, 2021, to ensure continued compliance by SDLAs and other affected stakeholders until the electronic transmission of MEC information is operational for all SDLAs.

If some SDLAs begin receiving MEC information from FMCSA prior to June 22, 2021, FMCSA and the SDLAs will make every effort to advise all stakeholders when such handling begins. MEs listed on the National Registry, employers and enforcement personnel (both State and Federal) will need to be made fully aware that some SDLAs may be following procedures different from the remaining States.

VI. Good Cause Exists

Although the promulgation of a final rule adjusting compliance dates would ordinarily involve the issuance of a notice of proposed rulemaking (NPRM) and an opportunity for public comment, the Administrative Procedure Act does permit their omission for good cause, when ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest'' (5 U.S.C. 553(b)(B)). The necessary IT infrastructure to enable stakeholders to comply with the regulatory provisions involved will not be available on June 22, 2018. Under these circumstances, and in order to timely clarify the applicable regulatory requirements, FMCSA finds that there is good cause to issue this interim final rule. A proposed rule allowing prior notice and opportunity for comment could not be completed before June 22 and is therefore both impractical and contrary to the public interest. An opportunity for public comment is provided after publication of the interim final rule. All comments will be reviewed and the interim final rule may be amended as a result of those comments.

In addition, upon a finding of good cause, the Agency may provide for a final rule to become effective less than 30 days after publication in the Federal Register (5 U.S.C. 553(d)(3)). Therefore, for the same reasons as indicated above, the Agency makes this interim final rule effective immediately upon publication in the **Federal Register**.

VII. International Impacts

The FMCSRs, and any exceptions to the FMCSRs, apply only within the United States (and, in some cases, United States territories). Motor carriers and drivers are subject to the laws and regulations of the countries in which they operate, unless an international agreement states otherwise. Drivers and carriers should be aware of the regulatory differences among nations.

VIII. Section-by-Section Analysis

A. Parts 383, 384, and 391

In parts 383, 384, and 391, FMCSA makes a few clarifying edits and changes the date of the rule as stated in the table below.

TABLE 1—DATE CHANGES

Section that is changed:	Existing language in the CFR that is removed today:	Language added to the CFR by today's final rule:
383.71(h)(1)(i)	June 22, 2018	June 22, 2021.
383.71(h)(1)(ii)	June 22, 2018	June 22, 2021.
383.71(h)(3)(i)	June 22, 2018	June 22, 2021.
383.71(h)(3)(ii)	June 22, 2018	June 22, 2021.
383.73(a)(2)(vii)(A)	June 22, 2018	June 22, 2021.
383.73(a)(2)(vii)(B)	June 22, 2018	June 22, 2021.
383.73(b)(5)(i)	June 22, 2018	June 22, 2021.
383.73(b)(5)(ii)	June 22, 2018	June 22, 2021.
383.73(o)(1)(i)	June 22, 2018	June 22, 2021.
383.73(o)(1)(ii)	June 22, 2018	June 22, 2021.
383.73(o)(2)(i)	June 22, 2018	June 22, 2021.
383.73(o)(2)(ii)	June 22, 2018	June 22, 2021.
383.73(o)(3)(i)	June 22, 2018	June 22, 2021.
383.73(o)(3)(ii)	June 22, 2018	June 22, 2021.
383.73(o)(4)(i)(A)(*1*)	June 22, 2018	June 22, 2021.
383.73(o)(4)(i)(A)(*2*)	June 22, 2018	June 22, 2021.
383.73(o)(4)(ii)(A)	June 22, 2018	June 22, 2021.
383.73(o)(4)(ii)(B)	June 22, 2018	June 22, 2021.

TABLE 1—DATE CHANGES—Continued

Section that is changed:	Existing language in the CFR that is removed today:	Language added to the CFR by today's final rule:
384.301(i)	June 22, 2018	June 22, 2021.
391.23(m)(2)(i)(B)(*1*)	June 22, 2018	June 21, 2021.
391.23(m)(2)(i)(C)	June 22, 2018	June 21, 2021.
391.23(m)(3)(i)(B)(*1*)	June 22, 2018	June 21, 2021.
391.23(m)(3)(i)(C)	June 22, 2018	June 21, 2021.
391.41(a)(2)(i)(A)	June 22, 2018	June 21, 2021.
391.41(a)(2)(i)(B)	June 22, 2018	June 22, 2021.
391.43(g)(2)(i)	June 22, 2018	June 22, 2021.
391.43(g)(2)(ii)	June 22, 2018	June 22, 2021.
391.43(g)(3)	June 22, 2018	June 22, 2021.
391.45(d)	June 22, 2018	June 22, 2021.
391.51(b)(7)(ii)	June 22, 2018	June 21, 2021.
391.51(b)(9)(ii)	June 22, 2018	June 21, 2021.

B. Sections 383.71(h)(4), 383.73(o)(6) and 391.23(m)(4)

Identical new paragraphs are added to §§ 383.71(h)(4), 383.73(o)(6), and 391.23(m)(4). The added text states that in the event of a conflict between the medical certification information provided electronically by FMCSA and a paper copy of the MEC, the medical certification information provided electronically by FMCSA shall control.

C. Section 391.41

In addition to the changes in the compliance dates in § 391.41 noted in the table above, FMCSA adds the phrase ''and through June 21, 2021'' to § 391.41(a)(2)(ii), following the phrase, ''Beginning on July 8, 2015.'' This provides an ending date for the provision that CLP holders, while operating a CMV, would be required to carry their MEC, or a copy, for up to 15 days after the date they were issued. FMCSA also adds a new paragraph (a)(2)(iv) that states that in the event of a conflict between the medical certification information provided electronically by FMCSA and a paper copy of the MEC, the medical certification information provided electronically by FMCSA shall control.

IX. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has determined that this interim final rule is not a significant regulatory action under section 3(f) of E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. Accordingly, the Office of Management and Budget (OMB) has not reviewed it under that Order. It is also not significant within the meaning of DOT regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980 (44 FR 11034, Feb. 26, 1979).

The Medical Examiner's Certification Integration Final Rule, published April 23, 2015 (80 FR 22790), amended the FMCSRs to establish a streamlined process for SDLAs to receive CMV driver physical examination results from the MEs, via the National Registry. The 2015 final rule estimated that the National Registry would be able to receive and transmit this information on a daily basis by June 22, 2018, and established compliance dates for MEs, motor carriers, FMCSA, and the States accordingly. This rule, effective today, delays until June 22, 2021, the compliance date requiring (1) FMCSA to electronically transmit from the National Registry to the SDLAs driver identification information, examination results, and restriction information from examinations performed for holders of CLPs/CDLs (interstate and intrastate); (2) FMCSA to electronically transmit to the SDLAs medical variance information for all CMV drivers; (3) SDLAs to post driver identification, examination results, and restriction information received electronically from FMCSA; and (4) motor carriers will no longer need to verify that their drivers holding CLPs or CDLs were certified by an ME listed on the National Registry. This action is being taken to ensure that SDLAs have sufficient time to make the necessary IT programming changes. Although this rule impacts the responsibilities of MEs, CMV drivers, motor carriers, SDLAs, and FMCSA, it is not expected to generate any economic costs or benefits.

The 2015 final rule accounted for costs associated with system development and implementation, and benefits associated with streamlined processes and reduced paperwork. These costs and benefits (originally anticipated to be realized on the June 22, 2018, compliance date) will not be realized on June 22, 2018. Therefore, the baseline against which to evaluate the impacts of this interim final rule is that the necessary systems will not be ready on June 22, 2018, and will instead be ready on June 22, 2021. This rule aligns the compliance date with the date when the systems will be ready and thus, when the costs and benefits estimated in the 2015 final rule can be realized. This rule does not result in additional costs or benefits, nor does it inhibit the realization of the costs and benefits identified in the 2015 final rule.

B. E.O. 13771 (Reducing Regulation and Controlling Regulatory Costs)

This interim final rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.[4]

C. Regulatory Flexibility Act (Small Entities)

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612), FMCSA is not required to complete a regulatory flexibility analysis, because, as discussed earlier in the Good Cause Exists section, this action is not subject to notice and comment under section

[4] Executive Office of the President, Office of Management and Budget. Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs.'' Memorandum M–17–21. April 5, 2017.

553(b) of the Administrative Procedure Act.[5]

Act.

D. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this interim final rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the interim final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please consult the FMCSA point of contact, Ms. Christine A. Hydock listed in the **FOR FURTHER INFORMATION CONTACT** section of this interim final rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1–888–REG–FAIR (1–888–734–3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $156 million (which is the value equivalent of $100 million in 1995, adjusted for inflation to 2015 levels) or more in any one year. Though this interim final rule will not result in such an expenditure, the Agency does discuss the effects of this rule elsewhere in this preamble.

F. Paperwork Reduction Act

This interim final rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

[5] 5 U.S.C 553(b).

G. E.O. 13132 (Federalism)

A rule has implications for Federalism under section 1(a) of Executive Order 13132 if it has ''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.'' FMCSA has determined that this interim final rule would not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

H. E.O. 12988 (Civil Justice Reform)

This interim final rule meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden.

I. E.O. 13045 (Protection of Children)

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997), requires agencies issuing ''economically significant'' rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation's environmental health and safety effects on children. The Agency determined this interim final rule is not economically significant. Therefore, no analysis of the impacts on children is required. In any event, the Agency does not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

J. E.O. 12630 (Taking of Private Property)

FMCSA reviewed this interim final rule in accordance with E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not effect a taking of private property or otherwise have taking implications.

K. Privacy

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108–447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note), requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rule does not require the collection of personally identifiable information (PII). The supporting PIA, available for review in the docket, gives a full and complete explanation of FMCSA practices for protecting PII in general and specifically in relation to this interim final rule.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency which receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002, Public Law 107–347, section 208, 116 Stat. 2899, 2921 (Dec. 17, 2002), requires Federal agencies to conduct a PIA for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would collect, maintain, or disseminate information because of this rule. As a result, FMCSA has not conducted a privacy impact assessment.

L. E.O. 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

M. E.O. 13211 (Energy Supply, Distribution, or Use)

FMCSA has analyzed this interim final rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under E.O. 13211. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under E.O. 13211.

N. E.O. 13783 (Promoting Energy Independence and Economic Growth)

E.O. 13783 directs executive departments and agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources, and to appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources. In accordance with E.O. 13783, DOT prepared and submitted a report to the Director of OMB that provides specific

recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency action that burden domestic energy production. This interim final rule has not been identified by DOT under E.O. 13783 as potentially alleviating unnecessary burdens on domestic energy production.

O. E.O. 13175 (Indian Tribal Governments)

This interim final rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

P. National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This interim final rule does not use technical standards. Therefore, FMCSA did not consider the use of voluntary consensus standards.

Q. Environment (NEPA, CAA, Environmental Justice)

FMCSA analyzed this interim final rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1(69 FR 9680, Mar. 1, 2004), Appendix 2, paragraph (s)(7) and paragraph (t)(2). The Categorical Exclusion (CE) in paragraph (s)(7) covers requirements for State-issued commercial license documentation and paragraph (t)(2) addresses regulations that assure States have the appropriate information systems and procedures concerning CDL qualifications. The content in this interim final rule is covered by these CEs and the final action does not have any effect on the quality of the environment. The CE determination is available for inspection or copying in the *Regulations.gov* website listed under **ADDRESSES**.

FMCSA also analyzed this rule under section 176(c) of the Clean Air Act, as amended (CAA) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it does not affect direct or indirect emissions of criteria pollutants.

Under E.O. 12898, each Federal agency must identify and address, as appropriate, ''disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations'' in the United States, its possessions, and territories. FMCSA evaluated the environmental justice effects of this interim final rule in accordance with the E.O., and has determined that no environmental justice issue is associated with this interim final rule, nor is there any collective environmental impact that would result from its promulgation.

List of Subjects

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

In consideration of the foregoing, FMCSA amends 49 CFR chapter III, parts 383, 384, and 391 to read as follows:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 1. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.,* and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 297, sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1746; sec. 32934 of Pub. L. 112–141, 126 stat. 405, 830; and 49 CFR 1.87.

■ 2. Amend § 383.71 by revising paragraphs (h)(1) and (3), and adding paragraph (h)(4), to read as follows:

§ 383.71 Driver application and certification procedures.

* * * * *

(h) * * *

(1) *New CLP and CDL applicants.* (i) Before June 22, 2021, a new CLP or CDL applicant who certifies that he/she will operate CMVs in non-excepted, interstate commerce must provide the State with an original or copy (as required by the State) of a medical examiner's certificate prepared by a medical examiner, as defined in 49 CFR 390.5, and the State will post a medical qualifications status of ''certified'' on the CDLIS driver record for the driver;

(ii) On or after June 22, 2021, a new CLP or CDL applicant who certifies that he/she will operate CMVs in non-excepted, interstate commerce must be medically examined and certified in accordance with 49 CFR 391.43 as medically qualified to operate a CMV by a medical examiner, as defined in 49 CFR 390.5. Upon receiving an electronic copy of the medical examiner's certificate from FMCSA, the State will post a medical qualifications status of ''certified'' on the CDLIS driver record for the driver;

* * * * *

(3) *Maintaining the medical certification status of ''certified.''* (i) Before June 22, 2021, in order to maintain a medical certification status of ''certified,'' a CLP or CDL holder who certifies that he/she will operate CMVs in non-excepted, interstate commerce must provide the State with an original or copy (as required by the State) of each subsequently issued medical examiner's certificate;

(ii) On or after June 22, 2021, in order to maintain a medical certification status of ''certified,'' a CLP or CDL holder who certifies that he/she will operate CMVs in non-excepted, interstate commerce must continue to be medically examined and certified in accordance with 49 CFR 391.43 as physically qualified to operate a commercial motor vehicle by a medical examiner, as defined in 49 CFR 390.5. FMCSA will provide the State with an electronic copy of the medical examiner's certificate information for all subsequent medical examinations in which the driver has been deemed qualified.

(4) In the event of a conflict between the medical certification information provided electronically by FMCSA and a paper copy of the medical examiner's certificate, the medical certification

information provided electronically by FMCSA shall control.

■ 3. Amend § 383.73 by revising paragraphs (a)(2)(vii), (b)(5), (o)(1)(i) introductory text, (o)(1)(ii) introductory text, (o)(2), (o)(3), (o)(4)(i)(A), and (o)(4)(ii), and adding paragraph (o)(6), to read as follows:

§ 383.73 State procedures

(a) * * *

(2) * * *

(vii)(A) Before June 22, 2021, for drivers who certified their type of driving according to § 383.71(b)(1)(i) (non-excepted interstate) and, if the CLP applicant submits a current medical examiner's certificate, date-stamp the medical examiner's certificate, and post all required information from the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (o) of this section.

(B) On or after June 22, 2021, for drivers who certified their type of driving according to § 383.71(b)(1)(i) (non-excepted interstate) and, if FMCSA provides current medical examiner's certificate information electronically, post all required information matching the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (o) of this section.

(b) * * *

(5)(i) Before June 22, 2021, for drivers who certified their type of driving according to § 383.71(b)(1)(i) (non-excepted interstate) and, if the CDL holder submits a current medical examiner's certificate, date-stamp the medical examiner's certificate and post all required information from the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (o) of this section.

(ii) On or after June 22, 2021, for drivers who certified their type of driving according to § 383.71(b)(1)(i) (non-excepted interstate) and, if FMCSA provides current medical examiner's certificate information electronically, post all required information matching the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (o) of this section.

* * * * *

(o) * * *

(1)(i) *Status of CLP or CDL holder.* Before June 22, 2021, for each operator of a commercial motor vehicle required to have a CLP or CDL, the current licensing State must:

* * * * *

(ii) *Status of CLP or CDL holder.* On or after June 22, 2021, for each operator of a commercial motor vehicle required to have a CLP or CDL, the current licensing State must:

* * * * *

(2) *Status update.* (i) Before June 22, 2021, the State must, within 10 calendar days of the driver's medical examiner's certificate or medical variance expiring, the medical variance being rescinded or the medical examiner's certificate being voided by FMCSA, update the medical certification status of that driver as ''not certified.''

(ii) On or after June 22, 2021, the State must, within 10 calendar days of the driver's medical examiner's certificate or medical variance expiring, the medical examiner's certificate becoming invalid, the medical variance being rescinded or the medical examiner's certificate being voided by FMCSA, update the medical certification status of that driver as ''not certified.''

(3) *Variance update.* (i) Before June 22, 2021, within 10 calendar days of receiving information from FMCSA regarding issuance or renewal of a medical variance for a driver, the State must update the CDLIS driver record to include the medical variance information provided by FMCSA.

(ii) On or after June 22, 2021, within 1 business day of electronically receiving medical variance information from FMCSA regarding the issuance or renewal of a medical variance for a driver, the State must update the CDLIS driver record to include the medical variance information provided by FMCSA.

(4) * * *

(i) * * *

(A)(*1*) Before June 22, 2021, notify the CLP or CDL holder of his/her CLP or CDL ''not-certified'' medical certification status and that the CMV privileges will be removed from the CLP or CDL unless the driver submits a current medical examiner's certificate and/or medical variance, or changes his/her self-certification to driving only in excepted or intrastate commerce (if permitted by the State);

(*2*) On or after June 22, 2021, notify the CLP or CDL holder of his/her CLP or CDL ''not-certified'' medical certification status and that the CMV privileges will be removed from the CLP or CDL unless the driver has been medically examined and certified in accordance with 49 CFR 391.43 as physically qualified to operate a commercial motor vehicle by a medical examiner, as defined in 49 CFR 390.5, or the driver changes his/her self-certification to driving only in excepted or intrastate commerce (if permitted by the State).

* * * * *

(ii)(A) Before June 22, 2021, if a driver fails to provide the State with the certification contained in § 383.71(b)(1), or a current medical examiner's certificate if the driver self-certifies according to § 383.71(b)(1)(i) that he/she is operating in non-excepted interstate commerce as required by § 383.71(h), the State must mark that CDLIS driver record as ''not-certified'' and initiate a CLP or CDL downgrade following State procedures in accordance with paragraph (o)(4)(i)(B) of this section.

(B) On or after June 22, 2021, if a driver fails to provide the State with the certification contained in § 383.71(b)(1), or, if the driver self-certifies according to § 383.71(b)(1)(i) that he/she is operating in non-excepted interstate commerce as required by § 383.71(h) and the information required by paragraph (o)(2)(ii) of this section is not received and posted, the State must mark that CDLIS driver record as ''not-certified'' and initiate a CLP or CDL downgrade following State procedures in accordance with paragraph (o)(4)(i)(B) of this section.

* * * * *

(6) In the event of a conflict between the medical certification information provided electronically by FMCSA and a paper copy of the medical examiner's certificate, the medical certification information provided electronically by FMCSA shall control.

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 4. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301, *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–59, 113 Stat. 1753, 1767; sec. 32934 of Pub. L. 112–141, 126 stat. 405, 830 and 49 CFR 1.87.

■ 5. Amend § 384.301 by revising paragraph (i) to read as follows:

§ 384.301 Substantial compliance-general requirements.

* * * * *

(i) A State must come into substantial compliance with the requirements of subpart B of this part and part 383 of this chapter in effect as of June 22, 2015, as soon as practical, but, unless otherwise specifically provided in this part, not later than June 22, 2021.

* * * * *

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTORS

■ 6. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 504, 508, 31133, 31136, 31149, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 1914, 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1748, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 5524 of Pub. L. 114–94, 129 Stat. 1312, 1560; and 49 CFR 1.87.

■ 7. Amend § 391.23 by revising paragraphs (m)(2)(i)(B)(*1*) and (m)(2)(i)(C), (m)(3)(i)(B)(*1*) and (m)(3)(i)(C), and adding paragraph (m)(4), to read as follows:

§ 391.23 Investigation and inquiries.

* * * * *

(m) * * *

(2) * * *

(i) * * *

(B)(*1*) Beginning on May 21, 2014, and through June 21, 2021, that the driver was certified by a medical examiner listed on the National Registry of Certified Medical Examiners as of the date of medical examiner's certificate issuance.

* * * * *

(C) *Exception.* Beginning on January 30, 2015, and through June 21, 2021, if the driver provided the motor carrier with a copy of the current medical examiner's certificate that was submitted to the State in accordance with § 383.73(b)(5) of this chapter, the motor carrier may use a copy of that medical examiner's certificate as proof of the driver's medical certification for up to 15 days after the date it was issued.

* * * * *

(3) * * *

(i) * * *

(B)(*1*) Through June 21, 2021, that the driver was certified by a medical examiner listed on the National Registry of Certified Medical Examiners as of the date of medical examiner's certificate issuance.

* * * * *

(C) Through June 21, 2021, if the driver provided the motor carrier with a copy of the current medical examiner's certificate that was submitted to the State in accordance with § 383.73(a)(2)(vii) of this chapter, the motor carrier may use a copy of that medical examiner's certificate as proof of the driver's medical certification for up to 15 days after the date it was issued.

* * * * *

(4) In the event of a conflict between the medical certification information provided electronically by FMCSA and a paper copy of the medical examiner's certificate, the medical certification information provided electronically by FMCSA shall control.

■ 8. Amend § 391.41 by revising paragraphs (a)(2)(i) and (ii), and adding paragraph (a)(2)(iv), to read as follows:

§ 391.41 Physical qualifications for drivers.

(a) * * *

(2) * * *

(i)(A) Beginning on January 30, 2015 and through June 21, 2021, a driver required to have a commercial driver's license under part 383 of this chapter, and who submitted a current medical examiner's certificate to the State in accordance with 49 CFR 383.71(h) documenting that he or she meets the physical qualification requirements of this part, no longer needs to carry on his or her person the medical examiner's certificate specified at § 391.43(h), or a copy, for more than 15 days after the date it was issued as valid proof of medical certification.

(B) On or after June 22, 2021, a driver required to have a commercial driver's license or a commercial learner's permit under 49 CFR part 383, and who has a current medical examiner's certificate documenting that he or she meets the physical qualification requirements of this part, no longer needs to carry on his or her person the medical examiner's certificate specified at § 391.43(h).

(ii) Beginning on July 8, 2015, and through June 21, 2021, a driver required to have a commercial learner's permit under part 383 of this chapter, and who submitted a current medical examiner's certificate to the State in accordance with § 383.71(h) of this chapter documenting that he or she meets the physical qualification requirements of this part, no longer needs to carry on his or her person the medical examiner's certificate specified at § 391.43(h), or a copy for more than 15 days after the date it was issued as valid proof of medical certification.

* * * * *

(iv) In the event of a conflict between the medical certification information provided electronically by FMCSA and a paper copy of the medical examiner's certificate, the medical certification information provided electronically by FMCSA shall control.

* * * * *

■ 9. Amend § 391.43 by revising paragraphs (g)(2) and (3) to read as follows:

§ 391.43 Medical examination; certificate of physical examination.

* * * * *

(g) * * *

(2)(i) Before June 22, 2021, if the medical examiner finds that the person examined is physically qualified to operate a commercial motor vehicle in accordance with § 391.41(b), he or she must complete a certificate in the form prescribed in paragraph (h) of this section and furnish the original to the person who was examined. The examiner must provide a copy to a prospective or current employing motor carrier who requests it.

(ii) On or after June 22, 2021, if the medical examiner identifies that the person examined will not be operating a commercial motor vehicle that requires a commercial driver's license or a commercial learner's permit and finds that the driver is physically qualified to operate a commercial motor vehicle in accordance with § 391.41(b), he or she must complete a certificate in the form prescribed in paragraph (h) of this section and furnish the original to the person who was examined. The examiner must provide a copy to a prospective or current employing motor carrier who requests it.

(3) On or after June 22, 2021, if the medical examiner finds that the person examined is not physically qualified to operate a commercial motor vehicle in accordance with § 391.41(b), he or she must inform the person examined that he or she is not physically qualified, and that this information will be reported to FMCSA. All medical examiner's certificates previously issued to the person are not valid and no longer satisfy the requirements of § 391.41(a).

* * * * *

■ 10. Amend § 391.45 by revising paragraph (d) to read as follows:

§ 391.45 Persons who must be medically examined and certified.

* * * * *

(d) On or after June 22, 2021, any person found by a medical examiner not to be physically qualified to operate a commercial motor vehicle under the provisions of paragraph (g)(3) of § 391.43.

■ 11. Amend § 391.51 by revising paragraphs (b)(7)(ii) and (b)(9)(ii) to read as follows:

§ 391.51 General requirements for driver qualification files.

* * * * *

(b) * * *

(7) * * *

(ii) *Exception.* For CDL holders, beginning January 30, 2012, if the CDLIS motor vehicle record contains medical certification status information, the motor carrier employer must meet this requirement by obtaining the CDLIS motor vehicle record defined at § 384.105 of this chapter. That record must be obtained from the current licensing State and placed in the driver qualification file. After January 30,

2015, a non-excepted, interstate CDL holder without medical certification status information on the CDLIS motor vehicle record is designated ''not-certified'' to operate a CMV in interstate commerce. After January 30, 2015 and through June 21, 2021, a motor carrier may use a copy of the driver's current medical examiner's certificate that was submitted to the State for up to 15 days from the date it was issued as proof of medical certification.

* * * * *

(9) * * *

(ii) Through June 21, 2021, for drivers required to have a CDL, a note relating to verification of medical examiner listing on the National Registry of Certified Medical Examiners required by § 391.23(m)(2).

* * * * *

Issued under authority delegated in 49 CFR 1.87 on: June 15, 2018.

Raymond P. Martinez,

Administrator.

[FR Doc. 2018–13314 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 170901861–8524–02]

RIN 0648–BH08

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Biennial Specifications

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

ACTION: Final rule.

SUMMARY: This final rule implements annual harvest specifications and management measures to establish allowable catch levels for Pacific mackerel for the fishing years 2017–2018 and 2018–2019. The harvest guideline (HG) and annual catch target (ACT) for the 2017–2018 fishing year are 26,293 metric tons (mt) and 25,293 mt, respectively. The HG and ACT for the 2018–2019 fishing year are 23,840 mt and 22,840 mt, respectively. The ACT serves as the primary directed commercial harvest quotas. If the fishery attains the ACT in either fishing year, the directed fishery will close, reserving the difference between the HG and ACT as a 1,000 mt set-aside for incidental landings in other fisheries. If the HG is reached, all retention would be prohibited through the end of the fishing year. This rule is intended to conserve and manage the Pacific mackerel stock off the U.S. West Coast.

DATES: Effective July 23, 2018 through June 30, 2019.

ADDRESSES: Copies of the report, ''Pacific Mackerel Biomass Projection Estimate for USA Management in 2017–2018 and 2018–2019'' may be obtained from the West Coast Regional Office, 501 W Ocean Blvd., Ste. 4200, Long Beach, CA 90802–4250.

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, West Coast Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.,* NMFS manages the Pacific mackerel fishery in the U.S. Exclusive Economic Zone off the West Coast in accordance with the Coastal Pelagic Species (CSP) Fishery Management Plan (FMP). The CPS FMP and its implementing regulations require NMFS to set annual harvest specifications for the Pacific mackerel fishery based on the annual specification framework and control rules in the FMP. The control rules in the CPS FMP include the HG control rule, which in conjunction with the overfishing limit (OFL) and acceptable biological catch (ABC) rules, are used to manage harvest levels for Pacific mackerel. According to the FMP, the quota for the principal commercial fishery, the HG, is determined using the FMP-specified HG formula. The HG is based, in large part, on the current estimate of stock biomass. The biomass estimate is an explicit part of the various harvest control rules for Pacific mackerel, and as the estimated biomass decreases or increases from one year to the next, the resulting allowable catch levels similarly trend. More information on the Pacific Fishery Management Council's (Council) process for developing Pacific mackerel harvest specifications and more detail on the HG control rule are provided in the proposed rule for this action (82 FR 56204) and are not repeated here.

The purpose of this final rule is to implement these harvest specifications, which include allowable harvest levels (ACT, HG, annual catch limit (ACL)), as well as annual catch reference points (OFL and ABC) that take into consideration uncertainty surrounding the current biomass estimates for Pacific mackerel for the 2017–2018 and 2018–2019 fishing years. As described above, the Pacific mackerel HG control rule is the primary mechanism for setting the annual commercial fishery quota, however the Council recommended, and NMFS is implementing, ACTs under the HG that will trigger a closure of directed commercial fishing for Pacific mackerel and incidental harvest provisions. The reason for instituting an ACT and closing directed fishing at the ACT instead of all commercial catch at the HG, is that Pacific mackerel commonly school with other CPS; the 1,000 mt buffer between the ACT and HG would allow for the continued prosecution of these other important CPS fisheries after the ACT for Pacific mackerel is attained. The OFL is the catch level above which overfishing would be occurring and the ABC is set below the OFL to account for scientific uncertainty in the OFL. The ACL can be set equal to or less than the ABC if necessary to ensure overfishing does not occur and serves as the basis to invoke management controls that can prevent the ACL from being exceeded and to correct or mitigate overages of the ACL if they occur, and can be set no higher than the ABC.

The Council recommended, and NMFS is implementing, Pacific mackerel harvest specifications and management measures for both the 2017–2018 and 2018–2019 fishing years. For the 2017–2018 Pacific mackerel fishing year these include an OFL of 30,115 mt, an ABC and ACL of 27,510 mt, a HG of 26,293 mt, and an ACT of 25,293 mt. For the 2018–2019 Pacific mackerel fishing year these include an OFL of 27,662 mt, an ABC and ACL of 25,269 mt, a HG of 23,840 mt, and an ACT of 22,840 mt. The Pacific mackerel fishing season runs from July 1 to June 30. These catch specifications are based on the control rules established in the CPS FMP and biomass estimates of 143,403 mt (2017–2018) and 131,724 mt (2018–2019). These biomass estimates are the result of the NMFS Southwest Fishery Science Center's Pacific mackerel stock assessment completed in June 2015, and a subsequent catch-only projection estimate completed in June 2017. The Council's Scientific and Statistical Committee approved the biomass estimates from the assessment and catch-only projection estimate as the best available scientific information for management at its June 2017 meeting (see **ADDRESSES**).

Upon the unlikely attainment of the ACT in either fishing year, directed fishing would close, reserving the difference between the HG and ACT (1,000 mt) as a set aside for incidental landings in other fisheries and other sources of mortality. For the remainder of the fishing year, incidental landings would be constrained to a 45-percent incidental catch allowance when Pacific

mackerel are landed with other CPS (in other words, no more than 45 percent by weight of the CPS landed per trip may be Pacific mackerel) or up to 3 mt of Pacific mackerel could be landed incidentally in non-CPS fisheries.[1] Upon attainment or projected attainment of the HG, no retention of Pacific mackerel would be allowed even as incidental catch. Limited incidental landing of Pacific mackerel in other fisheries, particularly other CPS fisheries, is necessary when the directed fishery is closed to reduce potential discarding of Pacific mackerel and allow for continued prosecution of other important stocks that may school with Pacific mackerel.

The NMFS West Coast Regional Administrator will publish a notice in the **Federal Register** announcing the date of any closure of either: (1) Directed fishing, when harvest levels near or attain the ACT; or (2) retention, including by incidental fishing, when harvest levels near or attain the HG. Additionally, to ensure the regulated community is informed of closures, NMFS will make announcements through all other means available, including fax, email, and mail to fishermen, processors, and state fishery management agencies. This rule would also add paragraph (p) to the prohibitions section at 50 CFR 660.505 referencing the prohibition on retention, possession, or landing of Pacific mackerel for the remainder of the year after the closure date specified in the **Federal Register** notice published by the Regional Administrator.

On November 28, 2017, a proposed rule was published in the **Federal Register** (82 FR 56204) soliciting public comments through December 28, 2017. NMFS did not receive any relevant public comments on the proposed rule.

In the **SUMMARY** section of the proposed rule only, NMFS mistakenly stated that the 1,000-mt set aside would be reserved ''for incidental landings in other CPS fisheries and other sources of mortality.'' In fact, as stated in the rest of the proposed rule and throughout this rule, the 1,000-mt set aside is reserved for incidental landings in other fisheries (not just CPS fisheries) and other sources of mortality.

[1] The following directed fisheries would be allowed to continue: (i) Fishing for live bait and (ii) minor directed fishing (after March 16, 2018) until the HG is taken, provided the amount retained does not exceed 1 mt per day per vessel or person, and which is limited to 1 fishing trip per day by any vessel.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the CPS FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: June 18, 2018.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.505, add a new paragraph (p) to read as follows:

§ 660.505 Prohibitions.

* * * * *

(p) Retain, possess or land Pacific mackerel after an announcement under § 660.511(j) that the harvest guideline has been taken or is projected to be reached soon.

■ 3. In § 660.511, add paragraphs (i) and (j) to read as follows:

§ 660.511 Catch restrictions.

* * * * *

(i) The following harvest specifications apply for Pacific mackerel:

(1) For the Pacific mackerel fishing season July 1, 2017, through June 30, 2018, the harvest guideline is 26,293 mt and the ACT is 25,293 mt;

(2) For the Pacific mackerel fishing season July 1, 2018, through June 30, 2019, the harvest guideline is 23,840 mt and the ACT is 22,840 mt.

(j) When an ACT in paragraph (i) of this section has been reached or is projected to be reached soon, then for the remainder of the Pacific mackerel fishing season, Pacific mackerel may not be targeted and landings of Pacific mackerel may not exceed 45 percent of landings when Pacific mackerel are landed with other CPS (in other words, no more than 45 percent by weight of the CPS landed per trip may be Pacific mackerel), except that up to 3 mt of Pacific mackerel may be landed without landing any other CPS. When a harvest guideline in paragraph (i) of this section has been reached or is projected to be reached soon, no further retention of Pacific mackerel is allowed through the end of the Pacific mackerel fishing season. The Regional Administer shall announce in the **Federal Register** the date that an ACT or the harvest guideline is reached or is expected to be reached, and the date and time that the restrictions described in this paragraph go into effect.

[FR Doc. 2018–13337 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 120
Thursday, June 21, 2018

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 HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2017–0911]

RIN 1625–AA09

Drawbridge Operation Regulation; Red River, Shreveport, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the operating schedule that governs the draws of the Union Pacific Railroad bridge, mile 227.0, and the Midsouth Railroad bridge, mile 228.2, across the Red River at Shreveport, LA. This proposed rule would allow the drawbridges to permanently remain in the closed-to-navigation position, no longer opening for vessel traffic. While there is vessel traffic on the waterway, no one has requested that either drawbridge open since 2007. Union Pacific Railroad and Midsouth Railroad, the bridge owners, requested to update the operating schedule accordingly.

DATES: Comments and related material must reach the Coast Guard on or before July 23, 2018.

ADDRESSES: You may submit comments identified by docket number USCG–2017–0911 using Federal eRulemaking Portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Mr. Eric A. Washburn, Bridge Administrator, Western Rivers, U.S. Coast Guard; telephone 314–269–2378, email *Eric.Washburn@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose and Legal Basis

The Coast Guard proposes to change the operating schedule that governs the draws of the Union Pacific Railroad bridge, mile 227.0, and the Midsouth Railroad bridge, mile 228.2, across the Red River at Shreveport, LA. The Red River extends approximately 294.0 miles from mile marker 304.0 on the Lower Mississippi River to Shreveport, LA, then through Twelve Mile and Cypress Bayous to its head of navigation near Daingerfield, TX. Regulations for the operation of drawbridges on the Red River are contained in 33 CFR 117.491. The Union Pacific Railroad bridge, mile 227.0, and the Midsouth Railroad bridge, mile 228.2, are currently the only bridges governed by the regulations in 33 CFR 117.491(c), which state that, ''the draws of the bridges above mile 105.8 through mile 234.4 shall open on signal if at least 48 hours notice is given.''

Navigation on the Red River in the vicinity of these bridges consists primarily of recreational craft, and commercial use of the waterway is only possible during periods of high water. Moreover, the U.S. Army Corps of Engineers does not maintain any project depth or navigable channel on this reach of the Red River, nor does the U.S. Coast Guard maintain any aids to navigation above mile 211.4. Under 33 CFR 117.491(d), the bridges above mile 234.4 need not open for the passage of vessels. There are no alternate routes for vessels transiting this section of the Red River.

Union Pacific Railroad owns the Union Pacific Railroad bridge, mile 227.0, across the Red River at Shreveport, LA, and has requested that the drawbridge regulation be amended to allow the bridge to remain in the permanently closed position. Union Pacific provided the Coast Guard with bridge logs that indicate that there has been no request for a bridge opening since 2007. In the closed position, the Union Pacific Railroad bridge, mile 227.0, provides 15.1 feet of vertical clearance at mean high water.

Midsouth Railroad owns the Midsouth Railroad bridge, mile 228.2, across the Red River at Shreveport, LA, and has also requested that the drawbridge remain in the permanently closed position. Midsouth Railroad provided the Coast Guard with bridge logs that indicate that there has been no request for a bridge opening since 2007. In the closed position, the Midsouth Railroad bridge, mile 228.2, provides 37.0 feet of vertical clearance at mean high water.

Under 33 CFR 117.39, the District Commander may authorize a drawbridge to remain in the closed to navigation position and be untended when there have been no requests for drawbridge openings for two years. Due to the lack of significant navigation on this portion of the Red River that requires draws to open and the fact that there has been no request to open the draws in over ten years, the Coast Guard believes that this proposed rule is reasonable, and if implemented, should continue to meet the present and future needs of navigation. Based on the records provided by Union Pacific Railroad and Midsouth Railroad, it is expected that the proposed change will have no known impact to navigation or other waterway users. The Coast Guard proposes this rulemaking under authority of 33 U.S.C. 499.

III. Discussion of Proposed Rule

The Coast Guard proposes to amend 33 CFR 117.491(c), which governs the operating schedule of the draws of the Union Pacific Railroad bridge, mile marker (MM) 227.0 and the Midsouth Railroad bridge, MM 228.2, across the Red River at Shreveport, LA. The regulation currently requires the draws of the bridges above mile 105.8 through mile 234.4 to open on signal if at least 48 hours' notice is given. This proposed rule would allow the bridges to remain closed to the passage of vessels. However, pursuant to 33 CFR 117.39, this rulemaking would include a provision that requires the owner or agency controlling the bridge to the draw to full operation within three months if the District Commander provides a notification that needs of navigation require resumed operation of the spans. The regulatory text and changes we are proposing appear at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the fact that these drawbridges do not currently open for the passage of vessels due to the lack of navigation on the river. The last recorded opening of the drawbridges was in 2007. Consultation with the bridge owners indicated that currently no bridge tender positions are assigned to the bridges.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.A. above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves changing the operating schedule that governs the draws of two bridges on the Red River near Shreveport, LA to remain permanently closed to navigation. Normally such actions are categorically excluded from further review, under paragraph L49 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A preliminary Record of Environmental Consideration is not required for this proposed rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacynotice.*

Documents mentioned in this NPRM as being available in this docket and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 117.491, revise paragraph (c) to read as follows:

§ 117.491 Red River.

* * * * *

(c) The draws of the bridges above mile 105.8 through mile 234.4 need not open for passage of vessels. The owner or agency controlling the bridge must restore the draw to full operation within three months if notified by the District Commander that the needs of navigation require resumed operation of the spans.

* * * * *

Dated: June 12, 2018.

P.F. Thomas,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2018–13321 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0463]

RIN 1625–AA00

Safety Zone; Beaufort Water Festival Air Show, Beaufort, SC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on the waters of the Beaufort River in Beaufort, SC. The safety zone is needed to ensure safety of life on navigable waters of the United States during the Beaufort Water Festival Air Show. This proposed regulation will prohibit persons and vessels from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port Charleston (COTP) or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before July 23, 2018.

ADDRESSES: You may submit comments identified by docket number USCG–2018–0463 using the Federal eRulemaking Portal at *http://www.regulations.gov*. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Lieutenant Justin Heck, Sector Charleston Office of Waterways Management, Coast Guard; telephone (843) 740–3184, email *Justin.C.Heck@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

On April 27, 2018, the Coast Guard received a marine event application for the 2018 Beaufort Water Festival Air Show that will take place from 12 p.m. until 5 p.m. on July 21, 2018. The safety zone is necessary to ensure the safety of life on the navigable waters of the United States during the Beaufort Water Festival Air Show. The COTP has determined that potential hazards associated with the airshow would be a safety concern for anyone within the regulated area.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within the regulated area before, during, and after the scheduled event. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1231.

III. Discussion of Proposed Rule

The COTP proposes to establish a safety zone from 12 p.m. until 5 p.m. on July 21, 2018. The safety zone would encompass a portion of the waterway that is 700 feet wide by 2600 feet in length on the waters of the Beaufort River in Beaufort, SC. No vessel or person would be permitted to enter, transit through, anchor in, or remain within the safety zone without obtaining permission from the COTP or a designated representative. The Coast Guard would provide notice of the safety zone by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. The safety zone will only be enforced for 5 hours, vessel traffic will be able to safely operate in the surrounding area during the enforcement period, and the rule will allow vessels to seek permission to enter the zone. Moreover, the Coast Guard will provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners via VHF–FM marine channel 16.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended,

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

We have considered the impact of this proposed rule on small entities. This rule may affect the following entities, some of which may be small entities: the owner or operators of vessels intending to enter, transit through, anchor in, or remain within the regulated area during the enforcement period. For the reasons stated in section IV.A. above, this proposed rule would not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting 5 hours that would prohibit entry on certain waters of the Beaufort River in Beaufort, SC. Normally such actions are categorically excluded from further review under paragraph L 60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacyNotice.*

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5;

Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T07–0463 to read as follows:

§ 165.T07 —0463 Safety Zone; Beaufort Water Festival Air Show, Beaufort, SC

(a) *Location.* This rule establishes a safety zone on certain waters of the Beaufort River, Beaufort, SC. The rule creates a regulated area that will encompass a portion of the waterway that is 700 feet wide by 2600 feet in length on waters of the Beaufort River encompassed within the following points: 32°25′47″ N/080°40′44″ W, 32°25′41″ N/080°40′14″ W, 32°25′35″ N/080°40′16″ W, 32°25′40″ N/080°40′46″ W. All coordinates are North American Datum 1983.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the COTP in the enforcement of the regulated areas.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the COTP or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the COTP by telephone at 843–740–7050, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the COTP or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the COTP or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Enforcement Period.* This rule will be enforced on July 21, 2018 from 12 p.m. until 5 p.m.

Dated: June 13, 2018.

J.W. Reed,

Captain, U.S. Coast Guard, Captain of the Port Charleston.

[FR Doc. 2018–13210 Filed 6–20–18; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2018–4]

Copyright Office Fees: Extension of Comment Period

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The Copyright Office is extending the deadline for the submission of written comments in response to its May 24, 2018 notice of proposed rulemaking proposing the adoption of a new fee schedule.

DATES: The comment period for the notice of proposed rulemaking, published on May 24, 2018 (83 FR 24054), is extended by an additional sixty days. Comments must be made in writing and must be received in the U.S. Copyright Office no later than 11:59 p.m. Eastern Time on September 21, 2018.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office website at *https://www.copyright.gov/rulemaking/feestudy2018/.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office for special instructions using the contact information below.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* or Jalyce Mangum, Attorney-Advisor, by email at *jmang@copyright.gov,* or either by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: On May 24, 2018, the U.S. Copyright Office issued a proposed rulemaking recommending the adoption of a new fee schedule for services in the following areas: Registration, recordation, record retrieval, search, and certification, the Licensing Division, and other ancillary services. The proposed fee schedule would assist the Office in recovering a significant part, though not the whole, of its costs.[1] The Office invited public comment on the notice of proposed rulemaking. To ensure that members of the public have sufficient time to respond, and to ensure that the Office has the benefit of a complete record, the Office is extending the submission deadline by an additional sixty days. Written comments now are due no later than September 21, 2018.

Dated: June 15, 2018.

Regan A. Smith,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2018–13323 Filed 6–20–18; 8:45 am]

BILLING CODE 1410–30–P

[1] 83 FR 24054 (May 24, 2018).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2015–0501; FRL–9979–79—Region 4]

Air Plan Approval; North Carolina: New Source Review for Fine Particulate Matter ($PM_{2.5}$)

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve changes to the North Carolina State Implementation Plan (SIP), submitted by the North Carolina Department of Environmental Quality (NC DEQ) through the Division of Air Quality (DAQ), to EPA on October 17, 2017. This SIP submittal modifies North Carolina's Prevention of Significant Deterioration (PSD) regulations and includes the adoption of specific federal provisions needed to meet the New Source Review (NSR) permitting program requirements for the fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). In addition, North Carolina's October 17, 2017, SIP submittal addresses portions of the PSD requirements for the infrastructure SIPs for the following NAAQS: 1997 Annual and 24-hour $PM_{2.5}$, 2006 24-hour $PM_{2.5}$, 2008 lead, 2008 8-hour ozone, 2010 sulfur dioxide (SO_2), 2010 nitrogen dioxide (NO_2) and 2012 Annual $PM_{2.5}$. As a result of this proposed approval of North Carolina's modified PSD regulations, EPA is also proposing to approve North Carolina's submittal with respect to the related PSD infrastructure SIP requirements for these NAAQS. As discussed in this notice, EPA previously disapproved portions of earlier submittals from North Carolina that were intended to meet

these requirements. These proposed approvals, if finalized, will remove EPA's obligation to promulgate a Federal Implementation Plans (FIP) to meet the relevant Clean Air Act (CAA or Act) requirements.

DATES: Comments must be received on or before July 23, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2015–0501 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Joel Huey of the Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Mr. Huey can be reached by telephone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What are the actions EPA is proposing?

EPA is proposing two actions with regard to North Carolina's SIP submittal updating the State's PSD regulations found at 15A North Carolina Administrative Code (NCAC) 02D .0530.[1] First, EPA is proposing to approve North Carolina's October 17, 2017, SIP submittal with regard to changes to the State's regulation at 15A NCAC 02D .0530 because EPA has preliminarily determined that the State's changes fully meet the requirements of EPA's rulemaking, ''Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC),'' Final Rule, 75 FR 64864 (October 20, 2010) (hereafter referred to as the ''2010 PSD $PM_{2.5}$ Rule'').

Second, as a result of the proposed approval of North Carolina's October 17, 2017, SIP submittal for these PSD requirements, EPA is proposing to approve this submittal for portions of the infrastructure SIP PSD elements for the following NAAQS: 1997 Annual and 24-hour $PM_{2.5}$, 2006 24-hour $PM_{2.5,}$ 2008 lead, 2008 8-hour ozone, 2010 SO_2, 2010 NO_2 and 2012 Annual $PM_{2.5}$.[2] [3]

II. Fine Particulate Matter and the NAAQS

As described in EPA's May 10, 2016 (81 FR 28801), proposal action to partially approve and partially disapprove revisions to North Carolina's SIP with regard to the State's NSR permitting regulations for $PM_{2.5}$, ''particulate matter,'' also known as particle pollution or PM, is a complex mixture of extremely small particles and liquid droplets that can affect the heart and lungs and cause serious health effects. EPA currently regulates PM according to two size categories: PM_{10}, which comprises all particles smaller than or equal to 10 micrometers in diameter and includes ''inhalable coarse particles,'' and $PM_{2.5}$, also known as ''fine particles,'' which comprises all particles smaller than or equal to 2.5 micrometers in diameter.

The CAA requires EPA to set air quality standards to protect both public health and the public welfare (*e.g.,* visibility, crops and vegetation). Particle pollution, especially fine particles, affects both. The human health effects associated with long- or short-term exposure to $PM_{2.5}$ are significant and include premature mortality, aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions and emergency room visits) and development of chronic respiratory disease. In addition, welfare effects associated with elevated $PM_{2.5}$ levels include visibility impairment as well as effects on sensitive ecosystems, materials damage and soiling and climatic and radiative processes.

Since July 1, 1987, EPA had used PM_{10} as an indicator for the PM NAAQS. *See* 52 FR 24634. On July 18, 1997, EPA amended the PM NAAQS by adding new standards that focus on fine particles, using $PM_{2.5}$ as the indicator. *See* 62 FR 38652. EPA established health-based (primary) annual and 24-hour standards for $PM_{2.5,}$ setting the annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) and the 24-hour standard at a level of 65 $\mu g/m^3$ (the ''1997 Annual and 24-hour $PM_{2.5}$ NAAQS''). EPA established welfare-based (secondary) standards identical to the primary standards. *Id.* On October 17, 2006, EPA revised the primary and secondary NAAQS for $PM_{2.5}$. *See* 71 FR 61236. In that rulemaking, EPA reduced the 24-hour NAAQS for $PM_{2.5}$ to 35 $\mu g/m^3$ (the ''2006 24-hour $PM_{2.5}$ NAAQS'') and retained the existing annual $PM_{2.5}$ NAAQS of 15 $\mu g/m^3$. *Id.* On January 15, 2013, EPA revised the primary NAAQS but not the secondary NAAQS for $PM_{2.5}$. *See* 78 FR 3086. In that rulemaking, EPA reduced the annual NAAQS for $PM_{2.5}$ to 12 $\mu g/m^3$ (the ''2012 Annual $PM_{2.5}$

[1] North Carolina's preconstruction permitting program for new and modified stationary sources is codified at 15A NCAC Subchapter 02D. Specifically, North Carolina's PSD preconstruction regulations are found at 15A NCAC 02D .0530 and apply to major stationary sources or modifications constructed in areas designated attainment or unclassifiable for the NAAQS, as required under part C of title I of the CAA. North Carolina's nonattainment new source review (NNSR) regulations are found at 15A NCAC 02D .0531 and apply to the construction and modification of any major stationary source of air pollution located in or impacting a NAAQS nonattainment area, as required by part D of title I of the CAA. This proposed action does not relate to North Carolina's NNSR regulations, which are already fully approved into North Carolina's SIP.

[2] North Carolina's October 17, 2017, SIP submittal requested approval of the PSD infrastructure SIPs for the 2008 lead, 2008 8-hour ozone, 2010 SO_2, 2010 NO_2 and the 2012 $PM_{2.5}$ NAAQS. On April 16, 2018, the State submitted a letter to EPA clarifying that the same submittal is intended to satisfy the PSD elements of the State's infrastructure SIP submittals for the 1997 and 2006 $PM_{2.5}$ NAAQS as well.

[3] The background for various NAAQS is provided in EPA's proposed and final rulemaking entitled ''Air Plan Approval and Disapproval; North Carolina: New Source Review for Fine Particulate Matter ($PM_{2.5}$).'' *See* 81 FR 28797 (May 10, 2016) and 81 FR 63107 (September 14, 2016).

NAAQS'' [4]) and retained the existing 24-hour $PM_{2.5}$ NAAQS of 35 μg/m³.

III. What is the background for these proposed actions?

A. Requirements of the 2010 PSD $PM_{2.5}$ Rule for PSD SIP Programs

As established in part C of title I of the CAA, EPA's PSD program protects public health and welfare from adverse effects of air pollution by ensuring that construction of new major sources or modifications in attainment or unclassifiable areas does not lead to significant deterioration of air quality while simultaneously ensuring that economic growth will occur in a manner consistent with preservation of clean air resources. Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility ''will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant.'' In other words, when a source applies for a permit to emit a regulated air pollutant in an area that is designated as attainment or unclassifiable for a NAAQS, the state and EPA must determine if the source's emissions of that pollutant will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the ''maximum allowable increase'' of an air pollutant allowed to occur above the applicable baseline concentration [5] for that pollutant. Therefore, an increment is the mechanism used to estimate ''significant deterioration'' of air quality for a pollutant in an area.

EPA finalized the 2010 PSD $PM_{2.5}$ Rule to provide additional regulatory requirements under the PSD SIP program regarding the implementation of the $PM_{2.5}$ NAAQS. *See* 75 FR 64864. The 2010 PSD $PM_{2.5}$ Rule required states to submit SIP revisions to EPA by July 20, 2012, adopting provisions equivalent to or at least as stringent as the PSD increments and associated implementing regulations. Specifically, the 2010 PSD $PM_{2.5}$ Rule requires states to adopt and submit for EPA approval into their SIP the numerical $PM_{2.5}$ increments promulgated pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. States are also required to adopt and submit for EPA approval revisions to the definitions for ''major source baseline date,'' ''minor source baseline date,'' and ''baseline area'' as part of the implementing regulations for the $PM_{2.5}$ increment.

For purposes of calculating increment consumption, a baseline area for a particular pollutant includes the attainment or unclassifiable area in which the source is located and any other attainment or unclassifiable area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in a significant ambient pollutant increase. *See* 40 CFR 51.166(b)(15)(i). Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emission increases.

In general, the submittal date of the first complete PSD permit application in a particular area is the operative ''baseline date,'' after which new sources must evaluate increment consumption.[6] On or before the date of the first complete PSD application, existing ambient concentration levels of a pollutant generally are considered to represent the baseline concentration from which increment consumption is calculated, except for certain changes in ambient concentration levels caused by emission changes from construction at major stationary sources. Increases in ambient concentration levels caused by emission increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, decreases in ambient concentration levels caused by emission decreases that occur after the applicable baseline date either restore or expand the amount of increment available.

In practice, three dates related to the PSD baseline concept are important in understanding how to calculate the amount of increment consumed—(1) trigger date; (2) major source baseline date; and (3) minor source baseline date. The trigger date, as the name implies, is a fixed date that initiates the overall increment consumption process nationwide. *See* 40 CFR 51.166(b)(14)(ii). The ''major source baseline date'' and the ''minor source baseline date'' are necessary to properly account for the increment-affecting emissions occurring after the trigger date, in accordance with the statutory definition of ''baseline concentration'' in section 169(4) of the Act. The ''major source baseline date,'' which precedes the trigger date, is the date after which actual changes in emissions associated with construction at any major stationary source affect the PSD increment. Ambient concentration levels associated with such changes in emissions are not included in the baseline concentration, even if the changes in emissions occur before the minor source baseline date. In accordance with the statutory definition of ''baseline concentration'' at section 169(4), the PSD regulations define a fixed date, related to the increments that EPA established for a particular pollutant, to represent the major source baseline date for that pollutant. The ''minor source baseline date,'' which is also pollutant-specific, is the earliest date after the trigger date on which a source or modification submits the first complete application for a PSD permit in a particular area. This is the date on which the baseline concentration associated with a particular increment generally is established. After the minor source baseline date, any ambient concentration level changes caused by a change in actual emissions (from both major and minor sources) affects the PSD increment for that area.

Once the minor source baseline date is established, the ambient pollutant concentration level increase caused by a proposed emission increase from the major source submitting the first PSD application consumes a portion of the increment in that area, as do any subsequent ambient concentration level increases caused by actual emission increases that occur from any new or existing source in the area. When the maximum pollutant concentration increase defined by the increment has been reached, additional PSD permits cannot be issued until sufficient amounts of the affected increment are ''freed up'' via emission reductions of the pollutant that may occur voluntarily (*e.g.,* via source shutdowns) or by mandatory control requirements imposed by the reviewing authority. Moreover, the overall air quality for a pollutant in a region cannot be allowed to deteriorate to a level in excess of the applicable NAAQS, even if all the increment in the area has not been consumed. Therefore, new or modified sources located in areas where the ambient pollutant concentration levels are near the level allowed by the NAAQS may not have full use of the

[4] Signed by the EPA Administrator on December 14, 2012.

[5] Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the ambient concentration levels which exist at the time of the first application for a PSD permit in the area after the applicable baseline date.

[6] Baseline dates are pollutant-specific. That is, a complete PSD application establishes the baseline dates only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

amount of ambient concentration increase allowed by the increment.

In the 2010 PSD $PM_{2.5}$ Rule, pursuant to the authority under section 166(a) of the CAA, EPA promulgated numerical increments for $PM_{2.5}$ as a new pollutant [7] for which NAAQS were established after August 7, 1977,[8] and derived 24-hour and annual $PM_{2.5}$ increments for the three area classifications (Class I, II and III). *See* 75 FR 64869 and the ambient air increment table at 40 CFR 51.166(c)(1). EPA also established the $PM_{2.5}$ ''trigger date'' as October 20, 2011 (40 CFR 51.166(b)(14)(ii)(c)), and the $PM_{2.5}$ ''major source baseline date'' as October 20, 2010 (40 CFR 51.166(b)(14)(i)). *See* 75 FR 64903. Finally, EPA amended the term ''baseline area'' at 40 CFR 51.166(b)(15)(i) to include a level of significance of 0.3 $\mu g/m^3$, annual average, for establishing a new baseline area for purposes of $PM_{2.5}$ increments. *Id.*

On May 16, 2008 (73 FR 28321), EPA finalized the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)'' (hereafter referred to as the ''2008 NSR $PM_{2.5}$ Rule'') to implement the 1997 $PM_{2.5}$ NAAQS for the NSR permitting program. The 2008 NSR $PM_{2.5}$ Implementation Rule revised the federal NSR program requirements to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment and nonattainment areas. Among other things, the 2008 NSR $PM_{2.5}$ Rule directed states to incorporate into their SIPs the requirement for applicability determinations and emission limits in PSD and NNSR permits to account for gases that condense to form particles (condensable PM).

B. Requirements for Infrastructure SIPs

By statute, states are required to have SIPs that provide for the implementation, maintenance, and enforcement of the NAAQS. States are further required to provide a SIP submittal meeting the applicable requirements of sections 110(a)(1) and (2) within three years after EPA promulgates a new or revised NAAQS.[9] EPA has historically referred to this type of submission as an ''infrastructure SIP.'' Sections 110(a)(1) and (2) require states to submit infrastructure SIPs that address basic program elements, such as air quality planning, permitting, and enforcement requirements and legal authority, that are designed to assure attainment and maintenance of the newly established or revised NAAQS. More specifically, section 110(a)(1) provides the procedural and timing requirements for infrastructure SIP submittals. Section 110(a)(2) lists specific elements that states must meet to satisfy the infrastructure SIP requirements related to a newly established or revised NAAQS. The contents of an infrastructure SIP submittal may vary depending upon the data and analytical tools available to the state, as well as the provisions already contained in the state's existing EPA approved SIP at the time when the state develops and submits the infrastructure SIP submittal for a new or revised NAAQS.

This action pertains to certain PSD-related infrastructure SIP requirements of section 110(a)(2)(C), 110(a)(2)(D)(i)(II) and 110(a)(2)(J), which are relevant in the context of a state's development of, and EPA's evaluation of, infrastructure SIP submittals. With the exception of these PSD-related requirements of section 110(a)(2) of the CAA, EPA has already approved or will consider in separate actions all other elements of North Carolina's infrastructure SIP submittals related to the 1997 Annual and 24-hour $PM_{2.5}$, 2006 24-hour $PM_{2.5}$, 2008 lead, 2008 8-hour ozone, 2010 SO_2, 2010 NO_2, and 2012 Annual $PM_{2.5}$ NAAQS.

C. EPA's Previous Action on North Carolina's SIP Submittal Related to the 2010 PSD $PM_{2.5}$ Rule

On September 5, 2013, DAQ submitted a SIP revision in response to EPA's 2010 PSD $PM_{2.5}$ Rule. On September 14, 2016 (81 FR 63107), EPA disapproved the portions of that submittal that pertain to the adoption and implementation of the $PM_{2.5}$ increments because the revision did not fully meet the requirements of the 2010 PSD $PM_{2.5}$ Rule. This action addresses only those portions of North Carolina's NSR SIP submittals and various infrastructure SIP submittals that EPA disapproved in the September 14, 2016, final action.[10] Specifically, although paragraphs (e), (q) and (v) of North Carolina's revised PSD regulations at 15A NCAC 02D .0530 incorporated the federally-required numerical $PM_{2.5}$ increments, North Carolina's regulations failed to include other federally-required provisions needed to implement the $PM_{2.5}$ increments, including (1) the definition of ''[m]ajor source baseline date'' for $PM_{2.5}$ codified at 40 CFR 51.166(b)(14)(i)(c) (defined as October 20, 2010); (2) the definition of ''[m]inor source baseline date'' for $PM_{2.5}$ codified at 40 CFR 51.166(b)(14)(ii)(c) (which establishes the $PM_{2.5}$ trigger date as October 20, 2011); and (3) the definition of ''[b]aseline area'' codified at 40 CFR 51.166(b)(15)(i). Without these definitions, North Carolina's PSD regulations did not require PSD sources to conduct the appropriate analyses demonstrating that emissions from proposed construction of new major stationary sources or major modifications will not cause or contribute to air quality deterioration beyond the amount allowed by the $PM_{2.5}$ increments. Therefore, EPA disapproved all of the $PM_{2.5}$ increment provisions set forth in North Carolina's September 5, 2013, SIP submittal, including all of the $PM_{2.5}$-related changes to 15A NCAC 02D .0530 at paragraphs (e), (q), and (v). *Id.* Under section 110(c)(1)(B), these disapprovals started a two-year clock for EPA to promulgate a FIP to address the PSD $PM_{2.5}$ program deficiencies.

D. EPA's Previous Action on North Carolina's SIP Submittals Related to Infrastructure SIP PSD Elements

In addition to disapproving the portions of North Carolina's September 5, 2013, SIP submittal pertaining to $PM_{2.5}$ increments, EPA's September 14, 2016, action partially approved and

[7] EPA generally characterized the $PM_{2.5}$ NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM_{10} NAAQS with the NAAQS for $PM_{2.5}$ when the $PM_{2.5}$ NAAQS were promulgated in 1997. EPA rather retained the Annual and 24-hour NAAQS for PM_{10} (retaining PM_{10} as an indicator of coarse particulate matter) and treated $PM_{2.5}$ as a new pollutant for purposes of developing increments. *See* 75 FR at 64864.

[8] EPA interprets section 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

[9] *See* EPA's proposed approval of North Carolina's December 4, 2015, infrastructure SIP submittal for the 2012 $PM_{2.5}$ NAAQS for a discussion on EPA's general approach to reviewing infrastructure SIPs. 81 FR 47314, 47316–18, July 21, 2016.

[10] EPA's September 14, 2016, action approved the following portions of the SIP submittals from North Carolina:

(1) A May 16, 2011, submittal (as revised and updated by the State's September 5, 2013, SIP submittal) as meeting the requirements of EPA's rule, ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' Final Rule, 73 FR 28321 (May 16, 2008);

(2) Administrative changes to North Carolina's PSD and NNSR regulations at 15A NCAC 02D .0530 and 15A NCAC 02D .0531 provided by the State in a SIP submittal also dated May 16, 2011, including clarification of the applicability of best available control technology (BACT) and lowest achievable emission rate (LAER) for electrical generating units (EGUs) in the State, and the inclusion of an additional Federal Land Manager (FLM) notification provision; and

(3) Portions of the PSD elements of North Carolina's infrastructure SIP submittals for various NAAQS as indicated.

partially disapproved the following North Carolina infrastructure submittals for PSD elements: 1997 Annual and 24-hour $PM_{2.5}$ NAAQS (dated April 1, 2008); 2006 24-hour $PM_{2.5}$ NAAQS (dated September 21, 2009); 2008 lead NAAQS (received on July 20, 2012); 2008 8-hour ozone NAAQS (received on November 2, 2017); 2010 SO_2 NAAQS (received March 18, 2014); 2010 NO_2 NAAQS (received on August 23, 2013); and 2012 Annual $PM_{2.5}$ NAAQS (received on December 4, 2015). The partial disapproval was limited to the $PM_{2.5}$ increment requirements of the 2010 $PM_{2.5}$ Rule for these infrastructure SIP submittals. Under section 110(c)(1)(B), these disapprovals started a two-year clock for EPA to promulgate a FIP to address these infrastructure SIP deficiencies.

IV. What is EPA's analysis of North Carolina's October 17, 2017, SIP submittal for PSD?

On October 17, 2017, North Carolina provided a SIP revision to correct the deficiencies EPA had identified in the State's September 5, 2013, SIP submittal related to the adoption of the $PM_{2.5}$ increments. The relevant federal $PM_{2.5}$ permitting requirements for SIPs, set forth in 40 CFR 51.165 and 51.166, were promulgated by EPA in the 2010 PSD $PM_{2.5}$ Rule. States were required to make their SIP submittals to address the requirements of the 2010 PSD $PM_{2.5}$ Rule no later than July 20, 2012. North Carolina's October 17, 2017, SIP submittal adopts changes in the State's PSD permitting program at 15A NCAC 02D .0530 by incorporating by reference EPA's PSD regulations as of July 1, 2014. This incorporation by reference includes the federally-required provisions of EPA's 2010 PSD $PM_{2.5}$ Rule needed to implement the PSD $PM_{2.5}$ program in North Carolina. Adopting the federal rule as of July 1, 2014, has the effect of adding to the North Carolina SIP the required definitions of ''major source baseline date,'' ''minor source baseline date,'' and ''baseline area'' that were lacking in the State's previous $PM_{2.5}$ submittals.

This incorporation by reference as of July 1, 2014, also captures EPA's October 25, 2012 (77 FR 65107), amendment to the definition of ''regulated NSR pollutant'' concerning condensable particulate matter. In that action, EPA amended the definition of ''regulated NSR pollutant'' to remove an inadvertent general requirement of the 2008 NSR $PM_{2.5}$ Rule to include the condensable portion of PM when measuring emissions-related indicators of ''PM emissions'' in the context of the NSR regulations. Under the revised definition, $PM_{2.5}$ and PM_{10} emissions must include the condensable portion of particulate matter, but not PM emissions.[11] Because North Carolina's current federally-approved NSR rule (a portion of which was approved by EPA's September 14, 2016, action) adopts the PSD definitions in the CFR as of May 16, 2008, it currently requires sources to account for the condensable fraction in the measurement and regulation of ''PM emissions'' (as well as ''$PM_{2.5}$ emissions'' and ''PM_{10} emissions''). By adopting the PSD definitions in the CFR as of July 1, 2014, the revised rule would continue to require sources to account for the condensable fraction in the measurement of ''$PM_{2.5}$ emissions'' and ''PM_{10} emissions'' but not ''PM emissions.'' As discussed in EPA's May 10, 2016 (81 FR 28801), proposed action, requiring the inclusion of condensable PM in measurements of ''PM emissions'' has little if any effect on preventing significant air quality deterioration or on efforts to attain the primary and secondary PM NAAQS. Therefore, North Carolina's incorporation by reference of EPA's PSD regulations as of July 1, 2014, is not only consistent with the current federal rule, but it also will not interfere with North Carolina's efforts to prevent significant deterioration of air quality and to attain and maintain compliance with the PM NAAQS.[12]

V. What is EPA's analysis of North Carolina's October 17, 2017, SIP submittal for the infrastructure SIP PSD elements?

North Carolina's October 17, 2017, SIP submittal addresses certain NSR/PSD requirements, as described above, and thereby meets the related infrastructure SIP requirements of section 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J). For the remainder of this proposed rulemaking, EPA's intent in referring to ''PSD elements'' is to address the PSD requirements in sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J). More detail regarding the aforementioned 110(a)(2) requirements related to PSD is provided in the discussion that follows.

Section 110(a)(2)(C) has three components that must be addressed in infrastructure SIP submittals: Enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources, and PSD permitting of new major sources and major modifications in areas designated attainment or unclassifiable as required by CAA title I part C (*i.e.,* the major source PSD program). Regarding section 110(a)(2)(C), this proposed action only addresses North Carolina's infrastructure SIP submittals with respect to the major source PSD program.

Section 110(a)(2)(D)(i) has two components: 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(i)(II). Each of these components has two subparts resulting in four distinct components, commonly referred to as ''prongs,'' that must be addressed in infrastructure SIP submittals. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emission activity in one state from contributing significantly to nonattainment of the NAAQS in another state (''prong 1'') and from interfering with maintenance of the NAAQS in another state (''prong 2''). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state from interfering with measures required in another state to prevent significant deterioration of air quality (''prong 3'') or to protect visibility (''prong 4''). With regard to section 110(a)(2)(D)(i), this proposed action only addresses North Carolina's infrastructure SIP submittals for prong 3.

Section 110(a)(2)(J) has four components that must be addressed in infrastructure SIP submittals: (1) Consultation with government officials; (2) public notification; (3) PSD; and (4) visibility protection. With regard to section 110(a)(2)(J), this proposed action only addresses North Carolina's infrastructure SIP submittals for PSD.

Regarding the PSD elements of sections 110(a)(2)(C) and (J), EPA interprets the CAA to require each state to make, for each new or revised NAAQS, an infrastructure SIP submittal that demonstrates that the state has a

[11] The October 25, 2012, final rule retained the general requirement to include the condensable fraction of PM_{10} and $PM_{2.5}$ emissions in each case for purposes of NSR permitting under EPA's regulations at 40 CFR 51.166(b)(49)(i), 40 CFR 52.21(b)(50)(i), 40 CFR 51.165(a)(1)(xxxvii), and 40 CFR part 51 Appendix S.

[12] EPA also notes that the version of EPA's PSD regulations incorporated by reference excludes the PSD $PM_{2.5}$ SILs provisions and SMC provisions, which EPA had promulgated in the 2010 PSD $PM_{2.5}$ Rule and later removed on December 9, 2013. The 2010 PSD $PM_{2.5}$ Rule gave states discretion to adopt $PM_{2.5}$ SILs and a SMC. *See* 75FR at 64900. On January 22, 2013, the D.C. Circuit vacated and remanded to EPA the portions of 50 CFR 51.166 and 52.21 addressing the $PM_{2.5}$ SILs and also vacated the parts of the rule that established the $PM_{2.5}$ SMC. On December 9, 2013 (78 FR 73698), EPA took final action amending its regulations to remove the $PM_{2.5}$ SILs and SMC provisions from the PSD regulations. However, since North Carolina's October 17, 2017, submittal does not include SILs or SMC, these regulatory provisions are not relevant to this proposed action.

complete PSD permitting program meeting the current requirements for all regulated NSR pollutants. The requirements of section 110(a)(2)(D)(i)(II) (prong 3) may also be satisfied by demonstrating that the air agency has a complete PSD permitting program correctly addressing all regulated NSR pollutants.

As described in EPA's guidance dated September 13, 2013,[13] an infrastructure SIP submittal should demonstrate that one or more air agencies has the authority to implement a comprehensive PSD permit program under CAA title I part C for all PSD-subject sources located in areas that are designated attainment or unclassifiable for one or more NAAQS. EPA interprets the PSD elements to require that a state's infrastructure SIP submittal for a particular NAAQS demonstrate that the state has a complete PSD permitting program in place covering all regulated NSR pollutants. A state's PSD permitting program is complete for the PSD elements if EPA has already approved or is simultaneously approving the state's implementation plan with respect to all structural PSD requirements [14] that are due under the EPA regulations or the CAA on or before the date of EPA's proposed action on the infrastructure SIP submittal.

On September 14, 2016, EPA partially approved and partially disapproved the PSD elements of North Carolina's infrastructure SIP submittals for the following NAAQS: 1997 Annual and 24-hour $PM_{2.5}$; 2006 24-hour $PM_{2.5}$; 2008 lead; 2008 8-hour ozone; 2010 NO_2; 2010 SO_2; and 2012 Annual $PM_{2.5}$. *See* 81 FR 63107. The partial disapproval was limited to the $PM_{2.5}$ increment requirements of the 2010 $PM_{2.5}$ Rule for these infrastructure SIP submittals. North Carolina submitted its October 17, 2017, SIP revision to EPA to correct the deficiencies in the State's PSD permitting program, and, as previously discussed, EPA is proposing to approve this SIP revision. If EPA's proposed action is finalized, North Carolina's SIP will include a complete PSD program that addresses all structural PSD requirements due under the CAA and EPA regulations. Because EPA proposes to approve North Carolina's SIP revisions for the PSD program, it is also proposing approval of the October 17, 2017, submittal for the PSD infrastructure SIP requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) for the 2008 lead NAAQS, 2008 ozone NAAQS, 2010 SO_2 NAAQS, 2010 NO_2 NAAQS, and 1997, 2006 and 2012 $PM_{2.5}$ NAAQS.[15]

VI. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference North Carolina's regulations 15A NCAC 02D .0530, entitled ''Prevention of Significant Deterioration,'' effective September 1, 2017. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and in hard copy at the EPA Region 4 office (see the **ADDRESSES** section of this preamble for more information).

VII. Proposed Actions

EPA is proposing to approve changes to the North Carolina SIP, provided by the NC DEQ, to EPA on October 17, 2017. These changes modify North Carolina's NSR permitting regulations codified at 15A 02D .0530—*Prevention of Significant Deterioration* and include the adoption of some federal requirements respecting implementation of the $PM_{2.5}$ NAAQS through the NSR permitting program. Specifically, EPA is proposing to approve North Carolina's October 17, 2017, SIP submittal as it relates to the requirements to comply with EPA's 2010 PSD $PM_{2.5}$ Rule. EPA also notes that North Carolina's incorporation by reference of EPA's PSD regulations as of July 1, 2014, includes EPA's amendment to the definition of ''regulated NSR pollutant'' concerning condensable PM promulgated on October 25, 2012.

If EPA finalizes all of the actions proposed in this notice, the version of 15A NCAC 02D .0530 (PSD) that became effective in the State on September 1, 2017, will be incorporated into North Carolina's SIP. As a result of the proposed approval of North Carolina's October 17, 2017, SIP submittal, EPA is also proposing to approve portions of the PSD elements of North Carolina's infrastructure SIP submittals (*i.e.,* CAA sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J)) for the 1997 Annual and 24-hour $PM_{2.5,}$ 2006 24-hour $PM_{2.5,}$ 2008 lead, 2008 8-hour ozone, 2010 SO_2, 2010 NO_2 and the 2012 Annual $PM_{2.5}$ NAAQS. If EPA finalizes this proposed approval action, that final action will remove EPA's obligation under section 110(c) to promulgate a FIP to address the $PM_{2.5}$ increments requirements of EPA's 2010 PSD $PM_{2.5}$ Rule PSD and the related PSD elements for the above listed infrastructure SIPs.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, these proposed actions:

- Are not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Are not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National

[13] EPA's September 13, 2013, guidance, titled ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a),'' provides advice on the development of infrastructure SIPs for the 2008 ozone NAAQS, the 2010 nitrogen dioxide NAAQS, the 2010 sulfur dioxide NAAQS, and the 2012 $PM_{2.5}$ NAAQS, as well as infrastructure SIPs for new or revised NAAQS promulgated in the future.

[14] Structural PSD program provisions include provisions necessary for the PSD program to address all regulated sources and regulated pollutants but do not include provisions under 40 CFR 51.166 that are considered optional.

[15] EPA has already approved or will consider in separate actions all other elements from North Carolina infrastructure SIP submissions related to the 2008 lead, 2008 8-hour ozone, 2010 NO_2, 2010 SO_2 NAAQS, and 1997, 2006 and 2012 $PM_{2.5}$ NAAQS.

Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

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

Dated: June 12, 2018.

Onis ''Trey'' Glenn, III,

Regional Administrator, Region 4.

[FR Doc. 2018–13356 Filed 6–20–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R09–OAR–2018–0366; FRL–9979–36—Region 9]

Outer Continental Shelf Air Regulations; Consistency Update for California

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to update a portion of the Outer Continental Shelf (OCS) Air Regulations. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (COA), as mandated by section 328(a)(1) of the Clean Air Act (''the Act''). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources for which the Santa Barbara County Air Pollution Control District (''Santa Barbara County APCD'') is the designated COA. The intended effect of approving the OCS requirements for the Santa Barbara County APCD is to regulate emissions from OCS sources in accordance with the requirements onshore. The change to the existing requirements discussed below is proposed to be incorporated by reference into the Code of Federal Regulations and listed in the appendix to the OCS air regulations.

DATES: Any comments must arrive by July 23, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2018–0366 at *http://www.regulations.gov,* or via email to Christine Vineyard, at *vineyard.christine@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, Air Division (Air-4), U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947–4125, *vineyard.christine@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background Information

On September 4, 1992, the EPA promulgated 40 CFR part 55,[1] which established requirements to control air pollution from OCS sources to attain and maintain federal and state ambient air quality standards and to comply with the provisions of part C of title I of the Act. Part 55 applies to all OCS sources offshore of the states except those located in the Gulf of Mexico west of 87.5 degrees' longitude. Section 328 of the Act requires that for such sources located within 25 miles of a state's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that the EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

Pursuant to § 55.12 of the OCS rule, consistency reviews will occur (1) at least annually; (2) upon receipt of a Notice of Intent under § 55.4; or (3) when a state or local agency submits a rule to the EPA to be considered for incorporation by reference in part 55. This proposed action is being taken in response to the submittal of requirements by the Santa Barbara County APCD. Public comments received in writing within 30 days of publication of this document will be considered by the EPA before publishing a final rule. Section 328(a) of the Act requires that the EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, the EPA must incorporate applicable onshore rules into part 55 as they exist onshore. This limits the EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents the EPA from making substantive changes to the requirements it incorporates. As a result, the EPA may be incorporating rules into part 55 that do not conform to all of the EPA's state implementation plan (SIP) guidance or certain requirements of the Act. Consistency updates may result in the inclusion of state or local rules or regulations into part 55, even though the same rules may

[1] The reader may refer to the Notice of Proposed Rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792) for further background and information on the OCS regulations.

ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by the EPA for inclusion in the SIP.

II. The EPA's Evaluation and Proposed Action

A. What rule was submitted to update 40 CFR part 55?

The Santa Barbara County APCD submitted the following requirement to update 40 CFR part 55:

Rule No.	Name	Revised date
360	Boilers, Water Heaters, and Process Heaters (0.075–2 MMBtu/hr.)	03/15/18

An earlier version of this rule is currently implemented on the OCS.

B. What criteria were used to evaluate the rule submitted to update 40 CFR part 55?

In proposing to update 40 CFR part 55, the EPA reviewed the rule submitted for inclusion in part 55 to ensure that it is rationally related to the attainment or maintenance of federal or state ambient air quality standards or to requirements of part C of title I of the Act, that it is not designed expressly to prevent exploration and development of the OCS and that it is potentially applicable to OCS sources. *See* 40 CFR 55.1 and 55.12(d)(2). The EPA has also evaluated the rule to ensure it is not arbitrary or capricious. *See* 40 CFR 55.12(e). The EPA has excluded administrative and procedural rules [2] and requirements concerning toxics, which are not related to the attainment and maintenance of federal and state ambient air quality standards.

C. Proposed Action and Public Comment

After review of the rule against the criteria set forth above and in 40 CFR part 55, the EPA is proposing to make Santa Barbara County APCD Rule 360 applicable to OCS sources. We will accept comments from the public on this proposal until July 23, 2018.

III. Incorporation by Reference

In this document, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the Santa Barbara County APCD rule set forth below. The EPA has made, and will continue to make, these materials available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore air pollution control requirements. To comply with this statutory mandate, the EPA must incorporate applicable onshore rules into 40 CFR part 55 as they exist onshore. *See* 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, the EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the CAA. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of any policy direction by the EPA. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866;
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, nor does it impose substantial direct compliance costs on tribal governments or preempt tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C 3501 *et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. OMB approved EPA Information Collection Request No. 1601.08 on September 18, 2017. The current approval expires September 30, 2020. The total burden for collection of information under 40 CFR part 55 is estimated to be 27,018 hours per year, using the definition of burden provided in 5 CFR 1320.3(b). *See* 82 FR 21811, 21812 (May 10, 2017).

[2] Each COA which has been delegated the authority to implement and enforce part 55 will use its administrative and procedural rules as onshore. However, in those instances where the EPA has not delegated authority to implement and enforce part 55, the EPA will use its own administrative and procedural requirements to implement the substantive requirements. 40 CFR 55.14(c)(4).

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedure, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer continental shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: May 31, 2018.

Deborah Jordan,

Acting Regional Administrator, Region IX.

For the reasons set out in the preamble, title 40 of the Code of Federal Regulations, part 55, is proposed to be amended as follows:

PART 55—OUTER CONTINENTAL SHELF AIR REGULATIONS

■ 1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Clean Air Act (42 U.S.C. 7401, *et seq.*) as amended by Public Law 101–549.

■ 2. Section 55.14 is amended by revising paragraph (e)(3)(ii)(F) to read as follows:

§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(F) *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources, May 2018.*

* * * * *

■ 3. Appendix A to part 55 is amended by revising paragraph (b)(6) under the heading ''California'' to read as follows:

Appendix A to Part 55—Listing of State and Local Requirements Incorporated by Reference into Part 55, by State

* * * * *

California

* * * * *

(b) * * *

(6) The following requirements are contained in *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources, May 2018:*

Rule 102 Definitions (Revised 08/25/16)
Rule 103 Severability (Adopted 10/23/78)
Rule 105 Applicability (Revised 08/25/16)
Rule 107 Emergencies (Adopted 04/19/01)
Rule 201 Permits Required (Revised 06/19/08)
Rule 202 Exemptions to Rule 201 (Revised 08/25/16)
Rule 203 Transfer (Revised 04/17/97)
Rule 204 Applications (Revised 08/25/16)
Rule 205 Standards for Granting Permits (Revised 04/17/97)
Rule 206 Conditional Approval of Authority to Construct or Permit to Operate (Revised 10/15/91)
Rule 207 Denial of Application (Adopted 10/23/78)
Rule 210 Fees (Revised 03/17/05)
Rule 212 Emission Statements (Adopted 10/20/92)
Rule 301 Circumvention (Adopted 10/23/78)
Rule 302 Visible Emissions (Revised 6/1981)
Rule 303 Nuisance (Adopted 10/23/78)
Rule 304 Particulate Matter-Northern Zone (Adopted 10/23/78)
Rule 305 Particulate Matter Concentration-Southern Zone (Adopted 10/23/78)
Rule 306 Dust and Fumes-Northern Zone (Adopted 10/23/78)
Rule 307 Particulate Matter Emission Weight Rate-Southern Zone (Adopted 10/23/78)
Rule 308 Incinerator Burning (Adopted 10/23/78)
Rule 309 Specific Contaminants (Adopted 10/23/78)
Rule 310 Odorous Organic Sulfides (Adopted 10/23/78)
Rule 311 Sulfur Content of Fuels (Adopted 10/23/78)
Rule 312 Open Fires (Adopted 10/02/90)
Rule 316 Storage and Transfer of Gasoline (Revised 01/15/09)
Rule 317 Organic Solvents (Adopted 10/23/78)
Rule 318 Vacuum Producing Devices or Systems-Southern Zone (Adopted 10/23/78)
Rule 321 Solvent Cleaning Operations (Revised 06/21/12)
Rule 322 Metal Surface Coating Thinner and Reducer (Adopted 10/23/78)
Rule 323 Architectural Coatings (Revised 11/15/01)
Rule 323.1 Architectural Coatings (Adopted 06/19/14, Effective 01/01/15)
Rule 324 Disposal and Evaporation of Solvents (Adopted 10/23/78)
Rule 325 Crude Oil Production and Separation (Revised 07/19/01)
Rule 326 Storage of Reactive Organic Compound Liquids (Revised 01/18/01)
Rule 327 Organic Liquid Cargo Tank Vessel Loading (Revised 12/16/85)
Rule 328 Continuous Emission Monitoring (Adopted 10/23/78)
Rule 330 Surface Coating of Metal Parts and Products (Revised 06/21/12)
Rule 331 Fugitive Emissions Inspection and Maintenance (Revised 12/10/91)
Rule 332 Petroleum Refinery Vacuum Producing Systems, Wastewater Separators and Process Turnarounds (Adopted 06/11/79)
Rule 333 Control of Emissions from Reciprocating Internal Combustion Engines (Adopted 06/19/08)
Rule 342 Control of Oxides of Nitrogen (NO_X) from Boilers, Steam Generators and Process Heaters) (Revised 04/17/97)
Rule 343 Petroleum Storage Tank Degassing (Adopted 12/14/93)
Rule 344 Petroleum Sumps, Pits, and Well Cellars (Adopted 11/10/94)
Rule 346 Loading of Organic Liquid Cargo Vessels (Revised 01/18/01)
Rule 349 Polyester Resin Operations (Revised 06/21/12)
Rule 352 Natural Gas-Fired Fan-Type Central Furnaces and Residential Water Heaters (Revised 10/20/11)
Rule 353 Adhesives and Sealants (Revised 06/21/12)
Rule 359 Flares and Thermal Oxidizers (Adopted 06/28/94)
Rule 360 Boilers, Water Heaters, and Process Heaters (0.075–2 MMBtu/hr.) (Revised 03/15/18)
Rule 361 Small Boilers, Steam Generators, and Process Heaters (Adopted 01/17/08)
Rule 370 Potential to Emit—Limitations for Part 70 Sources (Revised 01/20/11)
Rule 505 Breakdown Conditions Sections A., B.1, and D. only (Adopted 10/23/78)
Rule 603 Emergency Episode Plans (Adopted 06/15/81)
Rule 702 General Conformity (Adopted 10/20/94)
Rule 801 New Source Review—Definitions and General Requirements (Revised 08/25/16)
Rule 802 New Source Review (Revised 08/25/16)
Rule 804 Emission Offsets (Revised 08/25/16)
Rule 805 Air Quality Impact Analysis, Modeling, Monitoring, and Air Quality Increment Consumption (Revised 08/25/16)
Rule 806 Emission Reduction Credits (Revised 08/25/16)
Rule 808 New Source Review for Major Sources of Hazardous Air Pollutants (Adopted 05/20/99)
Rule 809 Federal Minor Source New Source Review (Revised 08/25/16)
Rule 810 Federal Prevention of Significant Deterioration (PSD) (Revised 06/20/13)
Rule 1301 Part 70 Operating Permits—General Information (Revised 08/25/16)
Rule 1302 Part 70 Operating Permits—Permit Application (Adopted 11/09/93)
Rule 1303 Part 70 Operating Permits—Permits (Revised 01/18/01)
Rule 1304 Part 70 Operating Permits—Issuance, Renewal, Modification and Reopening (Revised 01/18/01)
Rule 1305 Part 70 Operating Permits—Enforcement (Adopted 11/09/93)

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[FR Doc. 2018–13347 Filed 6–20–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BH72

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability (NOA); request for comments.

SUMMARY: The Gulf of Mexico (Gulf) Fishery Management Council (Gulf Council) and South Atlantic Fishery Management Council (South Atlantic Council) have submitted the Gulf For-hire Reporting Amendment for review, approval, and implementation by NMFS. The Gulf For-hire Reporting Amendment includes amendments to the Fishery Management Plan (FMP) for Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP) and the Coastal Migratory Pelagic (CMP) Resources of the Gulf of Mexico and Atlantic Region (CMP FMP). If approved by the Secretary of Commerce, the Gulf For-hire Reporting Amendment would revise reporting requirements for owners and operators of federally permitted charter vessels and headboats (for-hire vessels). The Gulf For-hire Reporting Amendment would require an owner or operator of a for-hire vessel with a Federal charter vessel/headboat permit for Gulf Reef Fish or Gulf CMP to submit an electronic fishing report for each fishing trip using NMFS-approved hardware and software, before offloading fish from the vessel. The Gulf For-hire Reporting Amendment would also require these owners or operators to notify NMFS prior to departing on any trip. The purpose of the Gulf For-hire Reporting Amendment is to increase and improve fisheries information collected from owners and operators of vessels with a Federal charter vessel/headboat permit for Gulf reef fish or Gulf CMP species. The information is expected to improve recreational fisheries management of the for-hire component in the Gulf.

DATES: Written comments on the Gulf For-hire Reporting Amendment must be received by August 20, 2018.

ADDRESSES: You may submit comments on the Gulf For-hire Reporting Amendment, identified by ''NOAA–NMFS–2018–0075,'' by either of the following methods:

- *Electronic submission:* Submit all electronic comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/docket?D=NOAA-NMFS-2018-0075, click the* ''*Comment Now!*'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit all written comments to Rich Malinowski, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in required fields if you wish to remain anonymous).

Electronic copies of the Gulf For-hire Reporting Amendment may be obtained from *www.regulations.gov* or the Southeast Regional Office website at *http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/index.html.* The Gulf For-hire Reporting Amendment includes an environmental assessment, regulatory impact review, Regulatory Flexibility Act analysis, and fishery impact statement.

FOR FURTHER INFORMATION CONTACT: Rich Malinowski, NMFS Southeast Regional Office, telephone: 727–824–5305, or email: *rich.malinowski@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any fishery management plan or amendment to NMFS for review and approval, partial approval, or disapproval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or amendment, publish an announcement in the **Federal Register** notifying the public that the FMP or amendment is available for review and comment.

The FMPs being revised by the Gulf For-hire Reporting Amendment were prepared by the Gulf Council and the South Atlantic Council, and the Gulf For-hire Reporting Amendment, if approved, would be implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Act.

Background

The Magnuson-Stevens Act requires that NMFS and regional fishery management councils prevent overfishing and achieve, on a continuing basis, the optimum yield from federally managed fish stocks. These mandates are intended to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act states that the collection of reliable data is essential to the effective conservation, management, and scientific understanding of the nation's fishery resources.

In 2014, NMFS implemented management measures contained in a framework action to the Reef Fish FMP and the CMP FMP (Headboat Reporting Framework), which modified recordkeeping and reporting provisions for an owner or operator of a headboat that has been issued a charter vessel/headboat permit for Gulf reef fish or Gulf CMP species (79 FR 6097, February 3, 2014). If selected by NMFS to participate in the Southeast Region Headboat Survey (SRHS), a headboat owner or operator must submit an electronic fishing report weekly, or at shorter intervals if notified by the Science and Research Director (SRD) of NMFS' Southeast Fisheries Science Center (SEFSC). Currently, the selected headboat owners or operators must submit an electronic fishing report to NMFS via the internet by the Sunday following the end of each reporting week, which runs from Monday through Sunday; in other words, reports are due within 7 days after a reporting week ends. If the reports are not submitted on time, the owner or operator of the vessel is prohibited from harvesting or possessing the applicable species until any delinquent electronic fishing reports are submitted to NMFS. The purpose of the Headboat Reporting Framework was to obtain more timely fishing information from headboats to better monitor recreational annual catch limits (ACLs), improve stock assessments, and improve compliance with reporting in Gulf recreational fisheries.

Currently, landings and discards from federally permitted charter vessels in the Gulf reef fish and CMP fisheries are monitored through the survey of charter vessels by the Marine Recreational Information Program (MRIP). As of January 1, 2018, fishing effort is calculated based on a sample of federally permitted charter vessels through a mail survey. Catch rate observations and catch sampling are provided through dockside monitoring, also conducted by MRIP. This MRIP charter vessel information is then available in 2-month increments known as waves, so that there are six waves during the calendar year, *e.g.,* January through February, March through April, etc.

The Gulf For-hire Reporting Amendment modifies the reporting requirements for both charter vessels and headboats. Owners or operators of

for-hire vessels with a Federal charter vessel/headboat permit for Gulf reef fish or Gulf CMP species would have to submit electronic fishing reports to NMFS for each trip prior to offloading fish. This would make the reporting requirements and deadline for charter vessels and headboats consistent.

If NMFS implements the electronic reporting requirements described in the Gulf For-hire Reporting Amendment, the MRIP survey of charter vessels would continue until the proposed electronic reporting program described in the amendment is certified by NMFS, and then the electronic reporting program could replace the MRIP survey of charter vessels.

Accurate and reliable fisheries information about catch, effort, and discards is critical to stock assessment and management evaluations. In addition, catch from federally permitted for-hire vessels may represent a substantial portion of the total recreational catch for Gulf Council managed fish species, such as red snapper, gray triggerfish, greater amberjack, and mutton snapper. The Gulf Council has determined that electronic reporting on a per trip basis for federally permitted for-hire vessels could provide more timely information than the current MRIP survey and SRHS, and more accurate and reliable information for many species with low catches, low ACLs, or for species that are only rarely encountered by fishery participants. The Gulf Council expects electronic reporting on a per trip basis by owners and operators of all federally permitted for-hire vessels to enhance data collection efforts and contribute to better fisheries management by improving the accuracy of the data and allowing for more data-rich stock assessments.

Actions Contained in the Gulf For-Hire Reporting Amendment

The Gulf For-hire Reporting Amendment includes actions to establish electronic reporting on a per trip basis before offloading fish from federally permitted charter vessels and headboats in the Gulf reef fish and CMP fisheries. The Gulf For-hire Reporting Amendment would also require vessel owners or operators to submit fishing reports via NMFS-approved hardware and software with global positioning system (GPS) capabilities that, at a minimum, archive vessel position data during a trip for subsequent transmission to NMFS. Lastly, prior to departing for any trip, the owner or operator of a federally permitted charter vessel or headboat would be required to notify NMFS and declare whether they are departing on a for-hire trip, or on another trip type. If the vessel will be operating as a charter vessel or headboat during the specified trip, the vessel owner or operator must also report expected return time and landing location.

Electronic Reporting by Federally Permitted Charter Vessels and Headboats

The Gulf For-hire Reporting Amendment would require an owner or operator of a charter vessel or headboat with a Federal charter vessel/headboat permit for Gulf reef fish or Gulf CMP species, and is operating as a for-hire vessel, to submit an electronic fishing report for each trip before offloading fish from the vessel. The electronic fishing report would include any species that were caught or harvested in or from any area, *e.g.,* in state or Federal waters in the Gulf or Atlantic, as well as information about the permit holder, vessel, location fished, fishing effort, discards, and socio-economic data. In the future, other information that could further benefit the management of federally permitted for-hire vessels included under the Gulf For-hire Reporting Amendment may also be subject to collection, as determined by NMFS, in collaboration with other data collection partners and in coordination with the Gulf Council. If no fish were retained on a trip, submission of an electronic fishing report would be required within 30 minutes after the trip ends.

If the Gulf For-hire Reporting Amendment is approved and implemented, the owner or operator of a federally permitted for-hire vessel that is on a for-hire trip would be required to submit an electronic fishing report using hardware and software that meets NMFS technical requirements and has been type approved by NMFS. NMFS-approved hardware could include electronic devices such as computers, tablets, smartphones, and vessel monitoring system units that allow for internet access and are capable of operating approved software. NMFS is currently evaluating potential software applications for the electronic for-hire reporting program and is considering the use of existing software applications already being used by partners in the region, including e-trips online and e-trips mobile, which are reporting products developed by the Atlantic Coastal Cooperative Statistics Program. Hardware and software that meet the NMFS type approval would be posted on the NMFS Southeast Region website upon publication of any final rule to implement revisions to the Gulf for-hire electronic reporting program.

NMFS recently published a proposed rule in the **Federal Register** to implement electronic reporting requirements contained in the South Atlantic For-Hire Reporting Amendment applicable to the for-hire component of recreational fisheries in the Atlantic (83 FR 14400, April 4, 2018). As proposed for the Atlantic, an owner or operator of a for-hire vessel issued a Federal charter vessel/headboat permit for Atlantic CMP species, Atlantic dolphin and wahoo, or South Atlantic snapper-grouper species, and is operating as a for-hire vessel, would have to submit an electronic fishing report using NMFS-approved hardware and software on a weekly basis. However, the South Atlantic Council does not intend for a vessel with Federal for-hire permits from multiple jurisdictions to report to multiple electronic reporting programs. Therefore, an owner or operator of a for-hire vessel with a Federal charter vessel/headboat permit for an applicable fishery in the Atlantic, who is required to report under another Council's program that has more stringent requirements, such as the proposed Gulf For-hire Reporting Amendment, would not also need to report under the South Atlantic's program.

This means that if NMFS implements the measures in the South Atlantic For-hire Reporting Amendment before implementing measures established through the Gulf For-hire Reporting Amendment, for-hire vessels issued the applicable Federal charter vessel/headboat permits in both the Gulf and Atlantic would be required to comply with the Atlantic electronic reporting program until a Gulf electronic reporting program is implemented, even if the for-hire trips only occur in the Gulf. Then, if NMFS subsequently implements the Gulf For-hire Reporting Amendment, fishermen on for-hire vessels issued Gulf for-hire permits would need to comply with the Gulf electronic reporting program requirements.

The Gulf For-hire Reporting Amendment also contains provisions addressing reporting during catastrophic conditions, such as after a hurricane, and delinquent reporting. During NMFS-declared catastrophic conditions, NMFS may accept paper reporting forms, and can modify or waive reporting requirements. Also, a delinquent report would result in a prohibition on the harvest or possession of the applicable species by the for-hire vessel permit holder until all required and delinquent reports have been

submitted and received by NMFS according to the reporting requirements.

Location Tracking and Reporting

The Gulf For-hire Reporting Amendment specifies that a for-hire vessel owner or operator submit fishing reports via NMFS-approved hardware and software with GPS capabilities that, at a minimum, archive vessel position data during a trip for subsequent transmission to NMFS. The location information would be transmitted electronically to NMFS. The GPS portion of the hardware would have to be permanently affixed to the vessel. The purpose of this requirement is verify whether a vessel is at the dock. Therefore, the GPS portion must have uninterrupted power unless the owner or operator applies for and is granted an exemption.

Trip Notification

The Gulf For-hire Reporting Amendment would require an owner or operator of a federally permitted charter vessel or headboat to submit a trip notification to NMFS before departing for any trip. The trip notification would include whether the vessel will be departing on a for-hire vessel or as another trip type, such as commercial. If the vessel will be departing on a for-hire trip, the owner or operator must also report the expected trip completion date, time, and landing location. The Gulf Council determined that a trip notification would improve effort estimation for charter vessels and headboats, and the ability of port agents and law enforcement to meet a vessel at end of a trip for biological sampling and landings validation.

Proposed Rule for the Gulf For-Hire Reporting Amendment

A proposed rule that would implement the Gulf For-hire Reporting Amendment is being drafted. In accordance with the Magnuson-Stevens Act, NMFS will evaluate the proposed rule to determine whether it is consistent with the FMPs, the Magnuson-Stevens Act, and other applicable laws. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Gulf Council has submitted the Gulf For-hire Reporting Amendment for Secretarial review, approval, and implementation. Comments on the Gulf For-hire Reporting Amendment must be received by August 20, 2018. Comments received will be considered by NMFS in the decision to approve, disapprove, or partially approve the Gulf For-hire Reporting Amendment. Comments received after the comment period will not be considered by NMFS in this decision. All comments received by NMFS on the amendment or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: June 15, 2018.

Jennifer M. Wallace,

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

[FR Doc. 2018–13278 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 83, No. 120
Thursday, June 21, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts; Extension of Comment Period

AGENCY: U.S. Department of Commerce.

ACTION: Notice of request for public comments and public hearing; extension of comment period.

SUMMARY: In response to requests for additional time, the Department of Commerce is extending the comment period for the notice of request for public comments and public hearing that was published in the **Federal Register** on May 30, 2018. In the notice, the Department requested written comments, data, analyses, or other information pertinent to the investigation to determine the effects on the national security of imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts. Through this notice, the Department extends the comment period to June 29, 2018 and the rebuttal period to July 13, 2018. Requests to appear at the hearings are also now due June 29, 2018.

DATES: The due date for filing comments, for requests to appear at the public hearing, and for submissions of a summary of expected testimony at the public hearing is June 29, 2018.

The due date is July 13, 2018 for rebuttal comments submitted in response to any comments filed on or before June 29, 2018.

The public hearings will be held on July 19 and 20, 2018. The hearings will begin at 8:30 a.m. local time and conclude at 5:00 p.m. local time, each day.

ADDRESSES:

Written comments: All written submissions must be in English and must be addressed to Section 232 Automobile and Automotive Parts Imports Investigation, and filed through the Federal eRulemaking Portal: *http://www.regulations.gov.* To submit comments via *www.regulations.gov,* enter docket number DOC–2018–0002 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 website by clicking on ''How to Use This Site'' on the left side of the home page). For alternatives to on-line submissions, please contact Sahra Park-Su at (202) 482–2811.

FOR FURTHER INFORMATION CONTACT: Sahra Park-Su, U.S. Department of Commerce (202) 482–2811. For more information about the section 232 program, including the regulations and the text of previous investigations, see *www.bis.doc.gov/*232.

SUPPLEMENTARY INFORMATION: On May 30, 2018, the Secretary of Commerce (''Secretary'') issued a request for public comment on an investigation under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), to determine the effects on the national security of imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts (83 FR 24735). The Department of Commerce is extending the comment period on the notice published from June 22, 2018 to June 29, 2018. In addition, the Department of Commerce is extending the due date for rebuttal comments submitted in response to any comments filed on or before June 29, 2018 to July 13, 2018. The dates and location for the public hearings as well as other instructions to commenters remain unchanged. The Department believes that a 7-day extension for comments allows adequate additional time for interested persons to submit comments while still allowing this national security investigation to proceed expeditiously.

Wilbur L. Ross,

Secretary of Commerce.

[FR Doc. 2018–13462 Filed 6–19–18; 4:15 pm]

BILLING CODE 3510–17–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Renewing Order Temporarily Denying Export Privileges

Mahan Airways, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran;

Pejman Mahmood Kosarayanifard, a/k/a Kosarian Fard, P.O. Box 52404, Dubai, United Arab Emirates;

Mahmoud Amini, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates;

Kerman Aviation, a/k/a GIE Kerman Aviation, 42 Avenue Montaigne 75008, Paris, France;

Sirjanco Trading LLC, P.O. Box 8709, Dubai, United Arab Emirates;

Mahan Air General Trading LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates;

Mehdi Bahrami, Mahan Airways-Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey;

Al Naser Airlines, a/k/a al-Naser Airlines, a/k/a Al Naser Wings Airline, a/k/a Alnaser Airlines and Air Freight Ltd., Home 46, Al-Karrada, Babil Region, District 929, St 21 Beside Al Jadirya Private Hospital, Baghdad, Iraq, and Al Amirat Street, Section 309, St. 3/H.20, Al Mansour , Baghdad, Iraq, and P.O. Box 28360, Dubai, United Arab Emirates, and P.O. Box 911399, Amman 11191, Jordan;

Ali Abdullah Alhay, a/k/a Ali Alhay, a/k/a Ali Abdullah Ahmed Alhay, Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadirya Private Hospital, Baghdad, Iraq, and Anak Street, Qatif, Saudi Arabia 61177;

Bahar Safwa General Trading, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates, and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates;

Sky Blue Bird Group, a/k/a Sky Blue Bird Aviation, a/k/a Sky Blue Bird Ltd, a/k/a Sky Blue Bird FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates;

Issam Shammout, a/k/a Muhammad Isam Muhammad Anwar Nur Shammout, a/k/a Issam Anwar, Philips Building, 4th Floor, Al Fardous Street, Damascus, Syria, and Al Kolaa, Beirut, Lebanon 151515, and 17–18 Margaret Street, 4th Floor, London, W1W 8RP, United Kingdom, and, Cumhuriyet Mah. Kavakli San St. Fulya, Cad. Hazar Sok. No.14/A Silivri, Istanbul, Turkey

Pursuant to Section 766.24 of the Export Administration Regulations, 15

CFR parts 730–774 (2018) (''EAR'' or ''the Regulations''),[1] I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the temporary denial order issued in this matter on December 20, 2017. I find that renewal of this order, as recently modified, is necessary in the public interest to prevent an imminent violation of the EAR.

I. Procedural History

On March 17, 2008, Darryl W. Jackson, the then-Assistant Secretary of Commerce for Export Enforcement (''Assistant Secretary''), signed an order denying Mahan Airways' export privileges for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order also named as denied persons Blue Airways, of Yerevan, Armenia (''Blue Airways of Armenia''), as well as the ''Balli Group Respondents,'' namely, Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghband, Hassan Alaghband, Blue Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., and Blue Sky Six Ltd., all of the United Kingdom. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations, and went into effect on March 21, 2008, the date it was published in the **Federal Register**.

This temporary denial order (''TDO'') was renewed in accordance with Section 766.24(d) of the Regulations.[2] Subsequent renewals also have issued pursuant to Section 766.24(d), including most recently on December 20, 2017.[3] Some of the renewal orders and the modification orders that have issued between renewals have added certain parties as respondents or as related persons, or effected the removal of certain parties.[4]

The September 11, 2009 renewal order continued the denial order as to Mahan Airways, but not as to the Balli Group Respondents or Blue Airways of Armenia.[5] As part of the February 25, 2011 renewal order, Pejman Mahmood Kosarayanifard (a/k/a Kosarian Fard), Mahmoud Amini, and Gatewick LLC (a/k/a Gatewick Freight and Cargo Services, a/k/a Gatewick Aviation Services) were added as related persons to prevent evasion of the TDO.[6] A modification order issued on July 1, 2011, adding Zarand Aviation as a respondent in order to prevent an imminent violation.[7]

As part of the August 24, 2011 renewal, Kerman Aviation, Sirjanco Trading LLC, and Ali Eslamian were added as related persons. Mahan Air General Trading LLC, Equipco (UK) Ltd., and Skyco (UK) Ltd. were added as related persons by a modification order issued on April 9, 2012. Mehdi Bahrami was added as a related person as part of the February 4, 2013 renewal order.

On May 21, 2015, a modification order issued adding Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. As detailed in that order and discussed further *infra,* these respondents were added to the TDO based upon evidence that they were acting together to, inter alia, obtain aircraft subject to the Regulations for export or reexport to Mahan in violation of the Regulations and the TDO.

Sky Blue Bird Group and its chief executive officer, Issam Shammout, were added as related persons as part of the July 13, 2015 renewal order.[8] On November 16, 2017, a modification order issued to remove Ali Eslamian, Equipco (UK) Ltd., and Skyco (UK) Ltd. as related persons following a request by OEE for their removal.[9]

The December 20, 2017 renewal order continued the denial of the export privileges of Mahan Airways, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General

[1] The Regulations, currently codified at 15 CFR parts 730–774 (2018), originally issued pursuant to the Export Administration Act of 1979 (''EAA'' or ''the Act''). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2017 (82 FR 39,005 (Aug. 16, 2017)) has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)).

[2] Section 766.24(d) provides that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation. Renewal requests are to be made in writing no later than 20 days before the scheduled expiration date of a temporary denial order. Renewal requests may include discussion of any additional or changed circumstances, and may seek appropriate modifications to the order, including the addition of parties as respondents or related persons, or the removal of parties previously added as respondents or related persons. BIS is not required to seek renewal as to all parties, and a removal of a party can be effected if, without more, BIS does not seek renewal as to that party. Any party included or added to a temporary denial order as a respondent may oppose a renewal request as set forth in Section 766.24(d). Parties included or added as related persons can at any time appeal their inclusion as a related person, but cannot challenge the underlying temporary denial order, either as initially issued or subsequently renewed, and cannot oppose a renewal request. *See also* note 4, *infra.*

[3] The December 20, 2017 renewal order was effective upon issuance and published in the **Federal Register** on December 29, 2017 (82 FR 61,745). Prior renewal orders issued on September 17, 2008, March 16, 2009, September 11, 2009, March 9, 2010, September 3, 2010, February 25, 2011, August 24, 2011, February 15, 2012, August 9, 2012, February 4, 2013, July 31, 2013, January 24, 2014, July 22, 2014, January 16, 2015, July 13, 2015, January 7, 2016, July 7, 2016, December 30, 2016, and June 27, 2017, respectively. The August 24, 2011 renewal followed the issuance of a modification order that issued on July 1, 2011, to add Zarand Aviation as a respondent. The July 13, 2015 renewal followed a modification order that issued May 21, 2015, and added Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. Each of the renewal orders and each of the modification orders referenced in this footnote or elsewhere in this order has been published in the **Federal Register**.

[4] Pursuant to Sections 766.23 and 766.24(c) of the Regulations, any person, firm, corporation, or business organization related to a denied person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may be added as a ''related person'' to a temporary denial order to prevent evasion of the order.

[5] Balli Group PLC and Balli Aviation settled proposed BIS administrative charges as part of a settlement agreement that was approved by a settlement order issued on February 5, 2010. The sanctions imposed pursuant to that settlement and order included, inter alia, a $15 million civil penalty and a requirement to conduct five external audits and submit related audit reports. The Balli Group Respondents also settled related charges with the Department of Justice and the Treasury Department's Office of Foreign Assets Control.

[6] *See* note 4, *supra,* concerning the addition of related persons to a temporary denial order. Kosarian Fard and Mahmoud Amini remain parties to the TDO. On August 13, 2014, BIS and Gatewick resolved administrative charges against Gatewick, including a charge for acting contrary to the terms of a BIS denial order (15 CFR 764.2(k)). In addition to the payment of a civil penalty, the settlement includes a seven-year denial order. The first two years of the denial period were active, with the remaining five years suspended conditioned upon Gatewick's full and timely payment of the civil penalty and its compliance with the Regulations during the seven-year denial order period. This denial order, in effect, superseded the TDO as to Gatewick, which was not included as part of the January 16, 2015 renewal order. The Gatewick LLC Final Order was published in the **Federal Register** on August 20, 2014. *See* 79 FR 49283 (Aug. 20, 2014).

[7] Zarand Aviation's export privileges remained denied until July 22, 2014, when it was not included as part of the renewal order issued on that date.

[8] The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') designated Sky Blue Bird and Issam Shammout as Specially Designated Global Terrorists (''SDGTs'') on May 21, 2015, pursuant to Executive Order 13324, for ''providing support to Iran's Mahan Air.'' See 80 FR 30762 (May 29, 2015).

[9] The November 16, 2017 modification was published in the **Federal Register** on December 4, 2017. *See* 82 FR 57,203 (Dec. 4, 2017). On September 28, 2017, BIS and Ali Eslamian resolved an administrative charge for acting contrary to the terms of the denial order (15 CFR 764.2(k)) that was based upon Eslamian's violation of the TDO after his addition to the TDO on August 24, 2011. Equipco (UK) Ltd. and Skyco (UK) Ltd., two companies owned and operated by Eslamian, also were parties to settlement agreement and were added to the settlement order as related persons. In addition to other sanctions, the settlement provides that Eslamian, Equipco, and Skyco shall be subject to a conditionally-suspended denial order for a period of four years from the date of the settlement order.

Trading LLC, Mehdi Bahrami, Al Naser Airlines, Ali Abdullah Alhay, Bahar Safwa General Trading, Sky Blue Bird Group, and Issam Shammout.

On May 25, 2018, BIS, through OEE, submitted a written request for renewal of the TDO that issued on December 20, 2017. The written request was made more than 20 days before the TDO's scheduled expiration. Notice of the renewal request was provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received. Furthermore, no appeal of the related person determinations made as part of the September 3, 2010, February 25, 2011, August 24, 2011, April 9, 2012, February 4, 2013, and July 13, 2015 renewal or modification orders has been made by Kosarian Fard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, or Issam Shammout.[10]

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue or renew an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent [.]'' Id. A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

B. The TDO and BIS's Request for Renewal

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO, and the renewal and modification orders subsequently issued in this matter, including the May 21, 2015 modification order and the renewal order issued on December 20, 2017, and the evidence developed over the course of this investigation, which indicate a blatant disregard of U.S. export controls and the TDO. The initial TDO was issued as a result of evidence that showed that Mahan Airways and other parties engaged in conduct prohibited by the EAR by knowingly re-exporting to Iran three U.S.-origin aircraft, specifically Boeing 747s (''Aircraft 1–3''), items subject to the EAR and classified under Export Control Classification Number (''ECCN'') 9A991.b, without the required U.S. Government authorization. Further evidence submitted by BIS indicated that Mahan Airways was involved in the attempted re-export of three additional U.S.-origin Boeing 747s (''Aircraft 4–6'') to Iran.

As discussed in the September 17, 2008 renewal order, evidence presented by BIS indicated that Aircraft 1–3 continued to be flown on Mahan Airways' routes after issuance of the TDO, in violation of the Regulations and the TDO itself.[11] It also showed that Aircraft 1–3 had been flown in further violation of the Regulations and the TDO on the routes of Iran Air, an Iranian Government airline. Moreover, as discussed in the March 16, 2009, September 11, 2009 and March 9, 2010 renewal orders, Mahan Airways registered Aircraft 1–3 in Iran, obtained Iranian tail numbers for them (EP–MNA, EP–MNB, and EP–MNE, respectively), and continued to operate at least two of them in violation of the Regulations and the TDO,[12] while also committing an additional knowing and willful violation when it negotiated for and acquired an additional U.S.-origin aircraft. The additional acquired aircraft was an MD–82 aircraft, which subsequently was painted in Mahan Airways' livery and flown on multiple Mahan Airways' routes under tail number TC–TUA.

The March 9, 2010 renewal order also noted that a court in the United Kingdom (''U.K.'') had found Mahan Airways in contempt of court on February 1, 2010, for failing to comply with that court's December 21, 2009 and January 12, 2010 orders compelling Mahan Airways to remove the Boeing 747s from Iran and ground them in the Netherlands. Mahan Airways and the Balli Group Respondents had been litigating before the U.K. court concerning ownership and control of Aircraft 1–3. In a letter to the U.K. court dated January 12, 2010, Mahan Airways' Chairman indicated, *inter alia,* that Mahan Airways opposes U.S. Government actions against Iran, that it continued to operate the aircraft on its routes in and out of Tehran (and had 158,000 ''forward bookings'' for these aircraft), and that it wished to continue to do so and would pay damages if required by that court, rather than ground the aircraft.

The September 3, 2010 renewal order discussed the fact that Mahan Airways' violations of the TDO extended beyond operating U.S.-origin aircraft and attempting to acquire additional U.S.-origin aircraft. In February 2009, while subject to the TDO, Mahan Airways participated in the export of computer motherboards, items subject to the Regulations and designated as EAR99, from the United States to Iran, via the United Arab Emirates (''UAE''), in violation of both the TDO and the Regulations, by transporting and/or forwarding the computer motherboards from the UAE to Iran. Mahan Airways' violations were facilitated by Gatewick LLC, which not only participated in the transaction, but also has stated to BIS that it acted as Mahan Airways' sole booking agent for cargo and freight forwarding services in the UAE.

Moreover, in a January 24, 2011 filing in the U.K. court, Mahan Airways asserted that Aircraft 1–3 were not being used, but stated in pertinent part that the aircraft were being maintained in Iran especially ''in an airworthy condition'' and that, depending on the outcome of its U.K. court appeal, the aircraft ''could immediately go back into service . . . on international routes into and out of Iran.'' Mahan Airways' January 24, 2011 submission to U.K. Court of Appeal, at p. 25, ¶¶ 108, 110. This clearly stated intent, both on its own and in conjunction with Mahan Airways' prior misconduct and statements, demonstrated the need to renew the TDO in order to prevent imminent future violations. Two of these three 747s subsequently were removed from Iran and are no longer in Mahan Airways' possession. The third of these 747s, with Manufacturer's Serial Number (''MSN'') 23480 and Iranian tail number EP–MNE, remained

[10] A party named or added as a related person may not oppose the issuance or renewal of the underlying temporary denial order, but may file an appeal of the related person determination in accordance with Section 766.23(c). See also note 2, *supra.*

[11] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

[12] The third Boeing 747 appeared to have undergone significant service maintenance and may not have been operational at the time of the March 9, 2010 renewal order.

in Iran under Mahan's control. Pursuant to Executive Order 13324, it was designated a Specially Designated Global Terrorist (''SDGT'') by the U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') on September 19, 2012.[13] Furthermore, as discussed in the February 4, 2013 Order, open source information indicated that this 747, painted in the livery and logo of Mahan Airways, had been flown between Iran and Syria, and was suspected of ferrying weapons and/or other equipment to the Syrian Government from Iran's Islamic Revolutionary Guard Corps. Open source information showed that this aircraft had flown from Iran to Syria as recently as June 30, 2013, and continues to show that it remains in active operation in Mahan Airways' fleet.

In addition, as first detailed in the July 1, 2011 and August 24, 2011 orders, and discussed in subsequent renewal orders in this matter, Mahan Airways also continued to evade U.S. export control laws by operating two Airbus A310 aircraft, bearing Mahan Airways' livery and logo, on flights into and out of Iran.[14] At the time of the July 1, 2011 and August 24, 2011 orders, these Airbus A310s were registered in France, with tail numbers F–OJHH and F–OJHI, respectively.[15]

The August 2012 renewal order also found that Mahan Airways had acquired another Airbus A310 aircraft subject to the Regulations, with MSN 499 and Iranian tail number EP–VIP, in violation of the TDO and the Regulations.[16] On September 19, 2012, all three Airbus A310 aircraft (tail numbers F–OJHH, F–OJHI, and EP–VIP) were designated as SDGTs.[17]

The February 4, 2013 renewal order laid out further evidence of continued and additional efforts by Mahan Airways and other persons acting in concert with Mahan, including Kral Aviation and another Turkish company, to procure U.S.-origin engines—two GE CF6–50C2 engines, with MSNs 517621 and 517738, respectively—and other aircraft parts in violation of the TDO and the Regulations.[18] The February 4, 2013 order also added Mehdi Bahrami as a related person in accordance with Section 766.23 of the Regulations. Bahrami, a Mahan Vice-President and the head of Mahan's Istanbul Office, also was involved in Mahan's acquisition of the original three Boeing 747s (Aircraft 1–3) that resulted in the original TDO, and has had a business relationship with Mahan dating back to 1997.

The July 31, 2013 renewal order detailed additional evidence obtained by OEE showing efforts by Mahan Airways to obtain another GE CF6–50C2 aircraft engine (MSN 528350) from the United States via Turkey. Multiple Mahan employees, including Mehdi Bahrami, were involved in or aware of matters related to the engine's arrival in Turkey from the United States, plans to visually inspect the engine, and prepare it for shipment from Turkey.

Mahan Airways sought to obtain this U.S.-origin engine through Pioneer Logistics Havacilik Turizm Yonetim Danismanlik (''Pioneer Logistics''), an aircraft parts supplier located in Turkey, and its director/operator, Gulnihal Yegane, a Turkish national who previously had conducted Mahan related business with Mehdi Bahrami and Ali Eslamian. Moreover, as referenced in the July 31, 2013 renewal order, a sworn affidavit by Kosol Surinanda, also known as Kosol Surinandha, Managing Director of Mahan's General Sales Agent in Thailand, stated that the shares of Pioneer Logistics for which he was the listed owner were ''actually the property of and owned by Mahan.'' He further stated that he held ''legal title to the shares until otherwise required by Mahan'' but would ''exercise the rights granted to [him] exactly and only as instructed by Mahan and [his] vote and/or decisions [would] only and exclusively reflect the wills and demands of Mahan[.]'' [19]

The January 24, 2014 renewal order outlined OEE's continued investigation of Mahan Airways' activities and detailed an attempt by Mahan, which OEE thwarted, to obtain, via an Indonesian aircraft parts supplier, two U.S.-origin Honeywell ALF–502R–5 aircraft engines (MSNs LF5660 and LF5325), items subject to the Regulations, from a U.S. company located in Texas. An invoice of the Indonesian aircraft parts supplier dated March 27, 2013, listed Mahan Airways as the purchaser of the engines and included a Mahan ship-to address. OEE also obtained a Mahan air waybill dated March 12, 2013, listing numerous U.S.-origin aircraft parts subject to the Regulations—including, among other items, a vertical navigation gyroscope, a transmitter, and a power control unit—being transported by Mahan from Turkey to Iran in violation of the TDO.

The July 22, 2014 renewal order discussed open source evidence from the March-June 2014 time period regarding two BAE regional jets, items subject to the Regulations, that were painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP–MOK and EP–MOI, respectively.[20] In addition, aviation industry resources indicated that these aircraft were obtained by Mahan Airways in late November 2013 and June 2014, from Ukrainian

[13] *See http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx.*

[14] The Airbus A310s are powered with U.S.-origin engines. The engines are subject to the EAR and classified under Export Control Classification (''ECCN'') 9A991.d. The Airbus A310s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR. They are classified under ECCN 9A991.b. The export or reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[15] OEE subsequently presented evidence that after the August 24, 2011 renewal, Mahan Airways worked along with Kerman Aviation and others to de-register the two Airbus A310 aircraft in France and to register both aircraft in Iran (with, respectively, Iranian tail numbers EP–MHH and EP–MHI). It was determined subsequent to the February 15, 2012 renewal order that the registration switch for these A310s was cancelled and that Mahan Airways then continued to fly the aircraft under the original French tail numbers (F–OJHH and F–OJHI, respectively). Both aircraft apparently remain in Mahan Airways' possession.

[16] See note 14, *supra.*

[17] *See http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx.* Mahan Airways was previously designated by OFAC as a SDGT on October 18, 2011. 77 FR 64,427 (October 18, 2011).

[18] Kral Aviation was referenced in the February 4, 2013 renewal order as ''Turkish Company No. 1.'' Kral Aviation purchased a GE CF6–50C2 aircraft engine (MSN 517621) from the United States in July 2012, on behalf of Mahan Airways. OEE was able to prevent this engine from reaching Mahan by issuing a redelivery order to the freight forwarder in accordance with Section 758.8 of the Regulations. OEE also issued Kral Aviation a redelivery order for the second CF6–50C2 engine (MSN 517738) on July 30, 2012. The owner of the second engine subsequently cancelled the item's sale to Kral Aviation. In September 2012, OEE was alerted by a U.S. exporter that another Turkish company (''Turkish Company No. 2'') was attempting to purchase aircraft spare parts intended for re-export by Turkish Company No. 2 to Mahan Airways. *See* February 4, 2013 renewal order.

On December 31, 2013, Kral Aviation was added to BIS's Entity List, Supplement No. 4 to Part 744 of the Regulations. *See* 78 FR75458 (Dec. 12, 2013). Companies and individuals are added to the Entity List for engaging in activities contrary to the national security or foreign policy interests of the United States. *See* 15 CFR 744.11.

[19] Pioneer Logistics, Gulnihal Yegane, and Kosol Surinanda also were added to the Entity List on December 12, 2013. *See* 78 FR 75458 (Dec. 12, 2013).

[20] The BAE regional jets are powered with U.S.-origin engines. The engines are subject to the EAR and classified under ECCN 9A991.d. These aircraft contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR. They are classified under ECCN 9A991.b. The export or reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

Mediterranean Airline, a Ukrainian airline that was added to BIS's Entity List (Supplement No. 4 to Part 744 of the Regulations) on August 15, 2011, for acting contrary to the national security and foreign policy interests of the United States.[21] Open source information indicated that at least EP–MOI remained active in Mahan's fleet, and that the aircraft was being operated on multiple flights in July 2014.

The January 16, 2015 renewal order detailed evidence of additional attempts by Mahan Airways to acquire items subject the Regulations in further violation of the TDO. Specifically, in March 2014, OEE became aware of an inertial reference unit bearing serial number 1231 (''the IRU'') that had been sent to the United States for repair. The IRU is subject to the Regulations, classified under ECCN 7A103, and controlled for missile technology reasons. Upon closer inspection, it was determined that IRU came from or had been installed on an Airbus A340 aircraft bearing MSN 056. Further investigation revealed that as of approximately February 2014, this aircraft was registered under Iranian tail number EP–MMB and had been painted in the livery and logo of Mahan Airways.

The January 16, 2015 renewal order also described related efforts by the Departments of Justice and Treasury to further thwart Mahan's illicit procurement efforts. Specifically, on August 14, 2014, the United States Attorney's Office for the District of Maryland filed a civil forfeiture complaint for the IRU pursuant to 22 U.S.C. 401(b) that resulted in the court issuing an Order of Forfeiture on December 2, 2014. EP–MMB remains listed as active in Mahan Airways' fleet and has been used on flights into and out of Iran as recently as December 19, 2017

Additionally, on August 29, 2014, OFAC blocked the property and interests in property of Asian Aviation Logistics of Thailand, a Mahan Airways affiliate or front company, pursuant to Executive Order 13224. In doing so, OFAC described Mahan Airways' use of Asian Aviation Logistics to evade sanctions by making payments on behalf of Mahan for the purchase of engines and other equipment.[22]

The May 21, 2015 modification order detailed the acquisition of two aircraft, specifically an Airbus A340 bearing MSN 164 and an Airbus A321 bearing MSN 550, that were purchased by Al Naser Airlines in late 2014/early 2015 and were under the possession, control, and/or ownership of Mahan Airways.[23] The sales agreements for these two aircraft were signed by Ali Abdullah Alhay for Al Naser Airlines.[24] Payment information reveals that multiple electronic funds transfers (''EFT'') were made by Ali Abdullah Alhay and Bahar Safwa General Trading in order to acquire MSNs 164 and 550.

The May 21, 2015 modification order also laid out evidence showing the respondents' attempts to obtain other controlled aircraft, including aircraft physically located in the United States in similarly-patterned transactions during the same recent time period. Transactional documents involving two Airbus A320s bearing MSNs 82 and 99, respectively, again showed Ali Abdullah Alhay signing sales agreements for Al Naser Airlines.[25] A review of the payment information for these aircraft similarly revealed EFTs from Ali Abdullah Alhay and Bahar Safwa General Trading that follow the pattern described for MSNs 164 and 550, *supra.* MSNs 82 and 99 were detained by OEE Special Agents prior to their planned export from the United States.

The July 13, 2015 renewal order outlined evidence showing that Al Naser Airlines' attempts to acquire aircraft on behalf of Mahan Airways extended beyond MSNs 164 and 550 to include a total of nine aircraft.[26] Four of the aircraft, all of which are subject to the Regulations and were obtained by Mahan from Al Naser Airlines, had been issued the following Iranian tail numbers: EP–MMD (MSN 164), EP–MMG (MSN 383), EP–MMH (MSN 391) and EP–MMR (MSN 416), respectively.[27] Publicly available flight tracking information provided evidence that at the time of the July 13, 2015 renewal, both EP–MMH and EP–MMR were being actively flown on routes into and out of Iran in violation of the TDO and Regulations.[28]

The January 7, 2016 renewal order discussed evidence that Mahan Airways had begun actively flying EP–MMD on international routes into and out of Iran, including from/to Bangkok, Thailand. Additionally, the January 7, 2016 order described publicly available aviation database and flight tracking information indicating that Mahan Airways continued efforts to acquire Iranian tail

[21] *See* 76 FR 50407 (Aug. 15, 2011). The July 22, 2014 renewal order also referenced two Airbus A320 aircraft painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP–MMK and EP–MML, respectively. OEE's investigation also showed that Mahan obtained these aircraft in November 2013, from Khors Air Company, another Ukrainian airline that, like Ukrainian Mediterranean Airlines, was added to BIS's Entity List on August 15, 2011. Open source evidence indicates the two Airbus A320 aircraft may be been transferred by Mahan Airways to another Iranian airline in October 2014, and issued Iranian tail numbers EP–APE and EP–APF, respectively.

[22] See *http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140829.aspx. See* 79 FR 55073 (Sep. 15, 2014). OFAC also blocked the property and property interests of Pioneer Logistics of Turkey on August 29, 2014. *Id.* Mahan Airways' use of Pioneer Logistics in an effort to evade the TDO and the Regulations was discussed in a prior renewal order, as summarized, *supra,* at 13–14. BIS added both Asian Aviation Logistics and Pioneer Logistics to the Entity List on December 12, 2013. *See* 78 FR 75458 (Dec. 12, 2013).

[23] Both of these aircraft are powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. Both aircraft contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[24] The evidence obtained by OEE showed Ali Abdullah Alhay as a 25% owner of Al Naser Airlines.

[25] Both aircraft were physically located in the United States and therefore are subject to the Regulations pursuant to Section 734.3(a)(1). Moreover, these Airbus A320s are powered by U.S.-origin engines that are subject to the Regulations and classified under Export Control Classification Number ECCN 9A991.d. The Airbus A320s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[26] This evidence included a press release dated May 9, 2015, that appeared on Mahan Airways' website and stated that Mahan ''added 9 modern aircraft to its air fleet [,]'' and that the newly acquired aircraft included eight Airbus A340s and one Airbus A321. See *http://www.mahan.aero/en/mahan-air/press-room/44.* The press release was subsequently removed from Mahan Airways' website. Publicly available aviation databases similarly showed that Mahan had obtained nine additional aircraft from Al Naser Airlines in May 2015, including MSNs 164 and 550. As also discussed in the July 13, 2015 renewal order, Sky Blue Bird Group, via Issam Shammout, was actively involved in Al Naser Airlines' acquisition of MSNs 164 and 550, and the attempted acquisition of MSNs 82 and 99 (which were detained by OEE).

[27] The Airbus A340s are powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The Airbus A340s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[28] There is some publicly available information indicating that the aircraft Mahan Airways is flying under Iranian tail number EP–MMR is now MSN 615, rather than MSN 416. Both aircraft are Airbus A340 aircraft that Mahan acquired from Al Naser Airlines in violation of the TDO and the Regulations. Moreover, both aircraft were designated as SDGTs by OFAC on May 21, 2015, pursuant to Executive Order 13324. See 80 FR 30762 (May 29, 2015).

numbers and press into active service under Mahan's livery and logo at least two more of the Airbus A340 aircraft it had obtained from or through Al Naser Airlines: EP–MME (MSN 371) and EP–MMF (MSN 376), respectively. Since January 2016, EP–MME has logged flights to and from Tehran, Iran involving various destinations, including Guangzhou, China and Dubai, United Arab Emirates, in further violation of the TDO and the Regulations.

The July 7, 2016 renewal order described Mahan Airways' acquisition of a BAE Avro RJ–85 aircraft (MSN 2392) in violation of the TDO and its subsequent registration under Iranian tail number EP–MOR.[29] This information was corroborated by publicly available information on the website of Iran's civil aviation authority. The July 7, 2016 order also outlined Mahan's continued operation of EP–MMF in violation of the TDO on routes from Tehran, Iran to Beijing, China and Shanghai, China, respectively.

The December 30, 2016 renewal order outlined Mahan's continued operation of multiple Airbus aircraft, including EP–MMD (MSN 164), EP–MMF (MSN 376), and EP–MMH (MSN 391), which were acquired from or through Al Naser Airlines in violation of the TDO, as previously detailed in pertinent part in the July 13, 2015 and January 7, 2016 renewal orders. Publicly available flight tracking information showed that the aircraft were operated on flights into and out of Iran, including from/to Beijing, China, Kuala Lumpur, Malaysia, and Istanbul, Turkey.[30] The June 27, 2017 renewal order included similar evidence regarding Mahan Airways' violation of the TDO by operating multiple Airbus aircraft subject to the Regulations, including, but not limited to, aircraft procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Moscow, Russia, Shanghai, China and Kabul, Afghanistan.[31]

The June 27, 2017 order also detailed evidence concerning a suspected planned or attempted diversion to Mahan of an Airbus A340 subject to the Regulations that had first been mentioned in OEE's December 13, 2016 renewal request.

The December 20, 2017 renewal order presented evidence that a Mahan employee attempted to initiate negotiations with a U.S. company for the purchase of an aircraft subject to the Regulations and classified under ECCN 9A610. Moreover, the order highlighted Al Naser Airlines' acquisition, via lease, of at least possession and/or control of a Boeing 737 (MSN 25361), bearing tail number YR–SEB, and an Airbus A320 (MSN 357), bearing tail number YR–SEA, from a Romanian company in violation of the TDO.[32] Open source information indicates that after the December 20, 2017 renewal order publically exposed Al Naser's acquisition of these two aircraft (MSNs 25361 and 357), the leases were subsequently cancelled and the aircraft returned to their owner.

Finally, the order also included evidence indicating that Mahan Airways was continuing to operate a number of aircraft subject to the Regulations, including aircraft originally procured from or through Al Naser Airlines, on flights into and out of Iran from/to Lahore, Pakistan, Shanghai, China, Ankara, Turkey, Kabul, Afghanistan, and Baghdad, Iraq, in violation of the TDO.[33]

OEE's May 25, 2018 renewal request includes evidence showing that Mahan continues to operate a number of aircraft subject to the EAR, including, but not limited to EP- MMF, EP–MMH, and EP–MME, on international flights into and out of Iran from/to Beijing, China, Dubai, United Arab Emirates, and Istanbul, Turkey.[34] Publically available flight tracking information also shows that Mahan is now actively operating an Airbus A340 (MSN 292), currently bearing Iranian tail number EP–MMT, on flights into and out of Iran.[35] OEE's continuing investigation indicates that this aircraft was acquired by Mahan in 2017 and prior to that the aircraft was registered in Kazakhstan under tail number UP–A4003. Publically available information points to the involvement of a Kazakh airline, whose aircraft fleet previously consisted of only short-range regional jets, in Mahan's acquisition of this aircraft.

Also, on May 24, 2018, OFAC designated a number of Mahan related entities and individuals, including, but not limited to, Otik Aviation of Turkey as Specially Designated Global Terrorists, pursuant to Executive Order 13224 for providing material support to Mahan as recently at 2017.[36] In addition to the designation of Mahan related entities, OFAC also designated a total of twelve aircraft owned and/or operated by Mahan.[37]

[29] The BAE Avro RJ–85 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The BAE Avro RJ–85 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the EAR regardless of its location. The aircraft is classified under ECCN 9A991.b, and its export or re-export to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[30] Specifically, on December 22, 2016, EP–MMD (MSN 164) flew from Dubai, UAE to Tehran, Iran. Between December 20 and December 22, 2016, EP–MMF (MSN 376) flew on routes from Tehran, Iran to Beijing, China and Istanbul, Turkey, respectively. Between December 26 and December 28, 2016, EP–MMH (MSN 391) flew on routes from Tehran, Iran to Kuala Lumpur, Malaysia.

[31] Publicly available flight tracking information shows that on June 22, 2017, EP–MME (MSN 371) flew from Moscow, Russia to Tehran, Iran. Additionally, between June 19, 2017, and June 20, 2017, EP–MMQ (MSN 449), an Airbus A430 also obtained from or through Al Naser Airlines, flew on routes between Shanghai, China and Tehran, Iran. Similar flight tracking information shows that on June 20, 2017, EP–MNK (MSN 618), an Airbus A300 originally acquired by Mahan via a Ukrainian company, flew between Kabul, Afghanistan and Mashhad, Iran.

[32] The Airbus A320 is powered with U.S.-origin engines, which are subject to the EAR and classified under Export Control Classification (''ECCN'') 9A991.d. The engines are valued at more than 10 percent of the total value of the aircraft, which consequently is subject to the EAR. The aircraft is classified under ECCN 9A991.b, and its export or reexport to Iran would require U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[33] For example, publicly available flight tracking information shows that on December 17, 2017, EP–MNV (MSN 567) flew from Lahore, Pakistan to Tehran, Iran. On December 18–19, 2017, EP–MMQ (MSN 449) flew on routes between Istanbul, Turkey and Tehran, Iran. Additionally, on December 17, 2017, EP–MNK (MSN 618), an Airbus A300 originally acquired by Mahan via a Ukrainian company, flew on routes between Baghdad, Iraq and Mashhad, Iran.

[34] Publicly available flight tracking information shows that on June 3, 2018, EP–MMF (MSN 376) flew on routes between Beijing, China and Tehran, Iran and on June 4, 2018, EP–MMH (MSN 391) flew from Dubai, United Arab Emirates to Tehran, Iran. Additionally, on June 4, 2018, EP–MME (MSN 371) flew on routes between Istanbul, Turkey and Tehran, Iran.

[35] The Airbus A340 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The Airbus A340 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the EAR regardless of its location. The aircraft is classified under ECCN 9A991.b. The export or re-export of this aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations. On June 4, 2018, EP–MMT (MSN 292) flew from Bangkok, Thailand to Tehran, Iran.

[36] OFAC's press release states in part that ''[o]ver the last several years, Otik Aviation has procured and delivered millions of dollars in aviation-related spare and replacement parts for Mahan Air, some of which are procured from the United States and the European Union. As recently as 2017, Otik Aviation continued to provide Mahan Air with replacement parts worth well over $100,000 per shipment, such as aircraft brakes.'' *See https://home.treasury.gov/news/press-releases/sm0395. See also https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180524.aspx.*

[37] *Id.* The twelve aircraft designated in which Mahan Airways has an interest are: EP–MMA (MSN 20), EP–MMB (MSN 56), EP–MMC (MSN 282), EP–MMJ (MSN 526), EP–MMV (MSN 2079), EP–MNF (MSN 547), EP–MOD (MSN 3162), EP–MOM (MSN 3165), EP–MOP (MSN 2257), EP–MOQ (MSN 2261), EP–MOR (MSN 2392), and EP–MOS (MSN 2347).

Lastly, OEE's renewal request also cites the April 2018 arrest and arraignment of a U.S. citizen on a three-count criminal information for unlicensed exports of U.S-origin aircraft parts to Iran valued at over $2 million. The criminal information lists Mahan as one of the defendant's customers.

C. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that the denied persons have acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of future violations. Therefore, renewal of the TDO is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should continue to cease dealing with Mahan Airways and Al Naser Airlines and the other denied persons in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations.

IV. Order

It is therefore ordered:

First, that MAHAN AIRWAYS, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran; PEJMAN MAHMOOD KOSARAYANIFARD A/K/A KOSARIAN FARD, P.O. Box 52404, Dubai, United Arab Emirates; MAHMOUD AMINI, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates; KERMAN AVIATION A/K/A GIE KERMAN AVIATION, 42 Avenue Montaigne 75008, Paris, France; SIRJANCO TRADING LLC, P.O. Box 8709, Dubai, United Arab Emirates; MAHAN AIR GENERAL TRADING LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates; MEHDI BAHRAMI, Mahan Airways-Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey; AL NASER AIRLINES A/K/A AL–NASER AIRLINES A/K/A AL NASER WINGS AIRLINE A/K/A ALNASER AIRLINES AND AIR FREIGHT LTD., Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadirya Private Hospital, Baghdad, Iraq, and Al Amirat Street, Section 309, St. 3/H.20, Al Mansour, Baghdad, Iraq, and P.O. Box 28360, Dubai, United Arab Emirates, and P.O. Box 911399, Amman 11191, Jordan; ALI ABDULLAH ALHAY A/K/A ALI ALHAY A/K/A ALI ABDULLAH AHMED ALHAY, Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadirya Private Hospital, Baghdad, Iraq, and Anak Street, Qatif, Saudi Arabia 61177; BAHAR SAFWA GENERAL TRADING, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates, and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates; SKY BLUE BIRD GROUP A/K/A SKY BLUE BIRD AVIATION A/K/A SKY BLUE BIRD LTD A/K/A SKY BLUE BIRD FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates; and ISSAM SHAMMOUT A/K/A MUHAMMAD ISAM MUHAMMAD ANWAR NUR SHAMMOUT A/K/A ISSAM ANWAR, Philips Building, 4th Floor, Al Fardous Street, Damascus, Syria, and Al Kolaa, Beirut, Lebanon 151515, and 17–18 Margaret Street, 4th Floor, London, W1W 8RP, United Kingdom, and Cumhuriyet Mah. Kavakli San St. Fulya, Cad. Hazar Sok. No.14/A Silivri, Istanbul, Turkey, and when acting for or on their behalf, any successors or assigns, agents, or employees (each a ''Denied Person'' and collectively the ''Denied Persons'') may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Export Administration Regulations (''EAR''), or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Sections 766.24(e) of the EAR, Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and/or Bahar Safwa General Trading may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022. In accordance with the provisions of Sections 766.23(c)(2) and 766.24(e)(3) of the EAR, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation,

Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, and/or Issam Shammout may, at any time, appeal their inclusion as a related person by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and/or Bahar Safwa General Trading as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading and each related person, and shall be published in the **Federal Register**. This Order is effective immediately and shall remain in effect for 180 days.

Dated: June 14, 2018.

Richard R. Majauskas,

Acting Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2018–13289 Filed 6–20–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG270

Pacific Island Fisheries; Western Pacific Stock Assessment Review; Public Meeting; Correction

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

ACTION: Notice of a public meeting; correction.

SUMMARY: NMFS and the Western Pacific Fishery Management Council (Council) have rescheduled a Western Pacific Stock Assessment Review (WPSAR) of a draft 2018 benchmark stock assessment for main Hawaiian Islands Kona crab. The meeting announced in the **Federal Register** on June 5, 2018, has been rescheduled for September 10–14, 2018.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates.

ADDRESSES: The location of the meeting has not changed. It will be at the Council office at 1164 Bishop St., Suite 1400, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT: Michael Seki, Director—NMFS Pacific Islands Fisheries Science Center (PIFSC), telephone: (808) 725–5360.

SUPPLEMENTARY INFORMATION: You may find background information about the stock assessment and WPSAR process, and details of the meeting agenda and special accommodations in the June 5, 2018, **Federal Register** notice: *https://www.federalregister.gov/documents/2018/06/05/2018-11977/pacific-island-fisheries-western-pacific-stock-assessment-review-public-meeting.*

Correction

In the **Federal Register** of June 5, 2018, (83 FR 26010) in FR Doc. 2018–11977, on page 26011, in the first column, the dates under the heading ''Meeting Agenda for WPSAR Review'' are corrected to read as follows:

Day 1 Monday September 10, 2018
Day 2 Tuesday September 11, 2018
Day 3 Wednesday September 12, 2018
Day 4 Thursday September 13, 2018
Day 5 Friday September 14, 2018

The meeting times and agenda items are not changed.

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

Dated: June 15, 2018.

Jennifer M. Wallace,

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

[FR Doc. 2018–13276 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF984

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys off of Rhode Island and Massachusetts

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

ACTION: Notice; Issuance of an Incidental Harassment Authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to Deepwater Wind New England, LLC (DWW), for authorization to take marine mammals incidental to marine site characterization surveys off the coast of Rhode Island and Massachusetts in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0486) and along potential submarine cable routes to a landfall location in Rhode Island, Massachusetts or New York.

DATES: This Authorization is valid for one year from the date of issuance.

FOR FURTHER INFORMATION CONTACT: Jordan Carduner, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the applications and supporting documents, as well as a list of the references cited in this document, may be obtained by visiting the internet at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* 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 an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term ''take'' means to harass, hunt, capture, or 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).

Summary of Request

On January 3, 2018, NMFS received a request from DWW for an IHA to take marine mammals incidental to marine site characterization surveys off the coast of Massachusetts and Rhode Island in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0486) and along potential submarine cable routes to a landfall location in either Rhode Island, Massachusetts or New York. A revised application was received on April 18, 2018. NMFS deemed that request to be adequate and complete. DWW's request is for take of 14 marine mammal species by Level B harassment. Neither DWW nor NMFS expects serious injury or mortality to result from this activity and the activity is expected to last no more than one year, therefore, an IHA is appropriate.

Description of the Proposed Activity

Overview

DWW proposes to conduct marine site characterization surveys, including high-resolution geophysical (HRG) and geotechnical surveys, in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf #OCS–A 0486 (Lease Area) and along potential submarine cable routes to landfall locations in either Rhode Island, Massachusetts or Long Island, New York. The purpose of the marine site characterization surveys are to obtain a baseline assessment of seabed/sub-surface soil conditions in the Lease Area and cable route corridors to support the siting of potential future offshore wind projects. Underwater sound resulting from DWW's proposed site characterization surveys has the potential to result in incidental take of marine mammals in the form of behavioral harassment.

DWW's survey activities would occur in the Northwest Atlantic Ocean within Federal waters. Surveys would occur within the Bureau of Ocean Energy Management (BOEM) Rhode Island–Massachusetts Wind Energy Area (RI–MA WEA) which is located east of Long Island, New York and south of Rhode Island and Massachusetts (see Figure 1 in the IHA application). Water depths in the Lease Area range from 26 to 48 meters (m) (85 to 157 feet (ft)). For the purpose of this IHA the Lease Area and submarine cable corridor are collectively termed the Project Area. Surveys would occur from approximately June 15, 2018 through December 31, 2018. The estimated duration of the geophysical survey is expected to be up to 200 days and the estimated duration of the geotechnical survey is expected to be up to 100 days.

Geotechnical surveys would entail the use of core penetration testing, deep boring cores and vibracores. Geotechnical surveys are not expected to result in the take of marine mammals, as described in the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018) and are not analyzed further in this document. Geophysical surveys would entail the use of a multibeam depth sounder, shallow penetration sub-bottom profiler (chirp), medium penetration sub-bottom profiler (boomer and sparker or bubble gun), sidescan sonar and marine magnetometer. The deployment of geophysical survey equipment, including the equipment planned for use during DWW's planned activity, produces sound in the marine environment that has the potential to result in harassment of marine mammals.

A detailed description of the planned survey activities, including types of survey equipment planned for use, is provided in the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not repeated here. We note, however, that one type of survey equipment was described incorrectly in the proposed IHA: The frequencies listed for the Edgetech 4125 sidescan sonar were incorrectly listed as 105 and 410 kilohertz (kHz); correct frequencies for the Edgetech 4125 are 400/900 kHz or 600/1600 kHz. Please refer to the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018) for a detailed description of the specific activity.

Comments and Responses

NMFS published a notice of proposed IHA in the **Federal Register** on May 4, 2018 (83 FR 19711). During the 30-day public comment period, NMFS received comment letters from the Marine Mammal Commission (Commission) and from a group of non-governmental organizations (NGOs) including Natural Resources Defense Council, the National Wildlife Federation, the Conservation Law Foundation, Defenders of Wildlife, Southern Environmental Law Center, Surfrider Foundation, Sierra Club, and the International Fund for Animal Welfare. NMFS has posted the comments online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* The following is a summary of the public comments received and NMFS' responses.

Comment 1: The Commission expressed concern that the method used to estimate the numbers of takes, which summed fractions of takes for each species across project days, does not account for and negates the intent of NMFS' 24 hour reset policy and recommended that NMFS share the rounding criteria with the Commission in a timely manner.

NMFS Response: NMFS appreciates the Commission's ongoing concern in this matter. Calculating predicted takes is not an exact science, and there are arguments for taking different mathematical approaches in different situations and for making qualitative adjustments in other situations. We believe, however, that the methodology used for take calculation in this IHA remains appropriate and is not at odds with the 24 hour reset policy the Commission references. We look forward to continued discussion with the Commission on this matter and will share draft guidance on this issue as soon as possible with the Commission.

Comment 2: The Commission recommended that, until behavioral thresholds are updated, NMFS require applicants to use the 120-decibel (dB) re 1 micropascal (µPa), rather than 160-dB re 1µPa, threshold for acoustic, non-impulsive sources (*e.g.,* sub-bottom profilers/chirps, echosounders, and other sonars including side-scan and fish-finding).

NMFS Response: Certain sub-bottom profiling systems are appropriately considered to be impulsive sources (*e.g.,* boomers, sparkers); therefore, the threshold of 160-dB re 1µPa will continue to be used for those sources. Other source types referenced by the Commission (*e.g.,* chirp sub-bottom profilers, echosounders, and other sonars including side-scan and fish-finding) produce signals that are not necessarily strictly impulsive; however, NMFS finds that the 160-dB root mean

square (rms) threshold is most appropriate for use in evaluating potential behavioral impacts to marine mammals because the temporal characteristics (*i.e.,* intermittency) of these sources are better captured by this threshold. The 120-dB threshold is associated with continuous sources and was derived based on studies examining behavioral responses to drilling and dredging. Continuous sounds are those whose sound pressure level remains above that of the ambient sound, with negligibly small fluctuations in level (NIOSH, 1998; ANSI, 2005). Examples of sounds that NMFS would categorize as continuous are those associated with drilling or vibratory pile driving activities. Intermittent sounds are defined as sounds with interrupted levels of low or no sound (NIOSH, 1998). Thus, signals produced by these source types are not continuous but rather intermittent sounds. With regard to behavioral thresholds, we consider the temporal and spectral characteristics of signals produced by these source types to more closely resemble those of an impulse sound rather than a continuous sound. The threshold of 160-dB re 1µPa is typically associated with impulsive sources, which are inherently intermittent. Therefore, the 160-dB threshold (typically associated with impulsive sources) is more appropriate than the 120-dB threshold (typically associated with continuous sources) for estimating takes by behavioral harassment incidental to use of such sources.

Comment 3: The Commission requested clarification regarding certain issues associated with NMFS' notice that one-year renewals could be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

NMFS Response: The process of issuing a renewal IHA does not bypass the public notice and comment requirements of the MMPA. The notice of the proposed IHA expressly notifies the public that under certain, limited conditions an applicant could seek a renewal IHA for an additional year. The notice describes the conditions under which such a renewal request could be considered and expressly seeks public comment in the event such a renewal is sought. Importantly, such renewals would be limited to circumstances where: The activities are identical or nearly identical to those analyzed in the proposed IHA; monitoring does not indicate impacts that were not previously analyzed and authorized; and, the mitigation and monitoring requirements remain the same, all of which allow the public to comment on the appropriateness and effects of a renewal at the same time the public provides comments on the initial IHA. NMFS has, however, modified the language for future proposed IHAs to clarify that all IHAs, including renewal IHAs, are valid for no more than one year and that the agency would consider only one renewal for a project at this time. In addition, notice of issuance or denial of a renewal IHA would be published in the **Federal Register**, as they are for all IHAs. The option for issuing renewal IHAs has been in NMFS's incidental take regulations since 1996. We will provide any additional information to the Commission and consider posting a description of the renewal process on our website before any renewal is issued utilizing this process.

Comment 4: The Commission recommended that NMFS increase the number of common dolphin takes and sperm whale takes, based on an assumption that the number proposed for authorization is insufficient for DWW's proposed survey, and that NMFS authorize at least 20 Level B harassment takes of Risso's dolphins, based on observations of Risso's dolphins during HRG surveys conducted by Deepwater Wind in the RI–MA WEA in 2017 (AIS Inc., 2017). The Commission further recommended that NMFS better evaluate the numbers of Level A and B harassment takes it plans to propose.

NMFS Response: NMFS considered the Commission's recommendations with regard to take numbers authorized for common dolphins, sperm whales and Risso's dolphins. The Commission noted that five sperm whales were observed during HRG surveys conducted by Deepwater Wind in the RI–MA WEA in 2017 and two were taken by Level B harassment, and expressed concern that the 2018 survey may be forced to shut down upon visual detection of sperm whales if the number of authorized takes of sperm whales is exceeded. However, results of the monitoring report from the 2017 IHA indicate that the majority of sperm whale detections during the 2017 survey were via passive acoustic monitoring (PAM), with only one confirmed visual detection which was outside the Level B zone at a distance of approximately 1,400 m from the vessel; both ''takes'' reported in the monitoring report were not based on visual detections but were instead based on acoustic detections that were localized within the Level B harassment zone (AIS Inc., 2017). However, for the IHA issued for 2017 surveys and for this IHA, NMFS does not consider animals detected acoustically but not confirmed visually by PSOs to have been taken by harassment. As the number of sperm whale takes in this IHA were based on the best available density data (*e.g.,* Roberts et al. (2016)), and as shutdown of survey equipment based on PAM detection alone is not required for sperm whales in this IHA, we have concluded the number of sperm whale takes authorized is appropriate. The Commission noted that common dolphins were the most regularly observed marine mammal species during Deepwater Wind's 2017 HRG surveys in the RI–MA WEA, with 2,677 common dolphins observed (AIS Inc., 2017) and expressed concern that the 2018 survey may be forced to shut down upon visual detection of common dolphins if the number of authorized takes of common dolphins is exceeded. NMFS agrees that common dolphins are likely to be prevalent during DWW's survey activities; however, we note that while 2,677 common dolphins were observed during 2017 surveys, 346 common dolphins were taken by Level B harassment (AIS Inc., 2017). NMFS is authorizing nearly 3 times the number of takes of common dolphins in this IHA (910) compared to the number of takes of common dolphins that occurred during 2017 surveys (346). As the number of common dolphin takes in this IHA were based on the best available density data (*e.g.,* Roberts et al. (2016)) and as this IHA authorizes nearly 3 times as many takes by Level B harassment of common dolphins compared to the number taken during Deepwater Wind's HRG surveys in 2017 (NMFS, 2017), we have concluded the number of common dolphin takes authorized is appropriate. The Commission noted that the monitoring report from the 2017 IHA issued to Deepwater Wind for HRG surveys in the RI–MA WEA indicated that eight Risso's dolphins were observed at 400 m from the source during Deepwater Wind's 2017 surveys and that the vessel had to avoid the Risso's dolphins to prevent unauthorized takes (AIS Inc., 2017). We

agree with the Commission that, based on monitoring data from the 2017 IHA issued to Deepwater Wind for HRG surveys in the RI–MA WEA (AIS Inc., 2017), the planned survey may encounter Risso's dolphins, and, thus authorization for the take of Risso's dolphins is warranted in this IHA. We have therefore authorized takes of Risso's dolphins in this IHA (Table 6). NMFS carefully evaluates the number of Level A and Level B harassment takes it proposes to authorize, as illustrated by the Level of analysis incorporated in our notices of proposed IHAs, and we will continue to do so.

Comment 5: The NGOs expressed concern regarding the marine mammal density estimates used to calculate take. Specifically, the commenters stated the estimates derived from models presented in Roberts *et al.* (2016) may underrepresent density and seasonal presence of large whales in the survey area, and recommended that NMFS consider additional data sources in density modeling in future analyses of estimated take, including initial data from state monitoring efforts, existing passive acoustic monitoring data, opportunistic marine mammal sightings data, and other data sources.

NMFS Response: NMFS has determined that the data provided by Roberts *et al.* (2016) represents the best available information concerning marine mammal density in the survey area and has used it accordingly. NMFS has considered other available information, including that cited by the commenters, and determined that it does not contradict the information provided by Roberts *et al.* (2016). The information discussed by the commenters does not provide data in a format that is directly usable in an acoustic exposure analysis, and the commenters make no useful recommendation regarding how to do so. We will review the data sources recommended by the commenters and will consider their suitability for inclusion in future analyses, as requested by the commenters.

Comment 6: Regarding mitigation measures, the NGOs recommended NMFS impose a restriction on site assessment and characterization activities that have the potential to harass the North Atlantic right whale from November 1st to May 14th.

NMFS Response: In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, 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; and (2) the practicability of the measures for applicant implementation, which may consider such things as relative cost and impact on operations.

DWW determined the planned duration of the survey based on their data acquisition needs, which are largely driven by the Bureau of Ocean Energy Management's (BOEM) data acquisition requirements prior to required submission of a construction and operations plan (COP). Any effort on the part of NMFS to restrict the months during which the survey could operate would likely have the effect of forcing the applicant to conduct additional months of surveys the following year, resulting in increased costs incurred by the applicant and additional time on the water with associated additional production of underwater noise which could have further potential impacts to marine mammals. Thus the time and area restrictions recommended by the commenters would not be practicable for the applicant to implement and would to some degree offset the benefit of the recommended measure. In addition, our analysis of the potential impacts of the survey on right whales does not indicate that such closures are warranted, as potential impacts to right whales from the survey activities would be limited to short-term behavioral responses; no marine mammal injury is expected as a result of the survey, nor is injury authorized in the IHA. We also note that the majority of the survey is already scheduled to occur outside the time frame recommended for closure by the commenters; the survey is planned to occur from June 15 through December 31, while the commenters recommend a seasonal closure from November 1 through May 14. Thus, in consideration of the limited potential benefits of time and area restrictions, in concert with the impracticability and increased cost on the part of the applicant that would result from such restrictions, NMFS has determined that time and area restrictions are not warranted in this case. Existing mitigation measures, including exclusion zones, ramp-up of survey equipment, and vessel strike avoidance measures, are sufficiently protective to ensure the least practicable adverse impact on species or stocks and their habitat.

Comment 7: Regarding mitigation measures, the NGOs recommended that NMFS require that geophysical surveys commence, with ramp-up, during daylight hours only to maximize the probability that North Atlantic right whales are detected and confirmed clear of the exclusion zone, and that, if a right whale were detected in the exclusion zone during nighttime hours and the survey is shut down, developers should be required to wait until daylight hours for ramp-up to commence.

NMFS Response: We acknowledge the limitations inherent in detection of marine mammals at night. However, similar to the discussion above regarding time and area closures, restricting the ability of the applicant to ramp-up surveys only during daylight hours would have the potential to result in lengthy shutdowns of the survey equipment, which could result in the applicant failing to collect the data they have determined is necessary, which could result in the need to conduct additional surveys the following year. This would result in significantly increased costs incurred by the applicant. Thus the restriction suggested by the commenters would not be practicable for the applicant to implement. In addition, as described above, potential impacts to marine mammals from the survey activities would be limited to short-term behavioral responses. Restricting surveys in the manner suggested by the commenters may reduce marine mammal exposures by some degree in the short term, but would not result in any significant reduction in either intensity or duration of noise exposure. No injury is expected to result even in the absence of mitigation, given the very small estimated Level A harassment zones. In the event that NMFS imposed the restriction suggested by the commenters, potentially resulting in a second season of surveys required for the applicant, vessels would be on the water introducing noise into the marine environment for an extended period of time. Therefore, in addition to practicability concerns for the applicant, the restrictions recommended by the commenters could result in the surveys spending increased time on the water, which may result in greater overall exposure to sound for marine mammals; thus the commenters have failed to demonstrate that such a requirement would result in a net benefit for affected marine mammals. Therefore, in consideration of potential effectiveness of the recommended measure and its practicability for the applicant, NMFS has determined that restricting survey start-ups to daylight hours is not warranted in this case.

However, in recognition of the concerns raised by the commenters, we have added a mitigation requirement to the IHA that shutdown of geophysical survey equipment is required upon

confirmed PAM detection of a North Atlantic right whale at night, even in the absence of visual confirmation, except in cases where the acoustic detection can be localized and the right whale can be confirmed as being beyond the 500 m exclusion zone (EZ); equipment may be re-started no sooner than 30 minutes after the last confirmed acoustic detection.

Comment 8: The NGOs recommended that NMFS require a 500 m EZ for marine mammals (with the exception of dolphins that voluntarily approach the vessel). Additionally, the NGOs recommended that protected species observers (PSOs) monitor to an extended 1,000 m EZ for North Atlantic right whales.

NMFS Response: Regarding the recommendation for a 1,000 m EZ specifically for North Atlantic right whales, we have determined that the 500 m EZ, as required in the IHA, is sufficiently protective. We note that the 500 m EZ exceeds the modeled distance to the Level B harassment isopleth (447 m), thus for North Atlantic right whales detected by PSOs this EZ would be expected to effectively minimize potential instances of injury and harassment.

Regarding the commenters' recommendation to require a 500 m EZ for all marine mammals (except dolphins that approach the vessel) we have determined the EZs as currently required in the IHA (described in Mitigation Measures, below) are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. The EZs would prevent all potential instances of marine mammal injury (though in this instance, injury would not be an expected outcome even in the absence of mitigation due to very small predicted isopleths corresponding to the Level A harassment threshold (Table 5) and would further prevent some instances of behavioral harassment, as well as limiting the intensity and/or duration of behavioral harassment that does occur. As NMFS has determined the EZs currently required in the IHA to be sufficiently protective, we do not think expanded EZs, beyond what is required in the IHA, are warranted.

Comment 9: The NGOs recommended that a combination of visual monitoring by PSOs and PAM should be required 24 hours per day.

NMFS Response: The PAM requirement has been included in the IHA because PAM was proposed by the applicant, and PAM is required in BOEM lease stipulations. We do not think the use of PAM is necessarily warranted for surveys using the sound sources proposed for use by DWW, due to relatively small areas that are expected to be ensonified to the Level A harassment threshold (Table 5). As we are not convinced that PAM is necessarily warranted for this type of survey, we do not think a requirement to expand the use of PAM to 24 hours a day during the survey is warranted. Expanding the PAM requirement to 24 hours a day may also result in increased costs on the part of the applicant. When the potential benefits of a 24 hour PAM requirement are considered in concert with the potential increased costs on the part of the applicant that would result from such a requirement, we determined a requirement for 24 hour PAM operation is not warranted in this case. Given the effects to marine mammals from the types of surveys authorized in this IHA are expected to be limited to behavioral harassment even in the absence of mitigation, we have determined the current requirements for visual and acoustic monitoring are sufficient to ensure the EZs and Watch Zone are adequately monitored for this particular activity.

Comment 10: The NGOs recommended that NMFS require a 10 knot speed restriction on all project-related vessels transiting to/from the survey area from November 1 through April 30 in New York state waters and the adjacent Block Island Seasonal Management Area (SMA) for North Atlantic right whales, and from February 1 to May 14 in Rhode Island and Massachusetts state waters outside of the Block Island SMA, and that all project vessels operating within the survey area should be required to maintain a speed of 10 knots or less during the entire survey period.

NMFS Response: NMFS has analyzed the potential for ship strike resulting from DWW's activity and has determined that the mitigation measures specific to ship strike avoidance are sufficient to avoid the potential for ship strike. These include: A requirement that all vessel operators comply with 10 knot (18.5 kilometer (km)/hour) or less speed restrictions in any SMA or Dynamic Management Area (DMA); a requirement that all vessel operators reduce vessel speed to 10 knots (18.5 km/hour) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinoid cetaceans are observed within 100 m of an underway vessel; a requirement that all survey vessels maintain a separation distance of 500 m or greater from any sighted North Atlantic right whale; a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots or less until the 500 m minimum separation distance has been established; and a requirement that, if a North Atlantic right whale is sighted in a vessel's path, or within 500 m of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Additional measures to prevent the potential for ship strike are discussed in more detail below (see the Mitigation section). We have determined that the ship strike avoidance measures are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. We also note that vessel strike during surveys is extremely unlikely based on the low vessel speed; the survey vessel would maintain a speed of approximately 4 knots (7.4 km/hour) while transiting survey lines.

Comment 11: The NGOs recommended that NMFS account for the potential for indirect ship strike risk resulting from habitat displacement in our analyses.

NMFS Response: NMFS determined that habitat displacement was not an expected outcome of the specified activity, therefore an analysis of potential impacts to marine mammals from habitat displacement is not warranted in this case.

Comment 12: The NGOs recommended that NMFS consider any existing siting and acoustic data and any new information that improves our understanding of marine mammal distribution and habitat use in the region in order to inform seasonal restrictions and mitigation measures in time for the November 2018 North Atlantic right whale migration period.

NMFS Response: We base our analyses on the best available information to inform mitigation measures in incidental take authorizations, and will continue to do so. Beyond a broad recommendation, the commenters have not provided us with any specific recommendations regarding data sources to consider, but we welcome future input, outside the comment period for this particular IHA, from interested parties on data sources that may be of use in analyzing the potential presence and movement patterns of North Atlantic right whales.

Comment 13: The NGOs recommended that NMFS encourage offshore wind developers to partner with scientists to collect data that would increase the understanding of the effectiveness of night vision and infra-red technologies off Rhode Island, Massachusetts, and the broader region, with a view towards greater reliance on these technologies to commence surveys during nighttime hours in the future.

NMFS Response: NMFS agrees with the NGOs that improved data on relative effectiveness of night vision and infrared technologies would be beneficial and could help to inform future efforts at detection of marine mammals during nighttime activities. The commenters have not provided us with any specific recommendations to evaluate beyond a broad recommendation. However, we will encourage coordination and communication between offshore wind developers and researchers on effectiveness of night vision and infrared technologies, to the extent possible. In recognition of the commenters' concerns, we have also added a requirement that the final report submitted to NMFS must include an assessment of the effectiveness of night vision equipment used during nighttime surveys, including comparisons of relative effectiveness among the different types of night vision equipment used.

Description of Marine Mammals in the Area of Specified Activity

Sections 3 and 4 of DWW's IHA 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' Stock Assessment Reports (SAR; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.fisheries.noaa.gov/species-directory*). All species that could potentially occur in the proposed survey area are included in Table 5 of the IHA application. However, the temporal and/or spatial occurrence of several species listed in Table 5 of the IHA application is such that take of these species is not expected to occur, and they are not discussed further beyond the explanation provided here. Take of these species is not anticipated either because they have very low densities in the project area, are known to occur further offshore than the project area, or are considered very unlikely to occur in the project area during the proposed survey due to the species' seasonal occurrence in the area.

Table 2 lists all species with expected potential for occurrence in the survey area and with the potential to be taken as a result of the proposed survey 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' SARs). While no mortality is anticipated or authorized here, PBR is included here as a gross indicator 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' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Atlantic SARs (*e.g.,* Hayes *et al.,* 2018). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2017 draft Atlantic SARs (Hayes *et al.,* 2018).

TABLE 1—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA THAT MAY BE AFFECTED BY DEEPWATER WIND NEW ENGLAND'S SURVEY ACTIVITIES

Common name	Stock	NMFS MMPA and ESA status; strategic (Y/N) [1]	Stock abundance (CV,N_{min}, most recent abundance survey) [2]	Predicted abundance (CV) [3]	PBR [4]	Occurrence and seasonality in the survey area
Toothed whales (Odontoceti)						
Sperm whale (*Physeter macrocephalus*).	North Atlantic	E; Y	2,288 (0.28; 1,815; n/a)	5,353 (0.12)	3.6	Rare.
Long-finned pilot whale (*Globicephala melas*).	W North Atlantic	-; Y	5,636 (0.63; 3,464; n/a)	[5] 18,977 (0.11)	35	Rare.
Atlantic white-sided dolphin (*Lagenorhynchus acutus*).	W North Atlantic	-; N	48,819 (0.61; 30,403; n/a).	37,180 (0.07)	304	Rare.
Atlantic spotted dolphin (*Stenella frontalis*).	W North Atlantic	-; N	44,715 (0.43; 31,610; n/a).	55,436 (0.32)	316	Rare.
Bottlenose dolphin (*Tursiops truncatus*).	W North Atlantic, Offshore.	-; N	77,532 (0.40; 56,053; 2011).	[5] 97,476 (0.06)	561	Common year round.
Common dolphin [6] (*Delphinus delphis*).	W North Atlantic	-; N	173,486 (0.55; 55,690; 2011).	86,098 (0.12)	557	Common year round.
Risso's dolphin (*Grampus griseus*).	W North Atlantic	-; N	18,250 (0.46; 12,619; 2011).	7,732 (0.09)	126	Rare.
Harbor porpoise (*Phocoena phocoena*).	Gulf of Maine/Bay of Fundy.	-; N	79,833 (0.32; 61,415; 2011).	* 45,089 (0.12)	706	Common year round.

TABLE 1—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA THAT MAY BE AFFECTED BY DEEPWATER WIND NEW ENGLAND'S SURVEY ACTIVITIES—Continued

Common name	Stock	NMFS MMPA and ESA status; strategic (Y/N) [1]	Stock abundance (CV,N_{min}, most recent abundance survey) [2]	Predicted abundance (CV) [3]	PBR [4]	Occurrence and seasonality in the survey area
Baleen whales (Mysticeti)						
North Atlantic right whale (*Eubalaena glacialis*).	W North Atlantic	E; Y	458 (0; 455; n/a)	*535 (0.45)	1.4	Year round in continental shelf and slope waters, occur seasonally to forage.
Humpback whale [7] (*Megaptera novaeangliae*).	Gulf of Maine	-; N	823 (0.42; 239; n/a)	*1,637 (0.07)	3.7	Common year round.
Fin whale [6] (*Balaenoptera physalus*).	W North Atlantic	E; Y	3,522 (0.27; 1,234; n/a)	4,633 (0.08)	2.5	Year round in continental shelf and slope waters, occur seasonally to forage.
Sei whale (*Balaenoptera borealis*).	Nova Scotia	E; Y	357 (0.52; 236; n/a)	*717 (0.30)	0.5	Year round in continental shelf and slope waters, occur seasonally to forage.
Minke whale [6] (*Balaenoptera acutorostrata*).	Canadian East Coast ...	-; N	20,741 (0.3; 1,425; n/a)	*2,112 (0.05)	162	Year round in continental shelf and slope waters, occur seasonally to forage.
Earless seals (Phocidae)						
Gray seal [8] (*Halichoerus grypus*).	W North Atlantic	-; N	27,131 (0.10; 25,908; n/a).	.....	1,554	Rare.
Harbor seal (*Phoca vitulina*).	W North Atlantic	-; N	75,834 (0.15; 66,884; 2012).	.....	2,006	Common year round.

[1] 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 (see footnote 3) 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] Stock abundance as reported in NMFS marine mammal stock assessment reports (SAR) except where otherwise noted. SARs available 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. For certain stocks, abundance estimates are actual counts of animals and there is no associated CV. The most recent abundance survey that is reflected in the abundance estimate is presented; there may be more recent surveys that have not yet been incorporated into the estimate. All values presented here are from the 2017 draft Atlantic SARs.

[3] This information represents species- or guild-specific abundance predicted by recent habitat-based cetacean density models (Roberts *et al.,* 2016). These models provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. Atlantic Ocean, and we provide the corresponding abundance predictions as a point of reference. Total abundance estimates were produced by computing the mean density of all pixels in the modeled area and multiplying by its area. For those species marked with an asterisk, the available information supported development of either two or four seasonal models; each model has an associated abundance prediction. Here, we report the maximum predicted abundance.

[4] Potential biological removal, 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 size (OSP).

[5] Abundance estimates are in some cases reported for a guild or group of species when those species are difficult to differentiate at sea. Similarly, the habitat-based cetacean density models produced by Roberts *et al.* (2016) are based in part on available observational data which, in some cases, is limited to genus or guild in terms of taxonomic definition. Roberts *et al.* (2016) produced density models to genus level for *Globicephala* spp. and produced a density model for bottlenose dolphins that does not differentiate between offshore and coastal stocks.

[6] Abundance as reported in the 2007 Canadian Trans-North Atlantic Sighting Survey (TNASS), which provided full coverage of the Atlantic Canadian coast (Lawson and Gosselin, 2009). Abundance estimates from TNASS were corrected for perception and availability bias, when possible. In general, where the TNASS survey effort provided superior coverage of a stock's range (as compared with NOAA shipboard survey effort), the resulting abundance estimate is considered more accurate than the current NMFS abundance estimate (derived from survey effort with inferior coverage of the stock range). NMFS stock abundance estimate for the common dolphin is 70,184. NMFS stock abundance estimate for the fin whale is 1,618.

[7] 2017 U.S. Atlantic draft SAR for the Gulf of Maine feeding population lists a current abundance estimate of 335 individuals; this estimate was revised from the previous estimate of 823 individuals. However, the newer estimate is based on a single aerial line-transect survey in the Gulf of Maine. The 2017 U.S. Atlantic draft SAR notes that that previous estimate was based on a minimum number alive calculation which is generally more accurate than one derived from line-transect survey (Hayes *et al.,* 2017), and that the abundance estimate was revised solely because the previous estimate was greater than 8 years old. Therefore, the previous estimate of 823 is more accurate, and we note that even that estimate is defined on the basis of feeding location alone (*i.e.,* Gulf of Maine).

[8] NMFS stock abundance estimate applies to U.S. population only, actual stock abundance is approximately 505,000.

Four marine mammal species that are listed under the Endangered Species Act (ESA) may be present in the survey area and are included in the take request: The North Atlantic right whale, fin whale, sei whale, and sperm whale.

Though marine mammal species other than those listed in Table 1 are known to occur in the Northwest Atlantic

Ocean, the temporal and/or spatial occurrence of several of these species is such that take of these species is not expected to occur, and they are therefore not discussed further beyond the explanation provided here. Take of these species is not anticipated either because they have very low densities in the project area (*e.g.,* blue whale, Clymene dolphin, pantropical spotted dolphin, striped dolphin, spinner dolphin, killer whale, false killer whale, pygmy killer whale,), or, they are known to occur further offshore than the project area (*e.g.,* beaked whales, short-finned pilot whale, rough toothed dolphin, Kogia *spp.*).

For the majority of species potentially present in the specific geographic region, NMFS has designated only a single generic stock (*e.g.,* ''western North Atlantic'') for management purposes. This includes the ''Canadian east coast'' stock of minke whales, which includes all minke whales found in U.S. waters. For humpback and sei whales, NMFS defines stocks on the basis of feeding locations, *i.e.,* Gulf of Maine and Nova Scotia, respectively. However, our reference to humpback whales and sei whales in this document refers to any individuals of the species that are found in the specific geographic region.

A detailed description of the species and stocks likely to be affected by DWW's survey, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not repeated here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*www.fisheries.noaa.gov/species-directory*) for generalized species accounts.

Information concerning marine mammal hearing, including marine mammal functional hearing groups, was provided in the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018), therefore that information is not repeated here. Please refer to that **Federal Register** notice for this information. For further information about marine mammal functional hearing groups and associated frequency ranges, please see NMFS (2016) for a review of available information. Fifteen marine mammal species (thirteen cetacean and two pinniped (both phocid) species) have the reasonable potential to co-occur with the survey activities. Please refer to Table 1. Of the cetacean species that may be present, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), seven are classified as mid-frequency cetaceans (*i.e.,* all delphinid species and the sperm whale), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from DWW's geophysical survey activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018) included a discussion of the effects of anthropogenic noise on marine mammals and their habitat, therefore that information is not repeated here; please refer to that **Federal Register** notice for that information. No instances of hearing threshold shifts, injury, serious injury, or mortality are expected as a result of the planned activities.

Estimated Take

This section provides an estimate of the number of incidental takes authorized through the 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, 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 are by Level B harassment, as use of the HRG equipment has the potential to result in disruption of behavioral patterns for individual marine mammals. NMFS has determined take by Level A harassment is not an expected outcome of the proposed activity and thus we do not authorize the take of any marine mammals by Level A harassment. This is discussed in greater detail below. As described previously, no mortality or serious injury is anticipated or authorized for this activity. Below we describe how the take is estimated for this project.

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 take estimate.

Acoustic Thresholds

NMFS uses 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 permanent threshold shift (PTS) of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the sound source (*e.g.,* frequency, predictability, duty cycle); the environment (*e.g.,* bathymetry); and the receiving animals (hearing, motivation, experience, demography, behavioral context); therefore can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.* 2012). NMFS uses a generalized acoustic threshold based on received level to estimate the onset of Level B (behavioral) harassment. NMFS predicts that marine mammals may be behaviorally harassed when exposed to underwater anthropogenic noise above received levels 160 dB re 1 µPa (rms) for non-explosive impulsive (*e.g.,* seismic HRG equipment) or intermittent (*e.g.,* scientific sonar) sources. DWW's activity includes the use of impulsive sources. Therefore, the 160 dB re 1 µPa (rms) criteria is applicable for analysis of Level B harassment.

Level A Harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (NMFS 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 Technical Guidance identifies the received levels, or thresholds, above which individual marine mammals are predicted to experience changes in their hearing sensitivity for all underwater

anthropogenic sound sources, reflects the best available science, and better predicts the potential for auditory injury than does NMFS' historical criteria.

These thresholds were developed by compiling and synthesizing the best available science and soliciting input multiple times from both the public and peer reviewers to inform the final product, and are provided in Table 2 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2016 Technical Guidance, which may be accessed at: *www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.* As described above, DWW's activity includes the use of intermittent and impulsive sources.

TABLE 2—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT IN MARINE MAMMALS

Hearing group	PTS onset thresholds	
	Impulsive *	Non-impulsive
Low-Frequency (LF) Cetaceans	$L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	$L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	$L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	$L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	$L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	$L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	$L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	$L_{E,PW,24h}$: 201 dB.

Note: * 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 (Lpk) has a reference value of 1 μPa, and cumulative sound exposure level (LE) has a reference value of 1μPa2s. 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 estimating the area ensonified above the acoustic thresholds.

The survey would entail the use of HRG survey equipment. The distance to the isopleth corresponding to the threshold for Level B harassment was calculated for all HRG survey equipment with the potential to result in harassment of marine mammals using the spherical transmission loss (TL) equation: $TL = 20\log_{10}$. Results of modeling indicated that, of the HRG survey equipment planned for use that has the potential to result in harassment of marine mammals, the AA Dura-Spark would be expected to produce sound that would propagate the furthest in the water (Table 3); therefore, for the purposes of the take calculation, it was assumed the AA Dura-Spark would be active during the entirety of the survey. Thus the distance to the isopleth corresponding to the threshold for Level B harassment for the AA Dura-Spark (estimated at 447 m; Table 3) was used as the basis of the Level B take calculation for all marine mammals.

TABLE 3—MODELED RADIAL DISTANCES FROM HRG SURVEY EQUIPMENT TO ISOPLETHS CORRESPONDING TO LEVEL B HARASSMENT THRESHOLD

HRG system	Radial distance (m) to level B harassment threshold (160 dB re 1 μPa)
TB Chirp	70.79
EdgeTech Chirp	6.31
AA Boomer	5.62
AA S-Boom	141.25
Bubble Gun	63.1
800J Spark	141.25
AA Dura Spark	446.69

Predicted distances to Level A harassment isopleths, which vary based on marine mammal functional hearing groups (Table 4), were also calculated. The updated acoustic thresholds for impulsive sounds (such as HRG survey equipment) contained in the Technical Guidance (NMFS, 2016) were presented as dual metric acoustic thresholds using both cumulative sound exposure level (SEL_{cum}) and peak sound pressure level metrics. As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth).

The SEL_{cum} metric considers both level and duration of exposure, as well as auditory weighting functions by marine mammal hearing group. In recognition of the fact that calculating Level A harassment ensonified areas could be more technically challenging to predict due to the duration component and the use of weighting functions in the new SEL_{cum} thresholds, NMFS developed an optional User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to facilitate the estimation of take numbers. DWW used the NMFS optional User Spreadsheet to calculate distances to Level A harassment isopleths based on SEL_{cum}. To calculate distances to the Level A harassment isopleths based on peak pressure, the

spherical spreading loss model was used (similar to the method used to calculate Level B isopleths as described above).

Modeling of distances to isopleths corresponding to Level A harassment was performed for all types of HRG equipment planned for use with the potential to result in harassment of marine mammals. Of the HRG equipment types modeled, the AA Dura Spark resulted in the largest distances to isopleths corresponding to Level A harassment for all marine mammal functional hearing groups; therefore, to be conservative, the isopleths modeled for the AA Dura Spark were used to estimate potential Level A take. Based on a conservative assumption that the AA Dura Spark would be operated at 1,000 joules during the survey, a peak source level of 223 dB re 1µPa was used for modeling Level A harassment isopleths based on peak pressure (Crocker & Fratantonio, 2016). Inputs to the NMFS optional User Spreadsheet for the AA Dura Spark are shown in Table 4. Modeled distances to isopleths corresponding to Level A harassment thresholds for the AA Dura Spark are shown in Table 5 (modeled distances to Level A harassment isopleths for all other types of HRG equipment planned for use are shown in Table 6 of the IHA application). As described above, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth). In this case, modeled distances to isopleths corresponding to the Level A harassment threshold are greater based on the peak SPL metric than the SEL_{cum} metric for all marine mammal functional hearing groups (Table 5).

TABLE 4—INPUTS TO THE NMFS OPTIONAL USER SPREADSHEET FOR THE AA DURA SPARK

Source Level (rms SPL) [1]	213 dB re 1µPa
Source Level (peak) [1]	223 dB re 1µPa
Weighting Factor Adjustment (kHz) [1]	3.2
Source Velocity (meters/second)	2.07
Pulse Duration (seconds)	0.0021
1/Repetition rate (seconds)	2.42
Duty Cycle	0.00

[1] Derived from Crocker & Fratantonio (2016), based on operation at 1,000 joules.

TABLE 5—MODELED RADIAL DISTANCES TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT THRESHOLDS

Functional hearing group (Level A harassment thresholds)	Radial distance (m) to Level A harassment threshold (SEL_{cum})	Radial distance (m) to Level A harassment threshold (Peak SPL_{flat})
Low frequency cetaceans		
($L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB)	1.3	1.6
Mid frequency cetaceans		
($L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB)	0.0	0.5
High frequency cetaceans		
($L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB)	8.6	11.2
Phocid Pinnipeds (Underwater)		
($L_{pk,flat}$: 218 dB; $L_{E,HF,24h}$: 185 dB)	0.7	1.8

Due to the small estimated distances to Level A harassment thresholds for all marine mammal functional hearing groups, based on both SEL_{cum} and peak SPL (Table 5), and in consideration of the mitigation measures (see the Mitigation section for more detail), NMFS has determined that the likelihood of Level A take of marine mammals occurring as a result of the planned survey is so low as to be discountable.

We note that because of some of the assumptions included in the methods used, isopleths produced may be overestimates to some degree. Most of the acoustic sources planned for use in DWW's survey (including the AA Dura Spark) do not radiate sound equally in all directions but were designed instead to focus acoustic energy directly toward the sea floor. Therefore, the acoustic energy produced by these sources is not received equally in all directions around the source but is instead concentrated along some narrower plane depending on the beamwidth of the source. However, the calculated distances to isopleths do not account for this directionality of the sound source and are therefore conservative. Two types of geophysical survey equipment planned for use in the planned survey are omni-directional, however the modeled distances to isopleths corresponding to the Level B harassment threshold for these sources are smaller than that for the Dura Spark, and the Dura Spark was used to conservatively estimate take for the duration of the survey. For mobile sources, such as the planned survey, the User Spreadsheet predicts the closest distance at which a stationary animal would not incur PTS if the sound source traveled by the animal in a straight line at a constant speed.

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.

The best available scientific information was considered in calculating marine mammal exposure estimates (the basis for estimating take). For cetacean species, densities calculated by Roberts *et al.* (2016) were used. The density data presented by Roberts *et al.* (2016) incorporates aerial and shipboard line-transect survey data from NMFS and from other organizations collected over the period 1992–2014. Roberts *et al.* (2016) modeled density from 8 physiographic and 16 dynamic oceanographic and biological covariates, and controlled for the influence of sea state, group size, availability bias, and perception bias on the probability of making a sighting. NMFS considers the models produced

by Roberts *et al.* (2016) to be the best available source of data regarding cetacean densities for this project. More information, including the model results and supplementary information for each model, is available online at: *seamap.env.duke.edu/models/Duke-EC-GOM-2015/.*

For the purposes of the take calculations, density data from Roberts *et al.* (2016) were mapped using a geographic information system (GIS), using density data for the months June through December. Mean density per month for each species within the survey area was calculated by selecting 13 random raster cells selected from 100 square kilometers (km^2) raster cells that were inside, or adjacent to, the RI–MA WEA (see Figure 1 in the IHA application). Estimates provided by the models are based on a grid cell size of 100 km^2; therefore, model grid cell values were then divided by 100 to determine animals per km^2.

Systematic, offshore, at-sea survey data for pinnipeds are more limited than those for cetaceans. The best available information concerning pinniped densities in the planned survey area is the U.S. Navy's Operating Area (OPAREA) Density Estimates (NODEs) (DoN, 2007). These density models utilized vessel-based and aerial survey data collected by NMFS from 1998–2005 during broad-scale abundance studies. Modeling methodology is detailed in DoN (2007). For the purposes of the take calculations, NODEs Density Estimates (DoN, 2007) as reported for the summer and fall seasons were used to estimate harbor seal and gray seal densities.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in harassment, radial distances to predicted isopleths corresponding to harassment thresholds are calculated, as described above. Those distances are then used to calculate the area(s) around the HRG survey equipment predicted to be ensonified to sound levels that exceed harassment thresholds. The area estimated to be ensonified to relevant thresholds in a single day of the survey is then calculated, based on areas predicted to be ensonified around the HRG survey equipment and the estimated trackline distance traveled per day by the survey vessel. DWW estimates a maximum daily track line distance of 110 km per day during HRG surveys. Based on the maximum estimated distance to the Level B harassment threshold of 447 m (Table 3) and the maximum estimated daily track line distance of 110 km, an area of 98.9 km^2 would be ensonified to the Level B harassment threshold per day during HRG surveys.

The number of marine mammals expected to be incidentally taken per day is then calculated by estimating the number of each species predicted to occur within the daily ensonified area, using estimated marine mammal densities as described above. Estimated numbers of each species taken per day are then multiplied by the number of survey days (*i.e.,* 200), and the product is then rounded, to generate an estimate of the total number of each species expected to be taken over the duration of the survey (Table 6).

The applicant estimated a total of 11 takes by Level A harassment of harbor porpoises, 5 takes by Level A harassment of harbor seals, and 7 takes by Level A harassment of gray seals would occur, in the absence of mitigation. However, as described above, due to the very small estimated distances to Level A harassment thresholds (Table 5), and in consideration of the mitigation measures, the likelihood of the planned survey resulting in take in the form of Level A harassment is considered so low as to be discountable; therefore, we do not authorize take of any marine mammals by Level A harassment. Although there are no exclusion zones (EZs) required for pinnipeds, the estimated distance to the isopleth corresponding to the Level A harassment threshold for pinnipeds is less than 2 m (Table 6); therefore, we determined the likelihood of an animal being taken within this proximity of the survey equipment to be so low as to be discountable. Authorized take numbers are shown in Table 6.

TABLE 6—TOTAL NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS AUTHORIZED AND TAKES AS A PERCENTAGE OF POPULATION

Species	Density (#/100 km^2)	Level A takes authorized	Estimated Level B takes	Level B takes authorized	Total authorized takes	Total authorized takes as a percentage of population [1]
North Atlantic right whale	0.01706	0	3	3	3	0.6
Humpback whale	0.14439	0	29	29	29	1.8
Fin whale [2]	0.21353	0	42	42	42	1.2
Sei whale [3]	0.005	0	1	2	2	0.3
Minke whale [2]	0.04745	0	9	9	9	<0.1
Sperm whale	0.00665	0	1	1	1	<0.1
Long-finned pilot whale [3]	0.15364	0	30	32	32	0.2
Bottlenose dolphin	1.60936	0	318	318	318	0.3
Atlantic Spotted dolphin [3]	0.00886	0	2	50	50	0.1
Common dolphin [2]	4.59986	0	910	910	910	0.5
Atlantic white-sided dolphin	1.8036	0	357	357	357	1.0
Risso's dolphin [4]	0	0	0	30	30	0.4
Harbor porpoise [5]	2.53125	0	501	501	501	1.1
Harbor seal	6.49533	0	1,285	1,285	1,285	1.7
Gray seal [4]	14.1160	0	2,792	2,792	2,792	10.3

[1] Estimates of total takes as a percentage of population are based on marine mammal abundance estimates provided by Roberts *et al.* (2016), when available, except where noted otherwise, to maintain consistency with density estimates which are derived from data provided by Roberts *et al.* (2016). In cases where abundances are not provided by Roberts *et al.* (2016), total takes as a percentage of population are based on abundance estimates in the NMFS Atlantic SARs (Hayes *et al.,* 2018).

[2] Estimates of total takes as a percentage of population are based on marine mammal abundance estimates as reported in the 2007 TNASS (Lawson and Gosselin, 2009) (Table 2). Abundance estimates from TNASS were corrected for perception and availability bias, when possible. In general, where the TNASS survey effort provided superior coverage of a stock's range (as compared with NOAA shipboard survey effort), the resulting abundance estimate is considered more accurate than abundance estimates based on NMFS surveys.

[3] The number of authorized takes (Level B harassment only) for these species has been increased from the estimated take to mean group size. Source for sei whale group size estimate is: Schilling *et al.* (1992). Source for long-finned pilot whale group size estimate is: Augusto *et al.* (2017). Source for Atlantic spotted dolphin group size estimate is: Jefferson *et al.* (2008). Source for Risso's dolphin group size estimate is: Baird and Stacey (1991).

[4] Take estimate for these species has been revised from the proposed IHA. See text below for further information.

[5] The density estimate in the IHA application is incorrectly shown as 0.0225781 animals/km^2. The correct density estimate is reflected in Table 6.

Species with Take Estimates Less than Mean Group Size: Using the approach described above to estimate take, the take estimates for the sei whale, long-finned pilot whale, Risso's dolphin and Atlantic spotted dolphin were less than the average group sizes estimated for these species (Table 6). However, information on the social structures and life histories of these species indicates these species are often encountered in groups. The results of take calculations support the likelihood that the survey is expected to encounter and to incidentally take these species, and we believe it is likely that these species may be encountered in groups. Therefore it is reasonable to conservatively assume that one group of each of these species will be taken during the planned survey. We authorize the take of the average group size for these species and stocks to account for the possibility that the planned survey encounters a group of any of these species or stocks (Table 6). Note that the take estimate for the sperm whale was not increased to average group size because, based on water depths in the survey area (26 to 48 m (52 to 92 ft)), it is very unlikely that groups of sperm whales, which tend to occur at greater depths, would be encountered by the survey.

We note that the IHA authorizes take of Risso's dolphins, though authorization for the take of Risso's dolphins was not proposed in the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018). Though density estimates for Risso's dolphins in the survey area indicate they would not be expected in the survey area, based on public comments and a review of monitoring data from a previous IHA issued for a similar activity in 2017 (NMFS, 2017) we have determined that take authorization for Risso's dolphins is warranted. The monitoring report from the IHA issued to Deepwater Wind in 2017 for HRG surveys in the RI–MA WEA indicates that a single group of Risso's dolphins was observed by PSOs (though not taken by Level A or Level B harassment) during that survey (AIS Inc., 2017). As the activities authorized through this IHA are similar to those conducted by DWW in 2017 (*i.e.,* HRG surveys conducted within the RI–MA WEA) NMFS has determined the planned survey may encounter Risso's dolphins and thus it is appropriate to authorize the take of Risso's dolphins. As take modeling based on density estimates (*e.g.,* Roberts et. al (2016)) indicated no Risso's dolphins would be taken by the survey, but we have determined take authorization for Risso's dolphins is warranted and Risso's dolphins may be encountered in groups, we have authorized the take of a group of Risso's dolphins, based on mean group size for the species (Table 6). We also note that the take estimate for gray seals has been revised from the number proposed for authorization. In the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018), the take number proposed for gray seals was based on an incorrect density estimate. The average density of gray seals in the survey area was reported as 0.0941067 per km^2; however the correct density is 0.14116 per km^2. The correct density has been used to re-calculate the authorized number of gray seal takes (Table 6).

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 relative cost and impact on operations.

Mitigation Measures

Based on the applicant's request, which includes requirements relating to the BOEM lease stipulations associated with ESA-listed marine mammals, and specific information regarding the zones ensonified above NMFS thresholds, NMFS is requiring the following mitigation measures during the marine site characterization surveys.

Marine Mammal Exclusion and Watch Zone

Marine mammal exclusion zones (EZ) will be established around the HRG survey equipment and monitored by protected species observers (PSO) during HRG surveys as follows:

- 500 m EZ for North Atlantic right whales;
- 200 m EZ for all other ESA-listed cetaceans (including fin whale, sei whale and sperm whale); and
- 25 m EZ for harbor porpoises.

The applicant proposed a 500 m EZ for North Atlantic right whales and 200 m EZ for all other marine mammals; however, for non-ESA-listed marine mammals, based on estimated distances to isopleths corresponding with Level A harassment thresholds (Table 5), we determined EZs for species other than those described above were not warranted. If HRG survey equipment is shut down (as described below) due to

a marine mammal being observed within or approaching the relevant EZs, ramp up of survey equipment may not commence until the animal(s) has been observed exiting the relevant EZ, or until an additional time period has elapsed with no further sighting of the animal (*e.g.,* 15 minutes for harbor porpoises and 30 minutes for all large whale species). In addition to the EZs described above, PSOs will visually monitor and record the presence of all marine mammals within a 500 m Watch Zone. Marine mammals observed by PSOs within 447 m of geophysical survey equipment will be documented as taken by Level B harassment.

Visual Monitoring

As per the BOEM lease, visual and acoustic monitoring of the established exclusion and monitoring zones will be performed by qualified and NMFS-approved PSOs. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate. PSOs will be equipped with binoculars and would estimate distances to marine mammals located in proximity to the vessel and/or exclusion zone using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the siting and monitoring of marine species. Position data will be recorded using hand-held or vessel GPS units for each sighting. Observations will take place from the highest available vantage point on the survey vessel. During surveys conducted at night, night-vision equipment with infrared light-emitting diodes spotlights and/or infrared video monitoring will be available for PSO use, and passive acoustic monitoring (described below) will be used.

Pre-Clearance of the Exclusion Zone

Prior to initiating HRG survey activities, DWW will implement a 30-minute pre-clearance period. During this period, the PSOs will ensure that no North Atlantic right whales are observed within 500 m of geophysical survey equipment, and that no other marine mammal species are observed within 200 m of geophysical survey equipment. Surveys may not begin until these zones have been clear of the relevant marine mammal species for 30 minutes. This pre-clearance requirement would include small delphinoids that approach the vessel (*e.g.,* bow ride). PSOs would also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

Passive Acoustic Monitoring

As proposed by the applicant and required by BOEM lease stipulations, PAM will be used to support monitoring during night time operations to provide for optimal acquisition of species detections at night. The PAM system will consist of an array of hydrophones with both broadband (sampling mid-range frequencies of 2 kHz to 200 kHz) and at least one low-frequency hydrophone (sampling range frequencies of 75 hertz (Hz) to 30 kHz). The PAM operator(s) will monitor acoustic signals in real time both aurally (using headphones) and visually (via sound analysis software). PAM operators will communicate nighttime detections to the lead PSO on duty who will ensure the implementation of the appropriate mitigation measure.

Shutdown of geophysical survey equipment is required upon confirmed PAM detection of a North Atlantic right whale at night, even in the absence of visual confirmation, except in cases where the acoustic detection can be localized and the right whale can be confirmed as being beyond the 500 m EZ; equipment may be re-started no sooner than 30 minutes after the last confirmed acoustic detection. However, aside from the required shutdown for right whales as described above, PAM detection alone would not trigger a requirement for any mitigation action to be taken upon acoustic detection of marine mammals, per BOEM requirements.

Ramp-Up of Survey Equipment

As proposed by the applicant, where technically feasible, a ramp-up procedure will be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure will be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the survey area by allowing them to detect the presence of the survey and vacate the area prior to the commencement of survey equipment use at full energy. Ramp-up of the survey equipment will not begin until the relevant EZs have been cleared by the PSOs, as described above. Systems will be initiated at their lowest power output and will be incrementally increased to full power. If any marine mammals are detected within the EZ prior to or during the ramp-up, HRG equipment will be shut down (as described below).

Shutdown Procedures

If a marine mammal is observed within or approaching the relevant EZ (as described above) an immediate shutdown of the survey equipment is required. Subsequent restart of the survey equipment may only occur after the animal(s) has either been observed exiting the relevant EZ or until an additional time period has elapsed with no further sighting of the animal (*e.g.,* 15 minutes for harbor porpoises and 30 minutes for North Atlantic right, fin, sei and sperm whales).

In addition, shutdown of geophysical survey equipment is required upon confirmed PAM detection of a North Atlantic right whale at night, even in the absence of visual confirmation, except in cases where the acoustic detection can be localized and the right whale can be confirmed as being beyond the 500 m EZ; equipment may be re-started no sooner than 30 minutes after the last confirmed acoustic detection.

As required in the BOEM lease, if the HRG equipment shuts down for reasons other than mitigation (*i.e.,* mechanical or electronic failure) resulting in the cessation of the survey equipment for a period greater than 20 minutes, a 30 minute pre-clearance period (as described above) will precede the restart of the HRG survey equipment. If the pause is less than 20 minutes, the equipment may be restarted as soon as practicable at its full operational level only if visual surveys were continued diligently throughout the silent period and the EZs remained clear of marine mammals during that entire period. If visual surveys were not continued diligently during the pause of 20 minutes or less, a 30-minute pre-clearance period (as described above) will precede the re-start of the HRG survey equipment. Following a shutdown, HRG survey equipment may be restarted following pre-clearance of the zones as described above.

If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within an EZ or within the area encompassing the Level B harassment isopleth (450 m), shutdown will occur.

Vessel Strike Avoidance

Vessel strike avoidance measures will include, but are not limited to, the following, as required in the BOEM lease, except under circumstances when complying with these requirements would put the safety of the vessel or crew at risk:

- All vessel operators and crew will maintain vigilant watch for cetaceans

and pinnipeds, and slow down or stop their vessel to avoid striking these protected species;

- All survey vessels greater than or equal to 65 ft (19.8 m) in overall length will comply with 10 knot (18.5 km/hr) or less speed restriction in any SMA per the NOAA ship strike reduction rule (73 FR 60173; October 10, 2008);
- All vessel operators will reduce vessel speed to 10 knots (18.5 km/hr) or less when any large whale, any mother/calf pairs, or large assemblages of non-delphinoid cetaceans are observed near (within 100 m (330 ft)) an underway vessel;
- All survey vessels will maintain a separation distance of 500 m (1640 ft) or greater from any sighted North Atlantic right whale;
- If underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots (18.5 km/hr) or less until the 500 m (1640 ft) minimum separation distance has been established. If a North Atlantic right whale is sighted in a vessel's path, or within 500 m (330 ft) to an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Engines will not be engaged until the North Atlantic right whale has moved outside of the vessel's path and beyond 500 m. If stationary, the vessel must not engage engines until the North Atlantic right whale has moved beyond 500 m;
- All vessels will maintain a separation distance of 100 m (330 ft) or greater from any sighted non-delphinoid cetacean. If sighted, the vessel underway must reduce speed and shift the engine to neutral, and must not engage the engines until the non-delphinoid cetacean has moved outside of the vessel's path and beyond 100 m. If a survey vessel is stationary, the vessel will not engage engines until the non-delphinoid cetacean has moved out of the vessel's path and beyond 100 m;
- All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted delphinoid cetacean. Any vessel underway remain parallel to a sighted delphinoid cetacean's course whenever possible, and avoid excessive speed or abrupt changes in direction. Any vessel underway reduces vessel speed to 10 knots (18.5 km/hr) or less when pods (including mother/calf pairs) or large assemblages of delphinoid cetaceans are observed. Vessels may not adjust course and speed until the delphinoid cetaceans have moved beyond 50 m and/or the abeam of the underway vessel;
- All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted pinniped; and
- All vessels underway will not divert or alter course in order to approach any whale, delphinoid cetacean, or pinniped. Any vessel underway will avoid excessive speed or abrupt changes in direction to avoid injury to the sighted cetacean or pinniped.

DWW will ensure that vessel operators and crew maintain a vigilant watch for cetaceans and pinnipeds by slowing down or stopping the vessel to avoid striking marine mammals. Project-specific training will be conducted for all vessel crew prior to the start of the site characterization survey activities. Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew members understand and will comply with the necessary requirements throughout the survey activities.

Seasonal Operating Requirements

The northern section of the survey area partially overlaps with a portion of a North Atlantic right whale SMA which occurs east of Long Island, New York, and south of Massachusetts and Rhode Island. This SMA is active from November 1 through April 30 of each year. Survey vessels that are >65 ft in length would be required to adhere to the mandatory vessel speed restrictions (<10 kn) when operating within the SMA during times when the SMA is active. In addition, between watch shifts, members of the monitoring team would consult NMFS' North Atlantic right whale reporting systems for the presence of North Atlantic right whales throughout survey operations. Members of the monitoring team would monitor the NMFS North Atlantic right whale reporting systems for the establishment of a Dynamic Management Area (DMA). If NMFS should establish a DMA in the survey area, within 24 hours of the establishment of the DMA DWW would coordinate with NMFS to shut down and/or alter the survey activities as needed to avoid right whales to the extent possible.

The mitigation measures are designed to avoid the already low potential for injury in addition to some Level B harassment, and to minimize the potential for vessel strikes. There are no known marine mammal rookeries or mating grounds in the survey area that would otherwise potentially warrant increased mitigation measures for marine mammals or their habitat (or both). The planned survey would occur in an area that has been identified as a biologically important area for migration for North Atlantic right whales. However, given the small spatial extent of the survey area relative to the substantially larger spatial extent of the right whale migratory area, the survey is not expected to appreciably reduce migratory habitat nor to negatively impact the migration of North Atlantic right whales, thus mitigation to address the survey's occurrence in North Atlantic right whale migratory habitat is not warranted. The survey area would partially overlap spatially with a biologically important feeding area for fin whales. However, the fin whale feeding area is sufficiently large (2,933 km^2), and the acoustic footprint of the planned survey is sufficiently small (<100 km^2 estimated to be ensonified to the Level B harassment threshold per day), that the survey is not expected to appreciably reduce fin whale feeding habitat nor to negatively impact the feeding of fin whales, thus mitigation to address the survey's occurrence in fin whale feeding habitat is not warranted. Further, we believe the mitigation measures are practicable for the applicant to implement.

Based on our evaluation of the applicant's proposed measures, NMFS has determined that the mitigation measures provide the means of 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.

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 survey 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.

Monitoring Measures

As described above, visual monitoring of the EZs and monitoring zone will be performed by qualified and NMFS-approved PSOs. PSO Qualifications will include completion of a PSO training course and documented field experience conducting similar surveys. As proposed by the applicant and required by BOEM, an observer team comprising a minimum of four NMFS-approved PSOs and a minimum of two certified PAM operator(s), operating in shifts, will be employed by DWW during the planned surveys. PSOs and PAM operators will work in shifts such that no one monitor will work more than 4 consecutive hours without a 2 hour break or longer than 12 hours during any 24 hour period. During daylight hours the PSOs will rotate in shifts of one on and three off, while during nighttime operations PSOs will work in pairs. The PAM operators will also be on call as necessary during daytime operations should visual observations become impaired. Each PSO will monitor 360 degrees of the field of vision.

Also as described above, PSOs will be equipped with binoculars and have the ability to estimate distances to marine mammals located in proximity to the vessel and/or exclusion zone using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the sighting and monitoring of marine species. During night operations, PAM and night-vision equipment with infrared light-emitting diode spotlights and/or infrared video monitoring will be used to increase the ability to detect marine mammals. Position data will be recorded using hand-held or vessel global positioning system (GPS) units for each sighting. Observations will take place from the highest available vantage point on the survey vessel. General 360-degree scanning will occur during the monitoring periods, and target scanning by the PSO will occur when alerted of a marine mammal presence.

Data on all PAM/PSO observations will be recorded, including dates, times, and locations of survey operations; time of observation, location and weather; details of marine mammal sightings (*e.g.,* species, numbers, behavior); and details of any observed taking (*e.g.,* behavioral disturbances or injury/mortality).

Reporting Measures

Within 90 days after completion of survey activities, a final technical report will be provided to NMFS that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, summarizes the number of marine mammals estimated to have been taken during survey activities (by species, when known), summarizes the mitigation actions taken during surveys (including what type of mitigation and the species and number of animals that prompted the mitigation action, when known), and provides an interpretation of the results and effectiveness of all mitigation and monitoring. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

In addition to the final technical report, DWW will provide the reports described below as necessary during survey activities. In the unanticipated event that DWW's survey activities lead to an injury (Level A harassment) or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement) of a marine mammal, DWW would immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the NMFS Greater Atlantic Stranding Coordinator. The report would include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and 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 event. NMFS would work with DWW to minimize reoccurrence of such an event in the future. DWW would not resume activities until notified by NMFS.

In the event that DWW discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition), DWW would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the NMFS Greater Atlantic 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 DWW to determine if modifications in the activities are appropriate.

In the event that DWW discovers an injured or dead marine mammal and 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), DWW would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, and the NMFS Greater Atlantic Regional Stranding Coordinator, within 24 hours of the discovery. DWW would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS. DWW may continue its operations under such a case.

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.

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).

To avoid repetition, our analysis applies to all the species listed in Table 6, given that NMFS expects the anticipated effects of the planned survey to be similar in nature.

NMFS does not anticipate that injury or mortality would occur as a result of DWW's planned survey, even in the absence of mitigation. Thus the IHA does not authorize any injury or mortality. As discussed in the *Potential Effects* section, non-auditory physical effects and vessel strike are not expected to occur.

We expect that all potential takes would be in the form of short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity were occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007). Potential impacts to marine mammal habitat were discussed in the **Federal Register** notice of the proposed IHA (83 FR 19711; May 4, 2018) (see *Potential Effects of the Specified Activity on Marine Mammals and their Habitat*). Marine mammal habitat may be impacted by elevated sound levels, but these impacts would be temporary. In addition to being temporary and short in overall duration, the acoustic footprint of the planned survey is small relative to the overall distribution of the animals in the area and their use of the area. Feeding behavior is not likely to be significantly impacted. Prey species are mobile and are broadly distributed throughout the project area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

There are no rookeries or mating grounds known to be biologically important to marine mammals within the planned survey area. As described above, the survey area would overlap spatially and temporally with a biologically important feeding area for fin whales. The important fin whale feeding area occurs from March through October and stretches from an area south of Montauk Point to south of Martha's Vineyard. However, the fin whale feeding area is sufficiently large (2,933 km^2), and the acoustic footprint of the planned survey is sufficiently small (<100 km^2 estimated to be ensonified to the Level B harassment threshold per day), that fin whale feeding habitat would not be reduced appreciably. Any fin whales temporarily displaced from the survey area would be expected to have sufficient remaining feeding habitat available to them, and would not be prevented from feeding in other areas within the biologically important feeding habitat. In addition, any displacement of fin whales from the survey area would be expected to be temporary in nature. Therefore, we do not expect fin whale feeding to be negatively impacted by the planned survey. There are no feeding areas known to be biologically important to marine mammals within the project area with the exception of the aforementioned feeding area for fin whales. There is no designated critical habitat for any ESA-listed marine mammals in the survey area.

The survey area is within a biologically important migratory area for North Atlantic right whales (effective March-April and November-December) that extends from Massachusetts to Florida (LaBrecque, *et al.,* 2015). Off the south coast of Massachusetts and Rhode Island, this biologically important migratory area extends from the coast to beyond the shelf break. Due to the fact that that the survey is temporary and short in overall duration, and the fact that the spatial acoustic footprint of the planned survey is very small relative to the spatial extent of the available migratory habitat in the area, right whale migration is not expected to be impacted by the planned survey.

The mitigation measures are expected to reduce the number and/or severity of takes by (1) giving animals the opportunity to move away from the sound source before HRG survey equipment reaches full energy; (2) preventing animals from being exposed to sound levels that may otherwise result in injury. Additional vessel strike avoidance requirements will further mitigate potential impacts to marine mammals during vessel transit to and within the survey area.

NMFS concludes that exposures to marine mammal species and stocks due to DWW's survey would result in only short-term (temporary and short in duration) effects to individuals exposed. Marine mammals may temporarily avoid the immediate area, but are not expected to permanently abandon the area. Major shifts in habitat use, distribution, or foraging success are not expected. NMFS does not anticipate the authorized take estimates to impact annual rates of recruitment or survival.

In summary and as described above, the following factors primarily support our 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, serious injury, or Level A harassment is anticipated or authorized;
- The anticipated impacts of the activity on marine mammals would be temporary behavioral changes due to avoidance of the area around the survey vessel;
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the planned survey to avoid exposure to sounds from the activity;
- The project area does not contain areas of significance for mating or calving;
- Effects on species that serve as prey species for marine mammals from the survey would be temporary and would not be expected to reduce the availability of prey or to affect marine mammal feeding;
- The mitigation measures, including visual and acoustic monitoring, exclusion zones, and shutdown measures, are expected to minimize potential impacts to marine mammals.

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 monitoring and mitigation measures, NMFS finds that the total marine mammal take from the specified 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.

The numbers of marine mammals that we authorize to be taken, for all species and stocks, would be considered small relative to the relevant stocks or populations (less than 11 percent of each species and stock). See Table 6. Based on the analysis contained herein of the proposed activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS 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

Section 7(a)(2) of the Endangered Species Act of 1973 (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. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

The NMFS Office of Protected Resources is authorizing the incidental take of four species of marine mammals which are listed under the ESA: The North Atlantic right, fin, sei, and sperm whale. BOEM consulted with NMFS GARFO under section 7 of the ESA on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. The NMFS GARFO issued a Biological Opinion concluding that these activities may adversely affect but are not likely to jeopardize the continued existence of the North Atlantic right, fin, and sperm whale. The Biological Opinion can be found online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* Upon request from the NMFS Office of Protected Resources, the NMFS GARFO will issue an amended incidental take statement associated with this Biological Opinion to include the takes of the ESA-listed marine mammal species authorized through this IHA.

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 (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment. Accordingly, NMFS prepared an Environmental Assessment (EA) and analyzed the potential impacts to marine mammals that would result from the project, as well as from a similar project proposed by Garden State Offshore Energy (a subsidiary of Deepwater Wind) off the coast of Delaware. A Finding of No Significant Impact (FONSI) was signed on June 13, 2018. A copy of the EA and FONSI is available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.*

Authorization

NMFS has issued an IHA to Deepwater Wind New England, LLC for conducting marine site characterization surveys offshore of Rhode Island and Massachusetts and along potential submarine cable routes, for a period of one year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: June 15, 2018.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–13279 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC969

2018 Revision to Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing—Underwater Acoustic Thresholds for Onset of Permanent and Temporary Threshold Shifts

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

ACTION: Notice.

SUMMARY: Per approval of the Secretary of Commerce, The National Marine Fisheries Service (NMFS) announces the availability of the 2018 Revision (NOAA Technical Memorandum NMFS–OPR–59) to its 2016 Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing—Underwater Acoustic Thresholds for Onset of Permanent and Temporary Threshold Shifts (Technical Guidance or Guidance) based on comments received during the review of the Guidance pursuant to section 10 of Presidential Executive Order, Implementing an America-First Offshore Energy Strategy (April 28, 2017).

ADDRESSES: The 2018 Revision to the Technical Guidance (NOAA Technical Memorandum NMFS–OPR–59) is available in electronic form via the internet at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

FOR FURTHER INFORMATION CONTACT: Amy R. Scholik-Schlomer, Office of Protected Resources, 301–427–8449, *Amy.Scholik@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Presidential Executive Order (E.O.) 13795, Implementing an America-First Offshore Energy Strategy (82 FR 20815; April 28, 2017), states in section 2 that ''It shall be the policy of the United States to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain

the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible.''

Among the requirements of E.O. 13795 is section 10, which called for a review of NMFS' Technical Guidance as follows: ''The Secretary of Commerce shall review [NMFS' Technical Guidance] for consistency with the policy set forth in Section 2 of this order and, after consultation with the appropriate Federal agencies, take all steps permitted by law to rescind or revise that guidance, if appropriate.''

The 2016 Technical Guidance referred to in E.O. 13795 is a technical document that compiles, interprets, and synthesizes scientific literature to produce updated received levels, or acoustic thresholds, above which individual marine mammals under NMFS' jurisdiction are predicted to experience changes in their hearing sensitivity (either temporary or permanent) for all underwater human-made sound sources. It is intended for use by NMFS analysts and managers and other relevant user groups and stakeholders, including other Federal agencies, when seeking to determine whether and how their activities are expected to result in hearing impacts to marine mammals via acoustic exposure. The Technical Guidance helps evaluate a proposed activity within a comprehensive effects analysis. It can inform decisions related to mitigation and monitoring requirements, but it does not mandate any specific mitigation. The Technical Guidance does not address or change NMFS' application of standards in the regulatory context, under applicable statutes, and does not create or confer any rights for or on any person, or operate to bind the public (*i.e.,* the use of the Technical Guidance is not mandatory).

The Office of Management and Budget previously classified the Technical Guidance as a Highly Influential Scientific Assessment (HISA). As such, the document underwent three independent peer reviews, at three different stages its development, including a follow-up to one of the peer reviews, prior to its dissemination by NMFS in 2016. Details of each peer review are included within the Technical Guidance (Appendix C), and specific peer reviewer comments and NMFS' responses are at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.* In addition to three independent peer reviews, there were three public comment periods. The **Federal Register** Notice of Availability for the 2016 Guidance (81 FR 51694; August 4, 2016) summarizes substantive public comments and NMFS' responses.

Review Under E.O. 13795

To assist the Secretary of Commerce in the review of the Technical Guidance for consistency with the policy in section 2 of E.O. 13795, NMFS solicited public comment via a 45-day public comment period (82 FR 24950; May 31, 2017). Additionally, on September 25, 2017, NMFS hosted an Interagency Consultation meeting with representatives from the Bureau of Ocean Energy Management (BOEM), Department of State, Federal Highway Administration, Marine Mammal Commission, National Park Service, National Science Foundation, U.S. Air Force, U.S. Army Corps of Engineers, U.S. Geological Survey, and U.S. Navy.

During the public comment period, NMFS received 62 comments from Federal agencies (Bureau of Ocean Energy Management, U.S. Navy, and Marine Mammal Commission), oil and gas industry representatives, Members of Congress, subject matter experts, non-governmental organizations, and members of the public. Most of the comments (85%) recommended no changes to the Technical Guidance. No public commenter suggested rescinding the Technical Guidance. The U.S. Navy, Marine Mammal Commission, Members of Congress, and subject matter experts expressed support for the Technical Guidance's auditory injury thresholds as reflecting the best available science. The remaining comments (15%) focused on additional scientific publications for consideration or recommended revisions to improve implementation of the Technical Guidance.

At the Federal Interagency Consultation meeting, none of the Federal agencies recommended rescinding the Technical Guidance. They expressed support for the Technical Guidance's auditory injury thresholds and the science behind their derivation. Comments received at the meeting focused on improvements to implementation of the Technical Guidance.

During both the public comment period and the Interagency meeting, three key topic areas were raised: (1) The limited scientific data on the impacts of sound on baleen whale hearing; (2) the need to determine accurate sound exposure durations for all species of marine mammals; and (3) the need to improve the Technical Guidance's optional User Spreadsheet tool. Commenters also encouraged the agency to establish working groups to address these data gaps and future needs.

2018 Revisions to Technical Guidance

In response to the feedback received during the public comment period and the Interagency meeting, NMFS has improved the Technical Guidance and updated User Spreadsheet tool in several ways. Since none of the public commenters or Federal agencies offered additional scientific data to modify the auditory injury thresholds, including those for baleen whales, no changes are warranted on that topic at this time. Nevertheless, NMFS plans to convene a working group later in 2018 to continue to examine and refine the auditory injury thresholds for baleen whales as more scientific data become available. Also, since none of the public commenters or Federal agencies offered additional scientific data to modify the sound exposure durations for all species of marine mammals, no specific changes are warranted on that topic at this time either. Nevertheless, NMFS plans to convene a working group later in 2018 to evaluate sound exposure durations to determine whether revisions are appropriate for future updates of the Technical Guidance based on any new information.

To help applicants implement the Technical Guidance and optional User Spreadsheet tool, NMFS has: (a) Drafted a new User Manual for the optional User Spreadsheet that provides more detailed instructions and examples on how to use it and plans to submit this User Manual for public comment later in 2018 to gain input from stakeholders and inform future versions of this manual; (b) modified the optional User Spreadsheet to provide additional capabilities to assess auditory injury thresholds; (c) modified the current optional User Spreadsheet tool to facilitate assessing auditory injury thresholds for commonly used sound source; (d) modified the Technical Guidance to be more reflective of an updated international standard specifically developed for underwater acoustics that became available after the documents finalization in 2016; (e) included a summary and preliminary analysis of relevant scientific literature published since the 2016 Technical Guidance's finalization; and (f) updated the Technical Guidance to include the Navy's finalized version of their 2016 Technical Report that was used to derive the Technical Guidance's auditory injury thresholds.

The 2018 Revision to the Technical Guidance (NOAA Technical

Memorandum NMFS–OPR–59) with the updated User Spreadsheet tool and the new companion User Manual is available in electronic form via the internet at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

Dated: June 18, 2018.

Elaine T. Saiz,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–13313 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG132

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the South Basin Improvements Project at the San Francisco Ferry Terminal

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

ACTION: Notice; Issuance of an Incidental Harassment Authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the San Francisco Bay Area Water Emergency Transportation Authority (WETA) to incidentally harass, by Level B harassment only, marine mammals during construction activities associated with the Downtown San Francisco Ferry Terminal Expansion Project, South Basin Improvements Project in San Francisco, California.

DATES: This Authorization is effective from June 1, 2018 through May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, 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: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* 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 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 an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The 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 action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) 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. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Summary of Request

On January 22, 2018, NMFS received a request from WETA for an IHA to take marine mammals incidental to expansion and improvements at the downtown San Francisco ferry terminal. The application was determined to be adequate and complete on April 10, 2018. WETA's request was for take of seven species of marine mammals by Level A and Level B harassment. This authorization is valid from June 1, 2018 to May 31, 2019. Neither WETA nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued an IHA to WETA for similar work (82 FR 29521; June 29, 2017). WETA 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 ''Estimated Take'' section.

Description of Activity

WETA is planning to expand berthing capacity at the Downtown San Francisco Ferry Terminal, located at the San Francisco Ferry Building, to support existing and future planned water transit services operated on San Francisco Bay by WETA and WETA's emergency operations. The Downtown San Francisco Ferry Terminal Expansion Project includes the construction of three new water transit gates and overwater berthing facilities, in addition to supportive landside improvements, such as additional passenger waiting and queueing areas, circulation improvements, and other water transit-related amenities. The new gates and other improvements would be designed to accommodate future planned water transit services between Downtown San Francisco and Antioch, Berkeley, Martinez, Hercules, Redwood City, Richmond, and Treasure Island, as well as emergency operation needs. The new gates will be constructed using 81 steel piles, ranging in diameter from 24 to 36 inches (in). All piles will be driven during the authorized in-water work window of June 1 to November 30, 2018.

A detailed description of the planned terminal expansion project is provided in the **Federal Register** notice for the proposed IHA (83 FR 18507; April 27, 2018). Since that time, no changes have been made to the planned construction activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Responses

A notice of NMFS's proposal to issue an IHA to WETA was published in the **Federal Register** on April 27, 2018 (83 FR 18507). That notice described, in detail, WETA's activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission).

Comment 1: The Commission noted minor errors and missing information in the text of the notice and the proposed authorization. The Commission recommends that NMFS review its notices more thoroughly before submitting for publication.

Response 1: NMFS thanks the Commission for pointing out the errors in the **Federal Register** notice for the proposed authorization. NMFS has addressed those errors in the notice of issuance of the authorization. NMFS makes every effort to read notices thoroughly prior to publication and will continue this effort to publish the best possible product for public comment.

Comment 2: The Commission stated its concerns over the appropriateness of the manner in which Level A harassment zones are estimated. The Commission pointed out that for impact driving of 36-inch piles, the Level A harassment zone for high-frequency cetaceans was estimated to be 602 meters, which is greater than the 341 meter Level B harassment zone. The Commission recommended that NMFS consult with both internal and external scientists and acousticians to determine the relevant accumulation time that could result in Level A harassment based on associated permanent threshold shift from cumulative sound exposure levels.

Response 2: NMFS understands the Commission's concerns and continues to work to improve Level A harassment zone estimation based on realistic noise propagation models and energy accumulation scheme. Currently, Level A harassment zones are based on exposure of cumulative sound exposure levels over a period of one working day's pile driving duration or instantaneous peak sound pressure level, while Level B harassment zones are based on instantaneous root-mean-squared sound pressure level that contains 90 percent of acoustic energy. The difference in the metrics between sound exposure levels and sound pressure level in assessing Level A and Level B harassments reflects the fact that prolonged exposure of intense noise could lead to permanent threshold shift if the animal chooses to stay within the injury zone. Occasionally, the conservative assumptions built into the User Spreadsheet result in Level A zones that are larger than Level B zones. The process of impact assessments will continue to evolve as more scientific data become available.

Comment 3: The Commission recommended that NMFS refrain from using a source level reduction factor for sound attenuation device implementation during impact pile driving for all relevant incidental take authorizations due to the different noise level reduction at different received ranges.

Response 3: While it is true that noise level reduction measured at different received ranges does vary, given that both Level A and Level B estimation using geometric modeling is based on noise levels measured at near-source distances (~ 10m), NMFS believes it reasonable to use a source level reduction factor for sound attenuation device implementation during impact pile driving. In the case of the SF–OBB impact driving isopleth estimates using an air bubble curtain for source level reduction, NMFS reviewed Caltrans' bubble curtain ''on and off'' studies conducted in San Francisco Bay in 2003 and 2004. The equipment used for bubble curtains has likely improved since 2004 but due to concerns for fish species, Caltrans has not able to conduct ''on and off'' tests recently. Based on 74 measurements (37 with the bubble curtain on and 37 with the bubble curtain off) at both near (<100 m) and far (≤100 m) distances, the linear averaged received level reduction is 6 dB. If limiting the data points (a total of 28 measurements, with 14 during bubble curtain on and 14 during bubble curtain off) to only near distance measurements, the linear averaged noise level reduction is 7 dB. Since impact zone analysis using geometric spreading model is typically based on measurements at near-source distance, we consider it appropriate to use a reduction of 7 dB as a noise level reduction factor for impact pile driving using an air bubble curtain system.

NMFS will evaluate the appropriateness of using a certain source level reduction factor for sound attenuation device implementation during impact pile driving for all relevant incidental take authorizations when more data become available.

Comment 4: The Commission recommended that NMFS promptly revise its draft rounding criteria and share it with the Commission.

Response 4: NMFS appreciates the Commission's ongoing concern in this matter. Calculating predicted take is not an exact science and there are arguments for taking different mathematical approaches in different situations, and for making qualitative adjustments in other situations. We believe, however, that the methodology used for take calculation in this IHA remains appropriate and is not at odds with the 24-hour reset policy the Commission references. We look forward to continued discussion with the Commission on this matter and will share the rounding guidance as soon as it is completed.

Comment 5: The Commission expressed concern about the lack of adequate time to provide public comments as well as the abbreviated timeframes during which NMFS is able to address public comments. The Commission recommended that NMFS ensure that it publishes and finalizes proposed IHAs sufficiently before the planned start date of the proposed activities to ensure full consideration is given to all comments received.

Response 5: NMFS will work to provide adequate time for public comment and response. NMFS also seeks to process IHA applications in a more expeditious manner.

Comment 6: The Commission requested clarification regarding certain issues associated with NMFS's notice that one-year renewals could be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

Response 6: The process of issuing a renewal IHA does not bypass the public notice and comment requirements of the MMPA. The notice of the proposed IHA expressly notifies the public that under certain, limited conditions an applicant

could seek a renewal IHA for an additional year. The notice describes the conditions under which such a renewal request could be considered and expressly seeks public comment in the event such a renewal is sought. Importantly, such renewals would be limited to circumstances where: The activities are identical or nearly identical to those analyzed in the proposed IHA; monitoring does not indicate impacts that were not previously analyzed and authorized; and, the mitigation and monitoring requirements remain the same, all of which allow the public to comment on the appropriateness and effects of a renewal at the same time the public provides comments on the initial IHA. NMFS has, however, modified the language for future proposed IHAs to clarify that all IHAs, including renewal IHAs, are valid for no more than one year and that the agency would consider only one renewal for a project at this time. In addition, notice of issuance or denial of a renewal IHA would be published in the **Federal Register**, as they are for all IHAs. Last, NMFS will publish on our website a description of the renewal process before any renewal is issued utilizing the new process.

Description of Marine Mammals in the Area of Specified Activities

A detailed description of the species likely to be affected by WETA's actions, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, are provided in WETA's application and the **Federal Register** notice for the proposed IHA (83 FR 18507; April 27, 2018). We are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please refer to additional species information available in the NMFS stock assessment reports for the Pacific at *https://www.fisheries.noaa.gov/resource/document/us-pacific-marine-mammal-stock-assessments-2016.*

Table 1 lists all species with expected potential for occurrence near downtown San Francisco 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 (2016). 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 Stock Assessment Reports (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 comprises 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. 2016 SARs (Caretta *et al.,* 2017). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2016 SARs (Caretta *et al.,* 2017).

TABLE 1—MARINE MAMMALS IN THE VICINITY OF DOWNTOWN SAN FRANCISCO

Common name	Scientific name	Stock	ESA/ MMPA status; Strategic (Y/N) [1]	Stock abundance (CV, Nmin, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-/- ; N	20,990 (0.05, 20,125, 2011).	624	132
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	California/Oregon/Washington.	E/D ; Y	1,918 (0.03, 1,876, 2014)	11	>6.5
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose dolphin	*Tursiops truncatus*	California Coastal	-/- ; N	453 (0.06, 346, 2011)	2.7	>2
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	San Francisco-Russian River.	-/- ; N	9,886 (0.51, 6,625, 2011)	66	0
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
California sea lion	*Zalophus californianus*	U.S.	-/- ; N	296,750 (n/a, 153,337, 2011).	9,200	389
Northern fur seal	*Callorhinus ursinus*	California	-/- ; N	14,050 (n/a, 7,524, 2013)	451	1.8
Guadalupe fur seal	*Arctocephalus townsendi*	Mexico to California	T/D ; Y	20,000 (n/a, 15,830, 2010)	542	>3.2
Family Phocidae (earless seals):						
Pacific harbor seal	*Phoca vitulina richardii*	California	-/- ; N	30,968 (n/a, 27,348, 2012)	1,641	43
Northern elephant seal	*Mirounga angustirostris*	California Breeding	-/- ; N	179,000 (n/a, 81,368, 2010).	4,882	8.8

[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; Nmin 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.

NOTE—Italicized species are not expected to be taken or proposed for authorization.

All species that could potentially occur in the project area are included in Table 1. However, the temporal and/or spatial occurrence of humpback whales and Guadalupe fur seals is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Humpback whales are rare visitors to the interior of San Francisco Bay. A recent, seasonal influx of humpback whales inside San Francisco Bay near the Golden Gate was recorded from April to November in 2016 and 2017 (Keener 2017). The Golden Gate is outside of this project's action area and humpback whales are not expected to be present during the project. Guadalupe fur seals occasionally range into the waters of Northern California and the Pacific Northwest. The Farallon Islands (off central California) and Channel Islands (off southern California) are used as haulouts during these movements (Simon 2016). Juvenile Guadalupe fur seals occasionally strand in the vicinity of San Francisco, especially during El Niño events. Most strandings along the California coast are animals younger than two years old, with evidence of malnutrition (NMFS 2017c). In the rare event that a Guadalupe fur seal or humpback whale is detected within the Level A or Level B harassment zones, work will cease until the animal has left the area (see ''Mitigation'').

Information concerning marine mammal hearing, including marine mammal functional hearing groups, was provided in the **Federal Register** notice for the proposed IHA (83 FR 18507; April 27, 2018), therefore that information is not repeated here; please refer to that **Federal Register** notice for this information. For further information about marine mammal functional hearing groups and associated frequency ranges, please see NMFS (2016) for a review of available information. Seven marine mammal species (three cetacean and four pinniped (two phocid and two otariid) species) have the reasonable potential to co-occur with the construction activities. Of the cetacean species that may be present, one is classified as a low-frequency cetacean (*i.e.,* gray whale), one is classified as a mid-frequency cetacean (*i.e.,* bottlenose dolphin), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from pile driving activities for the Ferry Terminal Expansion Project have the potential to result in behavioral harassment of marine mammals in the vicinity of the action area. The **Federal Register** notice for the proposed IHA (83 FR 18507; April 27, 2018) included a discussion of the effects of anthropogenic noise on marine mammals, therefore that information is not repeated here; please refer to the **Federal Register** notice for that information. No instances of hearing threshold shifts, injury, serious injury, or mortality are expected as a result of the planned activities.

The main impact to habitat associated with the Ferry Terminal Expansion Project would be temporarily increased sound levels and the associated direct effects on marine mammals. The project would not result in permanent impacts to habitats used by marine mammals, such as haulout sits, but may have potential short-term impacts to food sources such as fish and minor impacts to the immediate substrate during installation of piles. These potential effects are discussed in detail in the **Federal Register** notice for the proposed IHA (83 FR 18507; April 27, 2018), therefore that information is not repeated here; please refer to that **Federal Register** notice for that information.

Estimated Take

This section provides an estimate of the number of incidental takes authorized 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 exposure to acoustic sources (*i.e.,* impact and vibratory pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for harbor seals and California sea lions due to larger predicted auditory injury zones. Auditory injury is unlikely to occur for cetaceans. The mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable.

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 take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed 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 permanent threshold shift (PTS) of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to 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 decibels (dB) re 1 microPascal (μPa) (root mean square (rms)) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns and impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

WETA's activity includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) are applicable.

Level A harassment – 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). WETA's activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the table below. 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 2. Thresholds Identifying the Onset of Permanent Threshold Shift.

	PTS Onset Acoustic Thresholds* (Received Level)	
Hearing Group	**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 1μPa^{2}s. 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.

Level B Harassment

In-Water Disturbance during Vibratory Pile Driving—Level B behavioral disturbance may occur

incidental to the use of a vibratory or impact hammer due to propagation of underwater noise during installation of new steel piles. A total of 81 steel piles will be installed at the Ferry Terminal. During the 2017 construction season, all piles were installed using a vibratory hammer. The hydroacoustic monitoring conducted for vibratory driving during the 2017 season has been used to establish the expected source values of piles driven during the 2018 construction season. The SLs were measured at 10 m for the 30- and 36-in piles and between 9 and 15 m for the 24-in piles. The SLs for 24-in piles were calculated using the measured values from 9 to 15 m normalized to 10 m. The median RMS values were used as the SLs to estimate take from vibratory driving. These values are provided in Table 3.

TABLE 3—SOUND SOURCE LEVELS BY PILE TYPE

Pile size and installation method	Source level at 10 m (dB re 1 μPa)		
	Peak	RMS	SEL
24-in Vibratory	.....	154	.....
24-in Impact[1 2]	196	183	170
30-in Vibratory	.....	151	.....
30-in Impact[1 2]	203	183	170
36-in Vibratory	.....	157	.....
36-in Impact[1 2]	203	186	176

[1] Caltrans 2009.
[2] Impact SLs include 7 dB reduction due to bubble curtain.

Additionally, monitoring conducted during 2017 construction established that for vibratory pile driving in the project area, the transmission loss is greater than the standard value of 15 used in typical take calculations. For estimating take from vibratory pile driving, Level B harassment zones were calculated using the average transmission loss measured during pile driving from June through August of 2017 minus one standard deviation of those measurements (22.26 − 3.51 = 18.75). Additional pile driving in September and November of 2017 yielded a mean transmission loss of 19.0. The F value originally calculated (18.75) is comparable to the final reported average and is slightly more conservative, and was therefore used to calculate the harassment zones from vibratory pile driving. Using the calculated transmission loss model (18.75logR), the in-water Level B harassment zones were determined for each pile size (Table 4). For 24-in steel piles driven with a vibratory hammer, the Level B harassment zone is expected to be 651 m (2,136 ft). For 30-in piles, the Level B harassment zone is expected to be 450 m (1,476 ft). For 36-in piles, the Level B harassment zone is expected to be 940 m (3,084 ft).

In-Water Disturbance During Impact Pile Driving—As stated previously, all piles installed in the 2017 construction season were installed solely using a vibratory hammer. However, the use of an impact hammer to install piles may be required; therefore, the effects of impact pile driving is discussed here. Level B behavioral disturbance may occur incidental to the use of an impact hammer due to the propagation of underwater noise during the installation of steel piles. Piles will be driven to approximately 120 to 140 ft below Mean Lower Low Water (MLLW). Installation of these pipe piles may require up to 1,800 strikes per piles from an impact hammer using a DelMag D46–32, or similar diesel hammer, producing approximately 122,000 foot-pounds maximum energy per blow, and 1.5 seconds per blow average.

Other projects constructed under similar circumstances were reviewed to estimate the approximate noise produced by the 24-, 30, and 36-in steel piles. These projects include the driving of similarly sized piles at the Alameda Bay Ship and Yacht project, the Rodeo Dock Repair project, and the Amorco Wharf Repair Project (Caltrans 2012). Bubble curtains will be used during the installation of these piles, which, based on guidance provided by Caltrans for a mid-sized steel piles (with a diameter greater than 24 but less than 48 in), is expected to reduce noise levels by 7 dB rms (Caltrans 2015a).

Because no impact pile driving was used in the 2017 construction season, no site-specific transmission loss measurements exist for this project. The Practical Spreading Loss Model (15logR) is used to determine the Level B harassment zones for each pile size (Table 4). Both 24- and 30-in steel piles have a SL of 183 dB rms re 1 μPa and therefore have the same Level B harassment zone of 341 m (1,120 ft). For 36-in piles, the Level B harassment zone is expected to be 541 m (1,775 ft).

TABLE 4—PILE DRIVING SOURCE LEVELS AND LEVEL B HARASSMENT ZONES

Pile size and installation method	Source level (dB re 1 μPa rms)	Level B Threshold (dB re 1 μPa rms)	Propagation (xLogR)	Distance to level B threshold (m)
24-in Vibratory	154	120	18.75	651
24-in Impact	[a] 183	160	15	341
30-in Vibratory	151	120	18.75	450
30-in Impact	[a] 183	160	15	341
36-in Vibratory	157	120	18.75	940
36-in Impact	[a] 186	160	15	541

[a] Impact source levels include 7 dB reduction due to bubble curtain.

Level A Harassment

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, we developed a User Spreadsheet 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 (such as impact and vibratory 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.

TABLE 5—INPUTS FOR DETERMINING DISTANCES TO CUMULATIVE PTS THRESHOLDS

Pile size and installation method	Source level at 10 m (SEL)	Source level at 10 m (rms)	Propagation (xLogR)	Number of strikes per pile	Number of piles per day	Activity duration (seconds)
24-in Vibratory	.....	154	18.75	.....	4	900
24-in Impact	[a] 170	.....	15	1,800	3	.....
30-in Vibratory	.....	151	18.75	.....	4	900
30-in Impact	[a] 170	.....	15	1,800	3	.....
36-in Vibratory	.....	157	18.75	.....	4	1200
36-in Impact	[a] 176	.....	15	1,800	2	.....

[a] Source level includes 7 dB reduction due to bubble curtain.

TABLE 6—RESULTING LEVEL A ISOPLETHS

Pile size and installation method	Distance to level A threshold (m)				
	Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocid pinnipeds	Otariid pinnipeds
24-in Vibratory	3.1	<1	4	2	<1
24-in Impact	418	15	498	224	16
30-in Vibratory	2	<1	3	1	<1
30-in Impact	418	15	498	224	16
36-in Vibratory	5	<1	7	4	<1
36-in Impact	801	29	954	429	31

The resulting PTS isopleths assume an animal would remain stationary at that distance for the duration of the activity. The largest isopleths result from impact pile driving. All piles installed in the 2017 construction season were driven solely using a vibratory hammer indicating that vibratory driving will be the most likely method of installation in the 2018 season. Level A take of harbor seals and California sea lions has been authorized given their increased presence in the nearshore waters of the project site and the large Level A harassment zones, especially for 36-in piles.

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.

Gray Whale

Caltrans Richmond-San Rafael Bridge project monitors recorded 12 living and two dead gray whales in the surveys performed in 2012. All sightings were in either the Central or North Bay, and all but two sightings occurred during the months of April and May. One gray whale was sighted in June and one in October. The Oceanic Society has tracked gray whale sightings since they began returning to San Francisco Bay regularly in the late 1990s. Most sightings occurred just a mile or two inside of the Golden Gate, with some traveling into San Pablo Bay in the northern part of the San Francisco Bay (Self 2012). The Oceanic Society data show that all age classes of gray whales enter San Francisco Bay and they enter as singles or in groups of up to five individuals (Winning 2008). It is estimated that two to six gray whales enter San Francisco Bay in any given year.

Bottlenose Dolphin

Bottlenose dolphins are most often seen just within the Golden Gate or just east of the bridge when they are present in San Francisco Bay, and their presence may depend on the tides (GGCR 2016). Beginning in the summer of 2015, one to two bottlenose dolphins have been observed frequently swimming in the Oyster Point area of South San Francisco (GGCR 2016, 2017; Perlman 2017). Despite this recent occurrence, this stock is highly transitory in nature and is not expected to spend extended periods of time in San Francisco Bay. However, the number of sightings in the Central Bay has increased, suggesting that bottlenose dolphins are becoming more of a resident species.

Harbor Porpoise

In the last six decades, harbor porpoises have been observed outside of San Francisco Bay. The few porpoises that entered were not sighted past the Central Bay close to the Golden Gate Bridge. In recent years, however, there have been increasingly common observations of harbor porpoises in central, North, and South San Francisco Bay. According to observations by the

Golden Gate Cetacean Research team as part of their multi-year assessment, over 100 porpoises may be seen at one time entering San Francisco Bay and over 600 individual animals have been documented in a photo-ID database. Porpoise activity inside San Francisco Bay is thought to be related to tide-dependent foraging, as well as mating behaviors (Keener 2011; Duffy 2015). Sightings are concentrated in the vicinity of the Golden Gate Bridge and Angel Island, with fewer numbers sighted south of Alcatraz and west of Treasure Island (Keener 2011).

California Sea Lion

In San Francisco Bay, sea lions haul out primarily on floating K docks at Pier 39 in the Fisherman's Wharf area of the San Francisco Marine. The Pier 39 haulout is approximately 1.5 miles from the project vicinity. The Marine Mammal Center (TMMC) in Sausalito, California has performed monitoring surveys at this location since 1991. A maximum of 1,706 sea lions was seen hauled out during one survey effort in 2009 (TMMC 2015). Winter numbers are generally over 500 animals (Goals Project 2000). In August to September, counts average from 350 to 850 (NMFS 2004). Of the California sea lions observed, approximately 85 percent were male. No pupping activity has been observed at this site or at other locations in the San Francisco Bay (Caltrans 2012). The California sea lions usually frequent Pier 39 in August after returning from the Channel Islands (Caltrans 2013). In addition to the Pier 39 haulout, California sea lions haul out on buoys and similar structures throughout San Francisco Bay. They are mainly seen swimming off the San Francisco and Marin shorelines within San Francisco Bay, but may occasionally enter the project area to forage.

Northern Fur Seal

Juvenile northern fur seals occasionally strand during El Niño events (TMMC 2016). In normal years, TMMC admits about five northern fur seals that strand on the central California coast. During El Niño years, this number dramatically increases. For example, during the 2006 El Niño event, 33 fur seals were admitted. Some of these stranded animals were collected from shorelines in San Francisco Bay (TMMC 2016). The shoreline in the vicinity of the project is developed waterfront, consisting of piers and wharves where northern fur seals are unlikely to strand.

Pacific Harbor Seal

Long-term monitoring studies have been conducted at the largest harbor seal colonies in Point Reyes National Seashore and Golden Gate National Recreation Area since 1976. Castro Rocks and other haulouts in San Francisco Bay are part of the regional survey area for this study and have been included in annual survey efforts. Between 2007 and 2012, the average number of adults observed ranged from 126 to 166 during the breeding season (March through May), and from 92 to 129 during the molting season (June through July) (Truchinski *et al.,* 2008; Flynn *et al.,* 2009; Codde *et al.,* 2010, 2011, 2012; Codde and Allen 2015). Marine mammal monitoring at multiple locations inside San Francisco Bay was conducted by the California Department of Transportation (Caltrans) from May 1998 to February 2002, and determined that at least 500 harbor seals populate San Francisco Bay (Green *et al.,* 2002). This estimate agrees with previous seal counts in the San Francisco Bay, which ranged from 524 to 641 seals from 1987 to 1999 (Goals Project 2000).

Yerba Buena Island is the nearest harbor seal haulout site, with as many as 188 individuals observed hauled out. Harbor seals are more likely to be hauled out in the late afternoon and evening, and are more likely to be in the water during the morning and early afternoon. Tidal stage is a major controlling factor of haulout use by harbor seals, with more seals present during low tides than high tide periods (Green *et al.,* 2002). Therefore, the number of harbor seals in the vicinity of Yerba Buena Island will vary throughout the work period.

Northern Elephant Seal

Northern elephant seals are seen frequently on the California coast. Elephant seals aggregate at various sites along the coast to give birth and breed from December through March. Pups remain onshore or in adjacent shallow water through May. Adults make two foraging migrations each year, one after breeding and the second after molting (Stewart and DeLong 1995). Most strandings occur in May as young pups make their first trip out to sea. When those pups return to their rookery sites to molt in late summer and fall, some make brief stops in San Francisco Bay. Approximately 100 juvenile elephant seals strand in San Francisco Bay each year, including individual strandings at Yerba Buena Island and Treasure Island (fewer than 10 strandings per year) (Caltrans 2015b).

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

While impact pile driving may be used during this project, all piles in the previous year of construction were installed completely with vibratory pile driving. Impact driving take calculations are included for informational purposes (Tables 7 and 8). However, only vibratory pile driving take calculations are conservatively used to calculate Level B takes in this IHA as vibratory driving is the most likely method of pile installation and results in greater Level B harassment zones. In the event impact driving does occur, we have authorized small numbers of Level A takes of harbor seals and California sea lions due to the large Level A harassment zones.

Gray Whale

Gray whales occasionally enter San Francisco Bay during their northward migration period of February and March. Pile driving will not occur during this time and gray whales are not likely to be present at other times of the year. It is estimated that two to six gray whales enter the Bay in any given year, but they are unlikely to be present during the work period (June 1 through November 30). However, individual gray whales have occasionally been observed in San Francisco Bay during the work period, and therefore it is estimated that, at most, one pair of gray whales may be exposed to Level B harassment during two days of pile driving if they enter the Level B harassment zones (Table 12).

Bottlenose Dolphin

When bottlenose dolphins are present in San Francisco Bay, they are more typically found close to the Golden Gate. Recently, beginning in 2015, two individuals have been observed frequently in the vicinity of Oyster Point (GGCR 2016, 2017; Perlman 2017). The average reported group size for bottlenose dolphins is five. Reports show that a group normally comes into San Francisco Bay and transits past Yerba Buena Island once per week for approximately a two week stint, then leaves (NMFS 2017b). Assuming the dolphins come into San Francisco Bay three times per year, the group of five dolphins would make six passes through the Level B harassment zone for a total of 30 takes (Table 11).

Harbor Porpoise

A small but growing population of harbor porpoises uses San Francisco Bay. Porpoises are usually spotted in the vicinity of Angel Island and the Golden

Gate Bridge (Keener 2011), but may use other areas of the Central Bay in low numbers. During construction activities in 2017, marine mammal observers recorded eight sightings of harbor porpoises, including a group of two to three individuals that was seen three times over the course of the pile-driving season. Harbor porpoises generally travel individually or in small groups of two or three (Sekiguchi 1995), and a pod of up to four individuals was observed in the area south of Yerba Buena Island during the 2017 Bay Bridge monitoring window. A pod of four harbor porpoises could potentially enter the Level B harassment zone on as many as eight days of pile driving, for 32 total takes (Table 11).

California Sea Lion

Caltrans has conducted monitoring of marine mammals in the vicinity of the Bay Bridge for 16 years. From those data, Caltrans has produced at-sea density estimates for California sea lions of 0.161 animals per square kilometer (0.42 per square mile) for the summer-late fall season (Caltrans 2016). Marine mammal monitoring observations from the 2017 construction season were used to calculate a project-specific estimate of take per driving day (1.29 animals per day). Observations from marine mammal monitoring in 2017 were assumed to represent the occurrence of California sea lions along the waterfront while the Caltrans density represents the occurrence of California sea lions in open water in the bay. The two numbers were combined to calculate the daily average take over the entire Level B harassment zone (Table 7).

TABLE 7—ESTIMATED DAILY CALIFORNIA SEA LION TAKES

Pile size and installation method	Area of level B harassment zone (square km)	At-sea density (animals per square km) [a]	Takes per day from density	Takes per day from 2017 monitoring	Total daily level B takes
24-in Vibratory	0.519	0.161	0.0836	1.29	1.37
30-in Vibratory	0.248	0.161	0.0399	1.29	1.33
36-in Vibratory	1.084	0.161	0.1745	1.29	1.46

[a] Caltrans 2016.

During El Niño conditions, the density of California sea lions in San Francisco Bay may be much greater than the value used above. The likelihood of El Niño conditions occurring in 2018 is currently low, with La Niña conditions expected to develop (NOAA 2018). However, to account for the potential of El Niño developing in 2018, daily take estimated has been increased by a factor of 5 for each pile type (Table 8).

TABLE 8—ESTIMATED TOTAL CALIFORNIA SEA LION TAKES FROM VIBRATORY PILE DRIVING

Pile size	Number of piles	Number of days	Daily takes	Total takes by pile type
24-in	35	18	6.87	124
30-in	18	9	6.65	60
36-in	28	14	7.32	103
Total	.....	.....	.....	286

In addition to Level B takes due to vibratory pile driving, NMFS has authorized a small number of Level A takes due to impact pile driving, should impact driving occur. Given the 31 m Level A harassment zone from impact driving of 36-in piles, NMFS has authorized the Level A take of one California sea lion per day of impact driving of 36-in piles (14 days) for a total of 14 Level A takes. WETA will be required to implement a 30 m shutdown zone to minimize Level A takes but this authorization allows for the taking of California sea lions that unexpectedly surface within the Level A zone before a shutdown can be initiated.

Northern Fur Seal

The incidence of northern fur seals in San Francisco Bay depends largely on oceanic conditions, with animals more likely to strand during El Niño events. El Niño conditions are unlikely to develop in 2018 (NOAA 2018) but it is anticipated that up to 10 northern fur seals may be in San Francisco Bay and enter the Level B harassment zone (Table 11) (NMFS 2016b).

Pacific Harbor Seal

Caltrans has produced at-sea density estimates for Pacific harbor seals of 3.957 animals per square kilometer (10.25 per square mile) for the fall-winter season (Caltrans 2016). Even though work will predominantly occur during the summer, when at-sea density has been observed to be lower (Caltrans 2016), the higher value of fall-winter density is conservatively used. Additionally, marine mammal monitoring observations from the 2017 construction season were used to calculate a project-specific estimate of take per driving day (3.18 animals per day). Observations from marine mammal monitoring in 2017 were assumed to represent the occurrence of harbor seals along the waterfront while the Caltrans density represents the occurrence of harbor seals in open water in the bay. The two numbers were combined to calculate the daily average take over the entire Level B harassment zone (Table 9). The daily take and days of pile installation were used to calculate total harbor seal Level B takes (Table 10).

TABLE 9—ESTIMATED DAILY HARBOR SEAL TAKES

Pile size and installation method	Area of level B harassment zone (square km)	At-sea density (animals per square km) [a]	Takes per day from density	Takes per day from 2017 monitoring	Total daily level B takes
24-in Vibratory	0.510	3.957	2.054	3.18	5.23
30-in Vibratory	0.248	3.957	0.981	3.18	4.16
36-in Vibratory	1.084	3.957	4.289	3.18	7.47

[a] Caltrans 2016.

TABLE 10—ESTIMATED TOTAL PACIFIC HARBOR SEAL TAKES FROM VIBRATORY PILE DRIVING

Pile size	Number of piles	Number of days	Daily takes	Total takes by pile type
24-in	35	18	5.23	94
30-in	18	9	4.16	37
36-in	28	14	7.47	105
Total	.....	.....	.....	236

In addition to Level B takes due to vibratory pile driving, NMFS has authorized a small number of Level A takes due to impact pile driving, should impact driving occur. Given the large (224–429 m) Level A harassment zones from impact driving, NMFS has authorized the Level A take of three harbor seals per day on half of the planned days of activity (21 days) for a total of 63 Level A takes. WETA will be required to implement a 30 m shutdown zone to minimize Level A takes but this authorization allows for the taking of harbor seals that unexpectedly surface within the Level A zone before a shutdown can be initiated.

Northern Elephant Seal

Small numbers of elephant seals haul out or strand on Yerba Buena Island and Treasure Island each year. Monitoring of marine mammals in the vicinity of the Bay Bridge has been ongoing for 15 years. From these data, Caltrans has produced an estimated at-sea density for elephant seals of 0.06 animals per square kilometer (0.16 per square mile) (Caltrans 2015b). Most sightings of elephant seals occur in spring or early summer, and are less likely to occur during the period of in-water work for this project. As a result, densities during pile driving would be much lower. It is possible that a lone elephant seal may enter the Level B harassment zone once per week during the 26 week pile driving window (June 1 to November 30) for a total of 26 takes (Table 11).

TABLE 11—TOTAL AUTHORIZED TAKES

	Gray whale	Bottlenose dolphin	Harbor porpoise	California sea lion	Northern fur seal	Pacific harbor seal	Northern elephant seal
Level B Take Authorized	4	30	32	286	10	236	26
Level A Take Authorized	0	0	0	14	0	63	0
Total	4	30	32	300	10	299	26
Percent of Total Stock (%)	0.02	6.9	0.32	0.10	0.07	0.96	0.01

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, impact on operations, and, in the case

of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Mitigation for Marine Mammals and Their Habitat

General Construction Measures

A Spill Prevention Control and Countermeasure (SPCC) plan has been prepared to address the emergency cleanup of any hazardous material, and will be available onsite. The SPCC plan incorporates SPCC, hazardous waste, stormwater, and other emergency planning requirements. In addition, the project will comply with the Port's stormwater regulations. Fueling of land and marine-based equipment will be conducted in accordance with procedures outlined in the SPCC. Well-maintained equipment will be used to perform work, and except in the case of a failure or breakdown, equipment maintenance will be performed offsite. Equipment will be inspected daily by the operator for leaks or spills. If leaks or spills are encountered, the source of the leak will be identified, leaked material will be cleaned up, and the cleaning materials will be collected and properly disposed. Fresh cement or concrete will not be allowed to enter San Francisco Bay. All construction materials, wastes, debris, sediment, rubbish, trash, fencing, etc. will be removed from the site once project construction is complete, and transported to an authorized disposal area.

Pile Driving

Pre-activity monitoring will take place from 30 minutes prior to initiation of pile driving activity and post-activity monitoring will continue through 30 minutes post-completion of pile driving activity. Pile driving may commence at the end of the 30-minute pre-activity monitoring period, provided observers have determined that the shutdown zone (described below) is clear of marine mammals, which includes delaying start of pile driving activities if a marine mammal is sighted in the zone, as described below. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

If a marine mammal approaches or enters the shutdown zone during activities or pre-activity monitoring, all pile driving activities at that location shall be halted or delayed, respectively. If pile driving is halted or delayed due to the presence of a marine mammal, the activity may not resume or commence until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone and 15 or 30 minutes (for pinnipeds/small cetaceans or large cetaceans, respectively) have passed without re-detection of the animal. 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 thirty minutes.

For all pile driving activities, a minimum of one protected species observed (PSO) will be required, stationed at the active pile driving rig or at the best vantage point(s) practicable to monitor the shutdown zones for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. Two PSOs will be required on days when impact pile driving occurs.

Monitoring of pile driving will be conducted by qualified PSOs (see below) who will have no other assigned tasks during monitoring periods. WETA will adhere to the following conditions when selecting observers:

- Independent PSOs will be used (*i.e.,* not construction personnel);
- PSOs must have prior experience working as a marine mammal observer during construction activities; and
- WETA will submit PSO CVs for approval by NMFS.

WETA will ensure that observers have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- 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, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); 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.

To prevent Level A take of cetaceans, elephant seals, and Northern fur seals, shutdown zones equivalent to the Level A harassment zones will be established. If the Level A harassment zone is less than 10 m, a minimum 10 m shutdown zone will be enforced. WETA will implement shutdown zones as follows:

TABLE 12—PILE DRIVING SHUTDOWN ZONES

Pile size and installation method	Shutdown zone (m)				
	Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocid pinnipeds	Otariid pinnipeds
24-in Vibratory	10	10	10	10	10
24-in Impact	420	15	500	30 for harbor seals, 224 for all other species.	16
30-in Vibratory	10	10	10	10	10
30-in Impact	420	15	500	30 for harbor seals, 224 for all other species.	16
36-in Vibratory	10	10	10	10	10
36-in Impact	800	30	955	30 for harbor seals, 430 for all other species.	30

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the Level B harassment zones (Table 4), pile

driving and removal activities must cease immediately using delay and shut-down procedures. Similarly, if a species for which Level A take has not been authorized, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the Level A harassment zones (Table 6), pile driving and removal activities must cease immediately. Activities must not resume until the animal has been confirmed to have left the area or 15 or 30 minutes (pinniped/small cetacean or large cetacean, respectively) has elapsed.

Piles driven with an impact hammer will employ a ''soft start'' technique to give fish and marine mammals an opportunity to move out of the area before full-powered impact pile driving begins. This soft start will include an initial set of three strikes from the impact hammer at reduced energy, followed by a 30 second waiting period, then two subsequent three-strike sets. Soft start will be required at the beginning of each day's impact pile driving work and at any time following a cessation of impact pile driving of 30 minutes or longer.

Impact hammers will be cushioned using a 12-in thick wood cushion block. WETA will also employ a bubble curtain during impact pile driving. WETA will implement the following performance standards:

- The bubble curtain must distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column;
- The lowest bubble ring shall be in contact with the mudline for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline contact. No parts of the ring or other objects shall prevent full mudline contact; and
- WETA shall require that construction contractors train personnel in the proper balancing of air flow to the bubblers, and shall require that construction contractors submit an inspection/performance report for approval by WETA within 72 hours following the performance test. Corrections to the attenuation device to meet the performance standards shall occur prior to impact driving.

Based on our evaluation of the mitigation measures listed above, NMFS has determined that the 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.

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 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.

Hydroacoustic Monitoring

WETA's monitoring and reporting is also described in their Hydroacoustic Monitoring Plan and Marine Mammal Monitoring Plan, available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

Hydroacoustic monitoring will be conducted in consultation with the California Department of Fish and Wildlife (CDFW) during a minimum of ten percent of all impact pile driving activities. Hydroacoustic monitoring of vibratory pile driving was completed during the 2017 construction season and will not be conducted in 2018. Monitoring of impact pile driving will be done in accordance with the methodology outlined in the Hydroacoustic Monitoring Plan. The monitoring will be conducted to achieve the following:

- Be based on the dual metric criteria (Popper *et al.,* 2006) and the accumulated SEL;
- Establish field locations that will be used to document the extent of the area experiencing 187 dB SEL accumulated;
- Verify the distance of the Marine Mammal Level A harassment/shutdown zone and Level B harassment zone thresholds;
- Describe the methods necessary to continuously assess underwater noise on a real-time basis, including details on the number, location, distance, and depth of hydrophones and associated monitoring equipment;
- Provide a means of recording the time and number of pile strikes, the peak sound energy per strike, and interval between strikes; and
- Provide provisions to provide all monitoring data to the CDFW and NMFS.

Visual Marine Mammal Observations

WETA will collect sighting data and behavioral responses to construction for marine mammal species observed in the Level B harassment zones during the period of activity. All PSOs will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring. WETA proposes to use one PSO to monitor the shutdown zones and Level B harassment zones during vibratory pile driving. During impact pile driving, two PSOs will be used. The monitoring zones will be established equivalent to the Level B harassment zones for each pile size and installation method (Table 4). The PSO will monitor the shutdown zones and monitoring zones before, during, and after pile driving. Based on our requirements, WETA will implement the following procedures for pile driving and removal:

- The PSO will be located at the best vantage point in order to properly see the entire shutdown zone and as much of the monitoring zone as possible;

• During all observation periods, the observer will use binoculars and the naked eye to search continuously for marine mammals;

• If the shutdown zones are obscured by fog or poor lighting conditions, pile driving will not be initiated until that zone is visible. Should such conditions arise while pile driving is underway, the activity would be halted; and

• The shutdown and monitoring zones will be monitored for the presence of marine mammals before, during, and after any pile driving activity.

PSOs implementing the monitoring protocol will assess its effectiveness using an adaptive approach. The monitoring biologist will use their best professional judgment throughout implementation and seek improvements to these methods when deemed appropriate. Any modifications to the protocol will be coordinated between NMFS and WETA.

In addition, the PSO will survey the Level A and Level B harassment zones on two separate days—no earlier than seven days before the first day of construction—to establish baseline observations. Monitoring will be timed to occur during various tides (preferably low and high tides) during daylight hours from locations that are publicly accessible (*e.g.,* Pier 14 or the Ferry Plaza). The information collected from baseline monitoring will be used for comparison with results of monitoring during pile-driving activities.

Data Collection

WETA will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, WETA will attempt to distinguish between the number of individual animals taken and the number of incidences of take. We require that, at a minimum, the following information be collected on the sighting forms:

• 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, age and sex class of marine mammals;

• Description of any observable marine mammal behavior patterns, including bearing and direction of travel, and if possible, the correlation to SPLs;

• Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;

• Description of implementation of mitigation measures (*e.g.,* shutdown or delay);

• Locations of all marine mammal observations; and

• Other human activity in the area.

Reporting

A draft report will be submitted to NMFS within 90 days of the completion of marine mammal monitoring, or sixty days prior to the requested date of issuance of any future IHA for projects at the same location, whichever comes first. The report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving and removal days, and will also provide descriptions of any behavioral responses to construction activities by marine mammals and a complete description of all mitigation shutdowns and the results of those actions and an extrapolated total take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within 30 days following resolution of comments on the draft report.

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 activities associated with the ferry terminal construction project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level A (PTS) and Level B harassment (behavioral disturbance), from underwater sounds generated from pile driving and removal. 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 hammers will be the primary method of installation (impact driving is included only as a contingency). Impact pile driving produces short, sharp pulses with higher peak levels and much sharper rise time to reach those peaks. If impact driving is necessary, 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. WETA will also employ the use of 12-in-thick wood cushion block on impact hammers, and a bubble curtain as sound attenuation devices. Environmental conditions in San Francisco Ferry Terminal mean that marine mammal detection ability by trained observers is high, enabling a high rate of success in implementation of shutdowns to avoid injury.

WETA's activities are localized and of relatively short duration (a maximum of 41 days of pile driving over the work season). The entire project area is limited to the San Francisco ferry terminal area and its immediate surroundings. These localized and short-term noise exposures may cause short-term behavioral modifications in harbor seals, northern fur seals, northern elephant seals, California sea lions, harbor porpoises, bottlenose dolphins, and gray whales. Moreover,

the planned mitigation and monitoring measures are expected to reduce the likelihood of injury and behavior exposures. Additionally, no important feeding and/or reproductive areas for marine mammals are known to be within the ensonified area during the construction time frame.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat. The project activities will not modify existing marine mammal habitat for a significant amount of time. The 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 short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

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. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in fitness for the affected individuals, and thus will not result in any adverse impact to the stock as a whole.

In summary and as described above, the following factors primarily support our 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 is anticipated or authorized
- Injurious takes are not expected due to the presumed efficacy of the planned mitigation measures in reducing the effects of the specified activity to the level of least practicable impact;
- Level B harassment may consist of, at worst, temporary modifications in behavior (*e.g.,* temporary avoidance of habitat or changes in behavior);
- The lack of important feeding, pupping, or other areas in the action area;
- The high level of ambient noise already in the ferry terminal area; and
- The small percentage of the stock that may be affected by project activities (less than seven percent for all species).

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 monitoring and mitigation measures, NMFS finds that the total marine mammal take from the 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 11 details the number of instances that animals could be exposed to received noise levels that could cause Level A and Level B harassment for the planned work at the ferry terminal project site relative to the total stock abundance. The instances of take authorized to be taken for all stocks are considered small relative to the relevant stocks or populations even if each estimated instance of take occurred to a new individual—an unlikely scenario. The total percent of the population (if each instance was a separate individual) for which take is requested is approximately seven percent for bottlenose dolphins, two percent for harbor seals, and less than one percent for all other species (Table 13). For pinnipeds occurring in the vicinity of the ferry terminal, there will almost certainly be some overlap in individuals present day-to-day, and the number of individuals taken is expected to be notably lower. Similarly, the number of bottlenose dolphins that could be subject to Level B harassment is expected to be a single pod of five individuals exposed up to six times over the course of the project.

Based on the analysis contained herein of the activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS 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 authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Authorization

NMFS has issued an IHA to WETA for the potential harassment of small numbers of seven marine mammal species incidental to the Downtown San Francisco Ferry Terminal Expansion Project, South Basin Improvements Project, including the previously mentioned mitigation, monitoring, and reporting measures.

Dated: June 15, 2018.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–13281 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG242

Fisheries of the Northeastern United States; Bluefish Fishery; Scoping Process; Correction

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

ACTION: Notice of intent to prepare an environmental impact statement; notice

of initiation of scoping process; notice of public scoping meetings; requests for comments; correction.

SUMMARY: This action corrects the **DATES, ADDRESSES**, and **SUPPLEMENTARY INFORMATION** sections of a notice published on June 6, 2018, which contained some incorrect information that could leave the public misinformed. This notice extends the end date of the comment period, changes the location of a scoping hearing, and adds a sentence to clarify which scoping hearings will be joint Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission hearings.

DATES: The deadline for receipt of comments on the notice of intent published on June 6, 2018 (83 FR 26267), is extended to July 30, 2018. Written comments must be received on or before 11:59 p.m., EDT, on July 30, 2018. Twelve public scoping meetings will be held during this comment period.

ADDRESSES: Written comments on the referenced notice may be sent by any of the following methods:

- *Email to the following address: nmfs.garBluefishAmend@noaa.gov.* Include ''Bluefish Allocation Amendment Scoping Comments'' in the subject line;
- Mail or hand deliver to Dr. Christopher M. Moore, Executive Director; Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, Delaware 19901. Mark the outside of the envelope ''Bluefish Allocation Amendment Scoping Comments''; or
- Fax to (302) 674–5399.

The scoping document may be obtained from the Council office at the previously provided address, by request to the Council by telephone (302) 674–2331, or via the internet at *http://www.mafmc.org.*

Comments may also be provided verbally at any of the 12 public scoping meetings. Hearings will be held June 20–July 16 in nine coastal states from Massachusetts to Florida. The last four hearings will be joint hearings of the Council and Commission. See **SUPPLEMENTARY INFORMATION** of the original notice (83 FR 26267), and the corrections made below, for dates, times, and locations.

FOR FURTHER INFORMATION CONTACT: Dr. Christopher M. Moore, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901; telephone: 302–674–2331.

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2018, NMFS published a notice of intent (NOI) and scoping announcement (83 FR 26267) to provide background information and to request public comment on potential adjustments to the Bluefish Fishery Management Plan (FMP) through an allocation amendment. The NOI provides the public with a formal opportunity to comment on the specific ideas mentioned in the scoping document, as well as any additional ideas and solutions that could improve Bluefish FMP.

Need for Correction

In the original notice, the established comment period ended on July 6, 2018, before the last four scoping hearings were scheduled to take place, and without adequate time to receive public comment following the hearings. This correction extends the comment period to July 30, 2018, to appropriately encompass all of the scoping hearings, and to provide the Commission more time to accept final comments. In addition to the extension of the comment period, the location of the scoping hearing in Dover, Delaware, needed to be changed due to building availability. The date and time of this meeting (Thursday, June 21, 2018, at 6:00 p.m.) will remain the same.

Correction

In FR Doc. 2018–12105, in the **Federal Register** of Wednesday, June 6, 2018, on page 26268, in the second column of the table, in the fifth line, the address for the Delaware scoping hearing is corrected to read as follows:

''Dover Public Library, 35 E. Loockerman St, Dover, Delaware 19901.''

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

Dated: June 15, 2018.

Jennifer M. Wallace,

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

[FR Doc. 2018–13277 Filed 6–20–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2017–HA–0065]

Submission for OMB Review; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

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 July 23, 2018.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Cortney Higgins, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, 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: TRICARE Select Enrollment, Disenrollment, and Change Form; DD Form 3043; OMB Control Number 0720–0061.

Type of Request: Extension.

Number of Respondents: 99,300.

Responses per Respondent: 1.

Annual Responses: 99,300.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 24,825.

Needs and Uses: The information collection requirement is necessary to obtain each non-active duty TRICARE beneficiary's personal information needed to: (1) Complete his/her enrollment into the TRICARE Select health plan option, (2) dis-enroll a beneficiary, or (3) change a beneficiary's enrollment information (*e.g.,* address, add a dependent, report other health insurance). This information is required to ensure the beneficiary's TRICARE benefits and claims are administered based on their TRICARE plan of choice. Without this new enrollment form, each non-active duty TRICARE beneficiary is automatically defaulted into direct care, limiting their health care options to military hospitals and clinics. These beneficiaries would have no TRICARE coverage when using the TRICARE network of providers for services not available at their local military hospital or clinic.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Cortney Higgins.

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.

Requests for copies of the information collection proposal should be sent to Mr. Licari at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: June 15, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–13288 Filed 6–20–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2018–ICCD–0044]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; National Assessment of Educational Progress (NAEP) 2019 and 2020

AGENCY: National Center for Education Statistics (NCES), 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 July 23, 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–2018–ICCD–0044. 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 206–06, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kashka Kubzdela, 202–245–7377 or email *NCES.Information.Collections@ed.gov.*

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: National Assessment of Educational Progress (NAEP) 2019 and 2020.

OMB Control Number: 1850–0928.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 712,888.

Total Estimated Number of Annual Burden Hours: 379,934.

Abstract: The National Assessment of Educational Progress (NAEP), conducted by the National Center for Education Statistics (NCES), is a federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, technology and engineering literacy (TEL), and the arts. The National Assessment of Educational Progress Authorization Act (Pub. L. 107–279 Title III, section 303) requires the assessment to collect data on specified student groups and characteristics, including information organized by race/ethnicity, gender, socio-economic status, disability, and limited English proficiency. It requires fair and accurate presentation of achievement data and permits the collection of background, noncognitive, or descriptive information that is related to academic achievement and aids in fair reporting of results. The intent of the law is to provide representative sample data on student achievement for the nation, the states, and subpopulations of students and to monitor progress over time. The nature of NAEP is that burden alternates from a relatively low burden in national-level administration years to a substantial burden increase in state-level administration years when the sample has to allow for estimates for individual states and some of the large urban districts. The request to conduct NAEP 2017–2019 was approved in August 2016, with the latest change requests approved in March 2018 (OMB# 1850–0928 v.1–9). This request updates the scope, sampling, procedures, and materials to be used in NAEP in 2019 and 2020, including operational assessments, pilot tests, and special studies. The NAEP results will be reported to the public through the Nation's Report Card as well as other online NAEP tools.

Dated: June 18, 2018.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–13351 Filed 6–20–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Policy Statement Regarding Long-Term Authorizations To Export Natural Gas to Non-Free Trade Agreement Countries

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Policy statement.

SUMMARY: The Department of Energy (DOE) stands behind the long-term authorizations it has issued under the Natural Gas Act, approving the export of natural gas (including liquefied natural

gas) to non-free trade agreement countries. DOE is firmly committed to the durability and stability of the non-FTA export authorizations it has granted to date, and to any export authorizations issued by DOE in the future.

DATES: This policy statement is applicable on June 21, 2018.

FOR FURTHER INFORMATION CONTACT: Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation and International Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585; (202) 586–2627; or Cassandra Bernstein or Ronald (R.J.) Colwell, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Ave. SW, Washington, DC 20585; (202) 586–9793 or (202) 586–8499.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

The Department of Energy (DOE), Office of Fossil Energy (FE), is responsible for authorizing exports of domestically produced natural gas, including liquefied natural gas (LNG), to foreign nations pursuant to section 3 of the Natural Gas Act (NGA).[1] Under section 3(a) of the NGA, DOE/FE reviews applications to export natural gas to countries with which the United States has not entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (non-FTA countries).[2] NGA section 3(a) states that DOE ''shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.'' [3] DOE has consistently interpreted this provision as creating a rebuttable presumption that a proposed export of natural gas is in the public interest.[4] Accordingly, DOE will conduct an informal adjudication and grant an application to export LNG to non-FTA countries under NGA section 3(a) unless DOE finds that the proposed exportation will not be consistent with the public interest.[5] Additionally, under section 16 of the NGA, DOE is authorized to ''prescribe, issue, make, amend, and rescind such [export] orders . . . as it may find necessary or appropriate . . .'' to satisfy its statutory responsibilities.[6]

B. Regulatory Background

To date, DOE/FE has issued 29 final long-term authorizations to export LNG and compressed natural gas to non-FTA countries in a cumulative volume totaling 21.35 billion cubic feet per day of natural gas (approximately 7.79 trillion cubic feet per year).[7] Each of these authorizations has a term of 20 years, with additional time provided for LNG export operations to commence. In each authorization, DOE/FE has included a statement acknowledging its authority under NGA section 16 to ''make, amend, and rescind such [export] orders . . . as it may find necessary or appropriate . . . .'' to satisfy its statutory responsibilities.[8]

In these authorizations, DOE has stated that ''[s]ome commenters [have] asked DOE to clarify the circumstances under which the agency would exercise its authority to revoke (in whole or in part) previously issued LNG export authorizations.'' [9] In response, DOE has stated that it ''cannot precisely identify all the circumstances under which such action would be taken.'' [10] DOE has maintained, however, that '' '[i]n the event of any unforeseen developments of such significant consequence as to put the public interest at risk, DOE/FE is fully authorized to take action as necessary to protect the public interest.' '' [11]

DOE/FE has never rescinded a long-term non-FTA export authorization for any reason. Further, DOE has no record of ever having vacated or rescinded an authorization to import or export natural gas over the objections of the authorization holder.[12]

DOE has rescinded (or ''vacated'') one long-term LNG export authorization to FTA countries (*see supra* note 2)—DOE/FE Order No. 3482, issued to Louisiana LNG Energy LLC (LLNG) on August 28, 2014.[13] DOE/FE vacated this order in 2017 on the basis of LLNG's own prolonged inaction, after LLNG effectively self-terminated its proposed LNG export project.[14] Specifically, LLNG: (i) Failed to participate in its on-going FERC process, such that FERC terminated LLNG's pre-filing review process; [15] and (ii) failed to comply with its DOE/FE reporting obligations under the terms of its FTA order, for a period of more than 18 months.[16] Throughout this 18-month time period, DOE/FE made repeated efforts to contact LLNG, with no success.[17] Even after DOE/FE issued an Order to Show Cause—inviting LLNG to respond and explain the circumstances—LLNG took no action.[18] The evidence clearly showed

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[1] 15 U.S.C. 717b.

[2] This policy statement applies to authorizations to export natural gas to non-FTA countries under section 3(a) of the NGA, 15 U.S.C. 717b(a) (non-FTA authorizations). With regard to exports to FTA countries, NGA section 3(c) was amended by section 201 of the Energy Policy Act of 1992 (Pub. L. 102–486) to require that FTA applications ''shall be deemed to be consistent with the public interest'' and granted ''without modification or delay.'' 15 U.S.C. 717b(c).

[3] 15 U.S.C. 717b(a).

[4] *See Sierra Club* v. *U.S. Dep't of Energy,* 867 F.3d 189, 203 (D.C. Cir. 2017) (''We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.' '') (quoting *W. Va. Pub. Servs. Comm'n* v. *U.S. Dep't of Energy,* 681 F.2d 847, 856 (D.C. Cir. 1982)).

[5] Before reaching a final decision on any non-FTA application, DOE must also comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq. See, e.g., Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, FE Docket No FE Docket No. 17–79–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers Loaded at the Eagle Maxville Facility in Jacksonville, Florida, and Exported by Vessel to Free Trade Agreement and Non-Free Trade Agreement Nations, at 34–37 (Sept. 15, 2017).

[6] 15 U.S.C. 717o.

[7] 15 U.S.C. 717b(a); *see Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, at 34–37.

[8] *Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, at 33 n.98 (quoting 15 U.S.C. 717o); *see also Sabine Pass Liquefaction, LLC,* DOE/FE Order No. 2961, FE Docket No. 10–111–LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, at 33 n.45 (quoting 15 U.S.C. 717o) (May 20, 2011).

[9] *Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, at 33 n.98.

[10] *Id.*

[11] *Id.* (quoting *Sabine Pass Liquefaction, LLC,* DOE/FE Order No. 2961, at 33 n.45).

[12] *See* Ltr. from Paula Gant, U.S. Dep't of Energy, to Sen. Lisa Murkowski, at 1 (Oct. 17, 2013), *available at: https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=9E99E412-CE05-449D-8893-DC8D64C32D02* (last viewed June 8, 2018).

[13] *Louisiana LNG Energy LLC,* DOE/FE Order No. 3482, FE Docket No. 14–19–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Louisiana LNG Energy Project in Plaquemines Parish, Louisiana, to Free Trade Agreement Nations (Aug. 28, 2014).

[14] *See Louisiana LNG Energy LLC,* DOE/FE Order No. 3482–A, FE Docket Nos. 14–19–LNG & 14–29–LNG, Order Vacating Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel to Free Trade Agreement Nations and Dismissing Application to Export Liquefied Natural Gas by Vessel to Non-Free Trade Agreement Nations, at 2–4 (July 24, 2017); *see also Louisiana LNG Energy LLC,* FE Docket Nos. 14–19–LNG & 14–29–LNG, Order to Show Cause, at 2–5 (June 12, 2017).

[15] *See* Letter from Ann Miles, Director of FERC's Office of Energy Projects, to Martin Houston, Chairman of LLNG, Re: Pre-Filing Review Termination of the Mississippi River LNG Project, FERC Docket No. PF14–17–000 (Dec. 13, 2016) (FERC observing that LLNG ''has not filed the application needed for staff to continue the environmental review of [the] project''), *cited in Louisiana LNG Energy LLC,* DOE/FE Order No. 3482–A, at 3 n.9.

[16] *See Louisiana LNG Energy LLC,* DOE/FE Order No. 3482–A, at 2–3.

[17] *See id.* at 3.

[18] *See Louisiana LNG Energy LLC,* Order to Show Cause, at 5 (providing 30 days for LLNG to show

that LLNG neither wished to move forward with its proposed LNG export facility nor to maintain its FTA authorization.[19] DOE/FE therefore vacated LLNG's FTA authorization under NGA section 16, but it did so without objection by LLNG and without prejudice to LLNG, should LLNG wish to seek an export LNG authorization in the future.[20]

The LLNG proceeding was a highly unusual scenario where all evidence indicated that the company was no longer pursuing its proposed LNG export project and had, in fact, ceased to exist as a commercial operation. In vacating LLNG's FTA order without prejudice, DOE responded appropriately in both implementing its statutory authority under NGA section 16 and in upholding the integrity of its natural gas regulatory program under 10 CFR part 590.

II. DOE/FE Policy on Non-FTA Export Authorizations

Potential importers of U.S. LNG and financiers of LNG export projects (collectively, interested stakeholders) have expressed concern about DOE/FE rescinding one or more non-FTA export authorizations in the future. In raising this concern, they point to the language in the existing non-FTA authorizations (quoted above) in which DOE/FE has observed its authority under NGA section 16 to ''make, amend, and rescind such [export] orders . . . as it may find necessary or appropriate . . . .'' Citing DOE/FE's language, they have asked what potential ''developments'' in the U.S. LNG market could rise to the level of ''such significant consequence as to put the public interest at risk''—such that DOE would unilaterally rescind one or more non-FTA export authorizations or take other action to protect the public interest under NGA section 3(a).

As a preliminary matter, DOE/FE wishes to allay concerns about the security of existing (or future) non-FTA export authorizations. In this policy statement, DOE/FE affirms its commitment to all export authorizations issued under the NGA, including long-term authorizations approving the export of LNG to non-FTA countries. As indicated above, DOE/FE currently has issued 29 final non-FTA export authorizations, based on a thorough consideration of the public interest under section 3(a) of the NGA. In each of these proceedings, DOE/FE reviewed a substantial administrative record addressing factors including economic impacts, international impacts, security of natural gas supply, and environmental impacts, among others. In granting each application, DOE/FE concluded that exports of U.S. LNG will generate net economic benefits to the broader U.S. economy and will provide energy security and environmental benefits to the global community (including emerging economies presently reliant upon more carbon intensive fuels).[21]

DOE/FE stands firmly behind these factual findings and legal conclusions—many of which have been challenged and upheld in federal court.[22] Authorization holders, as well as any interested stakeholders, thus should have the utmost confidence in the validity of DOE/FE's LNG export authorizations for the full term of each non-FTA order. Indeed, as noted above, DOE has never rescinded a non-FTA export authorization for any reason. DOE has vacated one FTA order under NGA section 16, but the circumstances of that proceeding were based solely on the inaction of the authorization holder.[23]

As a matter of law, DOE preserves its authority to take action as necessary or appropriate to carry out its duties under the NGA.[24] However, DOE does not foresee a scenario where it would rescind one or more non-FTA authorizations. The United States government takes very seriously the investment-backed expectations of private parties subject to its regulatory jurisdiction. In particular, DOE understands the far-ranging economic investments and natural gas supply commitments associated with these authorizations over their full term—affecting both U.S. and global interests. DOE emphasizes that it remains committed to the durability and stability of the export authorizations it has granted under the NGA, as well as to supporting the approved export of U.S. natural gas around the world.

Issued in Washington, DC, on June 15, 2018.

Steven E. Winberg,

Assistant Secretary, Office of Fossil Energy.

[FR Doc. 2018–13427 Filed 6–19–18; 4:15 pm]

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cause, in writing, why its authorization should not be vacated—to which LLNG never responded); *Louisiana LNG Energy LLC,* DOE/FE Order No. 3482–A, at 3.

[19] *See Louisiana LNG Energy LLC,* DOE/FE Order No. 3482–A, at 3–4.

[20] *See id.* at 4 (also dismissing LLNG's pending non-FTA application without prejudice).

[21] *See, e.g., Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, at 23–38.

[22] In 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued four decisions upholding non-FTA export authorizations issued by DOE/FE under NGA section 3(a). *See, e.g., Sierra Club* vs. *U.S. Dep't of Energy,* 867 F.3d 189; *Sierra Club* v. *U.S. Dep't of Energy,* Nos. 16–1186, 16–1252, 16–1253, 703 Fed. Appx. 1 (D.C. Cir. Nov. 1, 2017).

[23] *See supra* at 4–5.

[24] 15 U.S.C. 717o.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2013–0566; FRL–9979–72–OAR]

RIN 2060–AT68

Public Hearing for and Extension of Comment Period on Review of the Primary National Ambient Air Quality Standard for Sulfur Oxides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public hearing and extension of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing that a public hearing will be held on the EPA's proposed decision in its ''Review of the Primary National Ambient Air Quality Standard for Sulfur Oxides,'' which was published in the **Federal Register** on June 8, 2018 (83 FR 26752). The EPA is proposing to retain the existing standard without revision. The hearing will be held on Tuesday, July 10, 2018, in Washington, DC. The EPA is additionally announcing a 17-day extension of the comment period for this proposed decision. The original comment period was to end on July 23, 2018. The extended comment period will now close on August 9, 2018.

DATES: The public hearing will be held on July 10, 2018, in Washington, DC (see **SUPPLEMENTARY INFORMATION** for additional information on the public hearing). The comment period on the proposed decision announced in the **Federal Register** on June 8, 2018 (83 FR 26752), is extended. Comments must be received on or before August 9, 2018.

ADDRESSES: *Public Hearing.* The July 10, 2018, public hearing will be held at the EPA, William Jefferson Clinton East Building, Room 1117, 1201 Constitution Avenue NW, Washington, DC 20004. Identification is required. If your driver's license is issued by America Samoa, you must present an additional form of identification to enter (see **SUPPLEMENTARY INFORMATION** for additional information on this location). Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2013–0566, to the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the online instructions for submitting

comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket: All documents in the docket are listed in the *https://www.regulations.gov* index. 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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *https://www.regulations.gov* or in hard copy at the EPA Docket Center Reading Room, William Jefferson Clinton West Building, 1301 Constitution Avenue NW, Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The phone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: If you would like to speak at the public hearing, please register using the online registration form available at: *https://www.epa.gov/so2-pollution/primary-national-ambient-air-quality-standard-naaqs-sulfur-dioxide* or contact Ms. Regina Chappell, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (OAQPS) (Mail Code C304–03), Research Triangle Park, NC 27711, telephone number: (919) 541–3650; fax number (919) 541–0942; email: *chappell.regina@epa.gov,* no later than 4:00 p.m. Eastern Time (ET) on July 6, 2018. If you have any questions relating to the public hearing, please contact Ms. Chappell.

For further information concerning the review of the primary national ambient air quality standard (NAAQS) for sulfur oxides, please contact Dr. Nicole Hagan, U.S. Environmental Protection Agency, OAQPS (Mail Code C504–06), Research Triangle Park, NC 27711; telephone number: (919) 541–3153; fax number: (919) 541–5315; email: *hagan.nicole@epa.gov.*

SUPPLEMENTARY INFORMATION: The EPA is reviewing the primary NAAQS for sulfur oxides as required under section 109 (42 U.S.C. 7409) of the Clean Air Act (CAA). The EPA's proposed decision to retain the current primary NAAQS for sulfur oxides without revision was published in the **Federal Register** on June 8, 2018 (83 FR 26752). The **Federal Register** notice of the proposed decision specified a 45-day public comment period and indicated that a public hearing would be held during the public comment period if one was requested by June 15, 2018. On June 8, we received a request for a public hearing. In keeping with the schedule of this NAAQS review, which is governed by a consent decree, the date for the public hearing will be July 10, 2018. Further, consistent with CAA section 307(d)(5) (42 U.S.C. 7607(d)(5)), this notice additionally extends the public comment period by 17 days, until August 9, 2018.

The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the EPA's proposed decision in the current review of the primary NAAQS for sulfur oxides. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. If you would like to present oral testimony at the hearing, please register using the online registration form available at: *https://www.epa.gov/so2-pollution/primary-national-ambient-air-quality-standard-naaqs-sulfur-dioxide* or notify Ms. Regina Chappell, U.S. Environmental Protection Agency, OAQPS (Mail Code C304–03), Research Triangle Park, NC 27711, telephone number: (919) 541–3650; fax number (919) 541–0942; email: *chappell.regina@epa.gov,* no later than 4:00 p.m. ET on July 6, 2018. Ms. Chappell will arrange a general time slot for you to speak. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) or in hard copy form. Commenters should notify Ms. Chappell if they need specific translation services for non-English speaking commenters.

The public hearing will convene at 9:00 a.m. and end at 6:00 p.m. ET or 2 hours after the last registered speaker has spoken, whichever is earlier. The EPA will make every effort to accommodate all individuals interested in providing oral testimony. A lunch break is scheduled from 12:00 p.m. until 1:00 p.m. The hearing schedule, including the list of speakers, will be posted on the EPA's website at *https://www.epa.gov/so2-pollution/primary-national-ambient-air-quality-standard-naaqs-sulfur-dioxide* prior to the hearing. Verbatim transcripts of the hearing and written statements will be included in the docket for the action.

This hearing will be held at a U.S. government facility. Individuals planning to attend the hearing should be prepared to show valid picture identification, such as a driver's license, to the security staff in order to gain access to the meeting room. However, driver's licenses from states and territories that do not comply with the REAL ID Act will not be accepted as identification. The REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. These requirements took effect on July 21, 2014. If your driver's license is issued by American Samoa, you must present an alternative form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses and military identification cards. For additional information for the status of your state regarding the REAL ID Act, go to *https://www.dhs.gov/real-id-enforcement-brief.* For additional information on building access and alternative forms of identification, go to *https://www.epa.gov/aboutepa/visiting-epa-headquarters.*

How can I get copies of this document and other related information?

The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2013–0566 (available at *https://www.regulations.gov*). The EPA has also made available information related to the proposed action on the following website: *https://www.epa.gov/so2-pollution/primary-national-ambient-air-quality-standard-naaqs-sulfur-dioxide.*

Dated: June 15, 2018.

Panagiotis Tsirigotis,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2018–13325 Filed 6–20–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9979–27–OARM]

National Advisory Council for Environmental Policy and Technology; Renewal of Charter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of charter renewal.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has determined that, in accordance with the provisions of the Federal Advisory Committee Act (FACA), the National Advisory Council for Environmental Policy and Technology (NACEPT) is necessary and in the public interest in connection with the performance of duties imposed on the agency by law. Accordingly, NACEPT will be renewed for an additional two-year period. The purpose of NACEPT is to provide advice and recommendations to the Administrator of EPA on a broad range of environmental policy, technology and management issues.

FOR FURTHER INFORMATION CONTACT: Eugene Green, Designated Officer, U.S. EPA, (Mail Code 1601M), 1200 Pennsylvania Avenue NW, Washington, DC 20460, telephone (202) 564–2432, or *green.eugene@epa.gov.*

Dated: June 4, 2018.

Donna J. Vizian,

Principal Deputy Assistant Administrator, Office of Administration and Resources Management.

[FR Doc. 2018–13352 Filed 6–20–18; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2018–1260]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This form is to be completed by EXIM borrowers as required under EXIM Credit Guarantee Facility (CGF) transactions in conjunction with a borrower's request for disbursement for U.S. goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM lenders to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements.

DATES: Comments should be received on or before August 20, 2018 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 18–02) or by email to *Mia.Johnson@exim.gov,* or by mail to Mia L. Johnson, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-02_itemized_statement_of_payments-us_costs_for_exim_cgf_-_final.xlsx.*

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–02 Itemized Statement of Payments—US Costs for EXIM Credit Guarantee Facility.

OMB Number: XXXX–XXXX.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for U.S. goods and services submitted to EXIM lenders under CGF transactions.

Affected Public: This form affects EXIM borrowers involved in financing U.S. goods and services under CGF transactions.

Annual Number of Respondents: 12.

Estimated Time per Respondent: 150 minutes.

Annual Burden Hours: 30 hours.

Frequency of Reporting or Use: As needed.

Government Expenses: None.

This form is submitted by the borrower to the CGF lender for review. The lender reports information regarding the disbursement electronically to EXIM using OMB Number 3048–0046 CGF (EIB 12–02) Disbursement Approval Request Report.

Bassam Doughman,

IT Specialist.

[FR Doc. 2018–13336 Filed 6–20–18; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice: 2018–1560]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This form is to be completed by EXIM borrowers as required under certain EXIM long-term guarantee and direct loan transactions in conjunction with a borrower's request for disbursement for local cost goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements. This form will be uploaded into an electronic disbursement portal.

DATES: Comments should be received on or before August 20, 2018 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 18–05) or by email to *Mia.Johnson@exim.gov,* or by mail to Mia L. Johnson, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-05_itemized_statement_of_payments-local_cost_form_-_final.xlsx*

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–05 Itemized Statement of Payments Long-term Guarantee and Direct Loan—Local Costs.

OMB Number: XXXX–XXXX.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for local cost goods and services submitted to EXIM through an electronic disbursement portal under certain long-term guarantee and direct loan transactions.

Affected Public: This form affects EXIM borrowers involved in financing

local cost goods and services under certain long-term guarantee and direct loan transactions.

Annual Number of Respondents: 25.

Estimated Time per Respondent: 30 minutes.

Annual Burden Hours: 12.5 hours.

Frequency of Reporting or Use: As needed.

Government Expenses:

Reviewing Time per Year: 12.5 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $531.25 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: $637.50.

Bassam Doughman,

IT Specialist.

[FR Doc. 2018–13346 Filed 6–20–18; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice: 2018–1460]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This form is to be completed by EXIM borrowers as required under certain EXIM long-term guarantee and direct loan transactions in conjunction with a borrower's request for disbursement for U.S. goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements. This form will be uploaded into an electronic disbursement portal.

DATES: Comments should be received on or before August 20, 2018 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 18–04) or by email to *Mia.Johnson@exim.gov,* or by mail to Mia L. Johnson, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-04_itemized_statement_of_payments-us_costs_form_-_final.xlsx.*

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–04 Itemized Statement of Payments—Long-term Guarantees and Direct Loans—U.S. Costs.

OMB Number: XXXX–XXXX.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for U.S. goods and services submitted to EXIM through an electronic disbursement portal under certain long-term guarantee and direct loan transactions.

Affected Public: This form affects EXIM borrowers involved in financing U.S. goods and services under certain long-term guarantee and direct loan transactions.

Annual Number of Respondents: 75.

Estimated Time per Respondent: 150 minutes.

Annual Burden Hours: 187.5 hours.

Frequency of Reporting or Use: As needed.

Government Expenses:

Reviewing Time per Year: 187.5 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $7,968.75 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: $9,562.50.

Bassam Doughman,

IT Specialist.

[FR Doc. 2018–13329 Filed 6–20–18; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2018–1360]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This form is to be completed by EXIM borrowers as required under EXIM Credit Guarantee Facility (CGF) transactions in conjunction with a borrower's request for disbursement for local cost goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM lenders to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements.

DATES: Comments should be received on or before August 20, 2018 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 18–03) or by email to *Mia.Johnson@exim.gov,* or by mail to Mia L. Johnson, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-03_itemized_statement_of_payments-local_costs_for_exim_cgf_-_final.xlsx*

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–03 Itemized Statement of Payments—Local Costs for EXIM Credit Guarantee Facility.

OMB Number: XXXX–XXXX.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for local cost goods and services submitted to EXIM lenders under CGF transactions.

Affected Public: This form affects EXIM borrowers involved in financing local cost goods and services under CGF transactions.

Annual Number of Respondents: 6.

Estimated Time per Respondent: 75 minutes.

Annual Burden Hours: 7.5 hours.

Frequency of Reporting or Use: As needed.

Government Expenses: None.

This form is submitted by the borrower to the CGF lender for review. The lender reports information regarding the disbursement electronically to EXIM using OMB Number 3048–0046 CGF (EIB 12–02) Disbursement Approval Request Report.

Bassam Doughman,

IT Specialist.

[FR Doc. 2018–13331 Filed 6–20–18; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, June 26, 2018 at 10:00 a.m.

PLACE: 1050 First Street NE, Washington, DC.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Laura E. Sinram,

Deputy Secretary of the Commission.

[FR Doc. 2018–13445 Filed 6–19–18; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, Federal Reserve Clearance for Board Public website Usability Surveys (FR 3076, OMB No. 7100–0366).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Board may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Report

Report title: Federal Reserve Clearance for Board Public website Usability Surveys.

Agency form number: FR 3076.

OMB control number: 7100–0366.

Frequency: As needed.

Respondents: Individuals.

Estimated number of respondents: Surveys: 100, Focus Groups: 20.

Estimated average hours per response: Surveys: 0.25, Focus Groups: 1.5.

Estimated annual burden hours: 420.

General description of report: The FR 3076 is used to gather qualitative and quantitative information directly from users or potential users of the Board's website such as Congress, other government agencies, the public, economic educators, economists, financial institutions, financial literacy groups, and community development groups and more. Participation is voluntary.

The FR 3076 may seek information from users or potential users of various Board web pages, including press releases, data releases and downloads, reports, supervision manuals, brochures, new web pages, audio, video, and use of social media. Information gathered may also include general input on users' interests and needs, feedback on website navigation and layout, distribution channels, or other factors which may affect the ability of users to locate and access content online.

Qualitative surveys conducted using the FR 3076 would include data gathering methods such as focus groups and individual interviews. Quantitative surveys conducted using the FR 3076 would include surveys conducted online or via mobile device, by phone or by mail, emails, or a combination of these methods. The Board may contract with an outside vendor to conduct focus groups, interviews, or surveys, or the Board may collect the data directly.

As the Board's public website continues to evolve, the Board may seek input from users or potential users of Board's public website on questions such as the following:

- Did you find the content and layout relevant and of value?
- How did you find the content you were looking for?
- Was the navigation useful?
- How did you learn about the content?
- How did you access the content? (*e.g.:* Paper copy distributed at an event, online, or mobile device). If online or through a mobile device, was the document printed, viewed on a tablet, or on a computer screen?
- What suggestions do you have for improving the format and appearance of online presentation? (*e.g.:* Readability—font size, charts, and graphs; organization of information; and navigating—indexing, search tools, and links)

What other information would be of value to enhance the online tool or information?

Legal authorization and confidentiality: The Board uses its website and social media to communicate important information to the public about a variety of different issues. The Board is required to provide certain information on its website. For example, under section 2B of the Federal Reserve Act the Board is required to provide certain reports, audits, and other information that ''the Board reasonably believes is necessary or helpful to the public in understanding the accounting, financial reporting, and internal controls of the Board and the Federal reserve banks.'' (12 U.S.C. 225b(c)). In addition, the Board uses its website to provide the public with information about a variety of other matters, including information about the Board, its actions, and the economy. The responses to the FR 3076 help the Board determine how to most effectively communicate this information to the public in order to fulfill its statutory responsibilities. The FR 3076 is voluntary. The information collected by the FR 3076 is not considered to be confidential.

Current actions: On April 5, 2018 the Board published a notice in the **Federal Register** (83 FR 14640) requesting public comment for 60 days on the extension, without revision, of the Federal Reserve Clearance for Board Public website Usability Surveys. The comment period for this notice expired on June 4, 2017. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, June 15, 2018.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2018–13287 Filed 6–20–18; 8:45 am]

BILLING CODE 6210–01–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 July 9, 2018.

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. *Donald G. Soffer 1995 Decanted Family Trust and Allen David Soffer, of St. Louis, Missouri, as Trustee of such trust; KMB Holdings Irrevocable Trust and James Frederick Barton, III, of Marco Island, Florida, and Ann Barton Crowe, of St. Louis, Missouri, both as Trustees of such trust; JFB Holdings Irrevocable Trust and Karen M. Barton, of Marco Island, Florida, and Ann Barton Crowe, of St. Louis, Missouri, both as Trustees of such trust; Brenda Sue Plocher Revocable Trust and Brenda Sue Plocher, of Highland, Illinois, as Trustee of such trust; Liebig Joint Revocable Trust and J. Travis Liebig, of St. Louis, Missouri, and Kristen M. Liebig, of St. Louis, Missouri, both as Trustees of such trust; Bernadette N. Barton 2006 Trust and James Frederick Barton, III, of Marco Island, Florida, Anna L. Dunlap, of St. Louis, Missouri, and Stephanie J. Opel, of St. Louis, Missouri, all as Trustees of such trust; Christopher W. Byron, of Edwardsville, Illinois; and Kathleen A. Byron, of Edwardsville, Illinois; The Crowe Joint Revocable Bank Stock Trust and Vance Crowe, of St. Louis, Missouri, and Ann Barton Crowe, of St. Louis, Missouri, both as Trustees of such trust; Chaos Holdings, LLC, of St. Louis, Missouri; the John J. Kang Revocable Trust and John J. Kang, of St. Louis, Missouri, as Trustee of such trust; Jeffrey A. Counton, of Maryville, Illinois; the Jessica H. Hoagland Revocable Trust, and Jessica H. Hoagland, of St. Louis, Missouri, and Craig C. Hoagland, of St. Louis, Missouri, both as Co-Trustees of such trust; Debra Marie Liebig, of Quincy, Illinois; Mishaal M. Taqui, of St. Louis, Missouri; Paul Meyers, of Chesterfield, Missouri, and Chasity Meyers, of Chesterfield, Missouri (collectively the ''Liebig Group'');* to acquire voting shares of St. Louis Bancshares, Inc., Town and Country, Missouri, and thereby acquire shares of St. Louis Bank, Town and Country, Missouri.

Board of Governors of the Federal Reserve System, June 18, 2018.

Ann Misback,

Secretary of the Board.

[FR Doc. 2018–13326 Filed 6–20–18; 8:45 am]

BILLING CODE 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 July 9, 2018.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Jack Bankhead, Mary Bankhead, James H. Gill, and Lynn Eldridge Gill all of Dallas, Texas, Atticus J. Gill, Fort Worth, Texas, and Meredith Gill Johnson, El Dorado Hills, California together known as the Gill Family Group, a group acting in concert;* to retain voting shares of City Bancshares, Inc. and thereby indirectly retain shares of City National Bank, both located in Corsicana, Texas.

Board of Governors of the Federal Reserve System, June 15, 2018.

Ann Misback,

Secretary of the Board.

[FR Doc. 2018–13275 Filed 6–20–18; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

[Docket No. 9372]

1–800 Contacts, Inc. Oral Argument Before the Commission

AGENCY: Federal Trade Commission.

ACTION: Oral argument; open meeting.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') will meet on Tuesday, June 26, 2018, in Room 532 of the FTC Building for an Oral Argument In the Matter of 1–800 Contacts, Inc. The public is invited to attend and observe the open portion of the meeting, which is scheduled to begin at 2:00 p.m. The remainder of the meeting will be closed to the public.

DATES: Oral argument is scheduled for June 26, 2018 at 2:00 p.m.

ADDRESSES: Federal Trade Commission Building, 600 Pennsylvania Avenue NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Donald S. Clark, Secretary, Office of the Secretary, 600 Pennsylvania Avenue NW, Washington, DC 20580, 202–326–2514.

SUPPLEMENTARY INFORMATION:

Open Meeting

(1) Oral Argument In the Matter of 1–800 Contacts, Inc., Docket No. 9372.

Closed Meeting

(2) Executive Session to follow Oral Argument In the Matter of 1–800 Contacts, Inc., Docket No. 9372.

Record of Commission's Vote

On June 15, 2018, the five Commissioners were recorded as voting in the affirmative to conduct Matter Number One in open session, and to close Matter Number Two, and to withhold from this meeting notice such information as is exempt from disclosure under 5 U.S.C. 552b(c).

Commission's Explanation of Closing

The Commission has determined that Matter Number Two may be closed under 5 U.S.C. 552b(c)(10), and that the public interest does not require the matter to be open.

General Counsel Certification

The General Counsel has certified that Matter Number Two may properly be closed, citing the following relevant exemptive provision: 5 U.S.C. 552b(c)(10).

Expected Attendees

Expected to attend the closed meeting are the Commissioners themselves, an advisor to one of the Commissioners, and such other Commission staff as may be appropriate.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2018–13327 Filed 6–20–18; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[Docket No. ATSDR–2015–0004]

Availability of Draft Toxicological Profile: Perfluoroalkyls

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice of availability; request for comments.

SUMMARY: The Agency for Toxic Substances and Disease Registry (ATSDR), within the Department of Health and Human Services (HHS) announces the availability of the Draft Toxicological Profile for Perfluoroalkyls for review and comment. All toxicological profiles issued as ''Drafts for Public Comment'' represent ATSDR's best efforts to provide important toxicological information on priority hazardous substances. ATSDR is seeking public comments and additional information, reports, and studies about the health effects of these substances. Although ATSDR considers key studies for this substance during the profile development process, this document solicits any relevant, additional studies. ATSDR will evaluate the quality and relevance of such data or studies for possible inclusion into the profile. ATSDR remains committed to providing a comment period for this document as a means to best serve public health.

DATES: Comments must be submitted by July 23, 2018.

ADDRESSES: You may submit comments, identified by docket number ATSDR–2015–0004, by any of the following methods:

- *Internet:* Access the Federal eRulemaking Portal at *www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Division of Toxicology and Human Health Sciences, Agency for Toxic Substances and Disease Registry, 1600 Clifton Rd. NE, MS F–57, Atlanta, GA 30329. Attn: Docket No. ATSDR–2015–0004.

Instructions: All submissions must include the agency name and docket number for this notice. All relevant comments will be posted without change. This means that no confidential business information or other confidential information should be submitted in response to this notice.

FOR FURTHER INFORMATION CONTACT: Susan Ingber, Division of Toxicology and Human Health Sciences, Agency for Toxic Substances and Disease Registry, 1600 Clifton Rd. NE, MS F–57, Atlanta, GA 30329, Email: *wng7@cdc.gov;* Phone: 770–488–0605.

SUPPLEMENTARY INFORMATION: The Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9601 *et seq.*] amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) [42 U.S.C. 9601 *et seq.*] by establishing certain requirements for ATSDR and the U.S. Environmental Protection Agency (EPA) regarding hazardous substances that are most commonly found at facilities on the CERCLA National Priorities List (NPL). Among these statutory requirements is a mandate for the Administrator of ATSDR to prepare toxicological profiles for each substance included on the priority list of hazardous substances [also called the Substance Priority List (SPL)]. This list identifies 275 hazardous substances that ATSDR and EPA have determined pose the most significant potential threat to human health. The SPL is available online at *www.atsdr.cdc.gov/spl.*

In addition, CERCLA provides ATSDR with the authority to prepare toxicological profiles for substances not found on the SPL. CERCLA authorizes ATSDR to establish and maintain inventory of literature, research, and studies on the health effects of toxic substances (CERCLA section 104(i)(1)(B)); to respond to requests for health consultations (CERCLA section 104(i)(4)); and to support the site-specific response actions conducted by the agency.

There have been two previous Public Comment periods for the Perfluoroalkyls toxicological profile, one in 2009 (74 FR 36492) and 2015 (80 FR 53157). Due to the public comments received to both notices, as well as new literature, we have revised the previous draft profile (including a revised Minimal Risk Level); therefore, ATSDR is releasing a revised draft profile for public comment.

Availability

The Draft Toxicological Profiles are available online at *http://www.atsdr.cdc.gov/ToxProfiles* and at *www.regulations.gov,* Docket No. ATSDR–2015–0004.

Pamela I. Protzel Berman,

Director, Office of Policy, Partnerships and Planning Agency for Toxic Substances and Disease Registry.

[FR Doc. 2018–13385 Filed 6–20–18; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC–2018–0050, NIOSH–314]

Draft—National Occupational Research Agenda for Healthcare and Social Assistance

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: The National Institute for Occupational Safety and Health of the Centers for Disease Control and Prevention announces the availability of a draft NORA Agenda entitled *National Occupational Research Agenda for Healthcare and Social Assistance (HCSA)* for public comment. To view the notice and related materials, visit *https://www.regulations.gov* and enter CDC–2018–0050 in the search field and click ''Search.''

Table of Contents

DATES: Electronic or written comments must be received by August 20, 2018.

ADDRESSES: You may submit comments, identified by CDC–2018–0050 and docket number NIOSH–314, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments.

• *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Instructions: All submissions received in response to this notice must include the agency name and docket number [CDC–2018–0050; NIOSH–314]. All relevant comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.* All information received in response to this notice will also be available for public examination and copying at the NIOSH Docket Office, 1150 Tusculum Avenue, Room 155, Cincinnati, OH 45226–1998.

FOR FURTHER INFORMATION CONTACT: Emily Novicki *NORACoordinator@cdc.gov*), National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Mailstop E–20, 1600 Clifton Road NE, Atlanta, GA 30329, phone (404) 498–2581 (not a toll free number).

SUPPLEMENTARY INFORMATION: The National Occupational Research Agenda (NORA) is a partnership program created to stimulate innovative research and improved workplace practices. The national agenda is developed and implemented through the NORA sector and cross-sector councils. Each council develops and maintains an agenda for its sector or cross-sector.

Background: The National Occupational Research Agenda for Healthcare and Social Assistance (HCSA) is intended to identify the research, information, and actions most urgently needed to prevent occupational injuries. The National Occupational Research Agenda for HCSA provides a vehicle for stakeholders to describe the most relevant issues, gaps, and safety and health needs for the sector. Each NORA research agenda is meant to guide or promote high priority research efforts on a national level, conducted by various entities, including: government, higher education, and the private sector.

The first National Occupational Research Agenda for HCSA was published in 2009 for the second decade of NORA (2006–2016). The revised agenda was developed considering new information about injuries and illnesses, the state of the science, and the probability that new information and approaches will make a difference. As the steward of the NORA process, NIOSH invites comments on the draft *National Occupational Research Agenda for HCSA*. Comments expressing support or with specific recommendations to improve the Agenda are requested. A copy of the draft Agenda is available at *https://www.regulations.gov* (see Docket Number CDC–2018–0050).

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2018–13308 Filed 6–20–18; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–1073]

Antimicrobial Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Antimicrobial Drugs Advisory Committee. The general function of the committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on August 8, 2018, from 8:30 a.m. to 1 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2018–N–1073. The docket will close on August 7, 2018. Submit either electronic or written comments on this public meeting by August 7, 2018. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before August 7, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of August 7, 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.

Comments received on or before July 24, 2018, will be provided to the committee. Comments received after that date will be taken into consideration by FDA.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions)*: Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–N–1073 for ''Antimicrobial Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; 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.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.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: Lauren D. Tesh, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *AMDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The committee will discuss new drug applications 209816, for omadacycline tablets, and 209817, for omadacycline injection, sponsored by Paratek Pharmaceuticals, Inc., for the proposed indications for the treatment of community acquired bacterial pneumonia and acute bacterial skin and skin structure infections.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before July 24, 2018, will be provided to the committee. Oral presentations from the public will be scheduled between approximately 11 a.m. and 12 noon. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before July 16, 2018. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by July 17, 2018.

Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Lauren Tesh (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–13296 Filed 6–20–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–1919]

Major Depressive Disorder: Developing Drugs for Treatment; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Major Depressive Disorder: Developing Drugs for Treatment.'' The purpose of this draft guidance is to assist sponsors in the clinical development of drugs for the monotherapeutic, combination, and adjunctive treatment of major depressive disorder (MDD). Specifically, this draft guidance addresses FDA's current thinking regarding the overall development program and clinical trial designs for antidepressant drug products. This draft guidance is intended to serve as a focus for continued discussions among FDA, pharmaceutical sponsors, the academic community, and the public. This draft

guidance revises the guidance for industry entitled ''Guidelines for the Clinical Evaluation of Antidepressant Drugs'' issued in September 1977.

DATES: Submit either electronic or written comments on the draft guidance by August 20, 2018 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–D–1919 for ''Major Depressive Disorder: Developing Drugs for Treatment; Draft Guidance for Industry.'' 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 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Juliette Touré, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4120, Silver Spring, MD 20993–0002, 301–796–2260.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Major Depressive Disorder: Developing Drugs for Treatment.'' The purpose of this draft guidance is to assist sponsors in the clinical development of drugs for the monotherapeutic, combination, and adjunctive treatment of MDD. Specifically, this draft guidance addresses FDA's current thinking regarding the overall development program and clinical trial designs for antidepressant drug products. This draft guidance is intended to serve as a focus for continued discussions among FDA, pharmaceutical sponsors, the academic community, and the public.

This draft guidance revises the guidance for industry entitled ''Guidelines for the Clinical Evaluation of Antidepressant Drugs'' issued in September 1977. Major revisions were made to the 1977 guidance to align it with the FDA's current thinking on this topic.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on developing drugs for the treatment of MDD. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. The Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR parts 312 and 314 have been approved under OMB control numbers 0910–0014 and 0910–0001, respectively.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: June 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–13297 Filed 6–20–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0108]

Prescription Drug User Fee Act Waivers, Reductions, and Refunds for Drug and Biological Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Prescription Drug Act User Fee Waivers, Reductions, and Refunds for Drug and Biological Products.'' This revised draft guidance provides recommendations to applicants planning to request a waiver or reduction in user fees. This draft guidance is a revision of the guidance for industry entitled ''User Fee Waivers, Reductions, and Refunds for Drug and Biological Products,'' issued in September 2011.

DATES: Although you can comment on any draft guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by August 20, 2018.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2011–D–0108 for ''Prescription Drug Act User Fee Waivers, Reductions, and Refunds for Drug and Biological Products.'' 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 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.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002 or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Sungjoon ''Alvin'' Chi, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Rm. 2185, Silver Spring, MD 20993, 301–796–7900, *CDERCollections@fda.hhs.gov;* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Prescription Drug User Fee Waivers, Reductions, and Refunds for Drug and Biological Products.'' This draft guidance provides recommendations to applicants regarding requests for waivers, reductions, or refunds of user fees assessed under sections 735 and 736 (21 U.S.C. 379g and 379h) of the Federal Food, Drug, and Cosmetic (FD&C) Act. This revised draft guidance describes the types of waivers, reductions, and refunds permitted

under the user fee provisions of the FD&C Act and the procedures for submitting requests for waivers, reductions, refunds, and requests for reconsiderations or appeals. The revised draft guidance also provides additional clarification on certain issues such as user fee exemptions for orphan drugs and FDA's current thinking on considerations relevant to eligibility for user fee waivers, reductions, and refunds under the applicable statutory provisions.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Prescription Drug User Fee Waivers, Reductions, and Refunds for Drug and Biological Products.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This draft guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party.

The information collection of this draft guidance has been submitted for OMB renewal of approval under OMB control number 0910–0693. In addition, the collection of information associated with Form FDA 3397 has been previously approved under OMB control number 0910–0297. Collection of information associated with new drug application or biologics license applications have been previously approved under OMB control numbers 0910–0001 and 0910–0338, respectively. See section X of the draft guidance document.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: June 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–13295 Filed 6–20–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA 2014–D–2138]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry: Adverse Event Reporting for Outsourcing Facilities Under Section 503B of the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on adverse event reporting for outsourcing facilities under the Federal Food, Drug, and Cosmetic Act (FD&C Act).

DATES: Submit either electronic or written comments on the collection of information by August 20, 2018.

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 August 20, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of August 20, 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 No. FDA 2014–D–2138 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry: Adverse Event Reporting for Outsourcing Facilities Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' 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: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry: Adverse Event Reporting for Outsourcing Facilities Under Section 503B of the Federal Food, Drug, and Cosmetic Act

OMB Control Number 0910–0800—Extension

This information collection supports Agency implementation of the Drug Quality and Security Act (DQSA) (Pub. L. 113–54), which amended the FD&C Act by adding new section 503B (21 U.S.C. 353b).

This notice solicits comments on adverse event reporting for outsourcing facilities under section 503B of the FD&C Act.

Under section 503B(b), a compounder can register as an outsourcing facility with FDA. If the conditions outlined in section 503B(a) of the FD&C Act are satisfied, a drug compounded by or under the direct supervision of a licensed pharmacist in an outsourcing facility is exempt from certain sections of the FD&C Act, including section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use) and section 505 (21 U.S.C. 355) (concerning the approval of human drug products under new drug applications (NDAs) or abbreviated new drug applications (ANDAs)). Drugs compounded in outsourcing facilities are not exempt from the requirements of section 501(a)(2)(B) of the FD&C Act (21 U.S.C. 351(a)(2)(B)) (concerning current good manufacturing practice for drugs).

Under section 503B(b)(5), an outsourcing facility must submit adverse event reports to FDA in accordance with the content and format requirements established through guidance or regulation under 21 CFR 310.305 (or any successor regulations). Accordingly, we developed the document, ''Guidance for Industry: Adverse Event Reporting for Outsourcing Facilities Under Section 503B of the Federal Food, Drug, and Cosmetic Act''.[1] The guidance explains electronic reporting of adverse events in accordance with § 310.305 with respect to outsourcing facilities.

Under § 310.305(c)(1), manufacturers, packers, and distributors of marketed prescription drug products that are not the subject of an approved NDA or ANDA, including, as set forth in the guidance, outsourcing facilities must submit to FDA adverse event reports within 15 calendar days of receiving the information and must submit follow-up reports within 15 calendar days of receipt of new information about the adverse event, or as requested by FDA. Outsourcing facilities must submit the adverse event report in an electronic format that FDA can process, review, and archive (collection of information is approved by OMB control number 0910–0291). A copy of the current labeling of the compounded drug product must be provided.

Under § 310.305(g), entities subject to the regulation must maintain for 10 years the records of all adverse events required to be reported under § 310.305. The outsourcing facility should also maintain records of its efforts to obtain the data elements described in the draft guidance for each adverse event report.

We estimate the burden of the information collection as follows:

[1] Available at: *https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM434188.pdf*.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Compounding outsourcing facility	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Submission of adverse event reports including copy of labeling and other information as described in the guidance	55	1	55	1.1	61

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Type of recordkeeping	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Records of adverse events, including records of efforts to obtain the data elements for each adverse event report	55	1	55	16	880

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

This is the first extension of the information collection and we have retained the currently approved burden estimate. Based on our review of Agency data, we estimate that annually 55 outsourcing facilities (''Number of Respondents'' and ''Total Annual Responses'' in table 1) will submit adverse event reports to FDA as specified in the guidance and that preparing and submitting this information will take approximately 1.1 hours per registrant (''Average Burden per Response'' in table 1). Likewise, we estimate that annually 55 outsourcing facilities (''Number of Recordkeepers'' in table 2) will maintain records of adverse events as specified in the guidance and that preparing and maintaining the records will take approximately 16 hours per registrant (''Average Burden per Recordkeeping'' in table 2).

Dated: June 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–13294 Filed 6–20–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–2194]

Novartis Pharmaceuticals Corporation, et al.; Withdrawal of Approval of Five New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of five new drug applications (NDAs) from multiple applicants. The holders of the applications notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of July 23, 2018.

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6248, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: The holders of the applications listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
NDA 020831	Foradil Aerolizer (formoterol fumarate) Powder, 0.012 milligram (mg)/inhalation.	Novartis Pharmaceuticals Corp., One Health Pl., East Hanover, NJ 07936.
NDA 022504	Axiron (testosterone) Transdermal Metered Solution, 30 mg/1.5 milliliter (mL) actuation.	Eli Lilly and Co., Lilly Corporate Center, Indianapolis, IN 46285.
NDA 050585	Rocephin (ceftriaxone sodium) for Injection, equivalent to (EQ) 10 gram (g) base/vial, EQ 250 mg base/vial (IV/IM), EQ 500 mg base/vial (IV/IM), EQ 1 g base/vial (IV/IM), EQ 2 g base/vial (IV/IM), EQ 500 mg base/vial, N/A; N/A, 1% (Rocephin kit), EQ 1 g base/vial, N/A; N/A, 1% (Rocephin kit).	Hoffmann-La Roche, Inc., c/o Genentech, Inc., 1 DNA Way, South San Francisco, CA 94080.
NDA 050624	Rocephin (ceftriaxone sodium) with Dextrose in Plastic Container Injection, EQ 10 mg base/mL, EQ 20 mg base/mL, and EQ 40 mg base/mL.	Do.
NDA 202763	Testosterone Gel, 25 mg/2.5 g packet, 50 mg/5 g packet	ANI Pharmaceuticals, Inc., 210 Main St. West, Baudette, MN 56623.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of July 23, 2018. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on July 23, 2018 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: June 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–13293 Filed 6–20–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2018–0009; OMB No. 1660—NEW]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Transcript Request Form

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before July 23, 2018.

ADDRESSES: 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 Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Clarence (Smiley) White, Chief, Operations and Support Branch, United States Fire Administration, 301–447–1055 or by email at *Smiley.White@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on February 22, 2018 at 83 FR 7752 with a 60 day public comment period. FEMA received two anonymous public comments that were not relevant to the information collection. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Transcript Request Form.

Type of Information Collection: New information collection.

OMB Number: 1660—NEW.

Form Titles and Numbers: FEMA Form 064–0–0–12, Transcript Request Form.

Abstract: FEMA provides training to advance the professional development of personnel engaged in fire prevention and control and emergency management activities through its Center for Domestic Preparedness (CDP), Emergency Management Institute (EMI), National Fire Academy (NFA), National Training and Education Division, National Domestic Preparedness Consortium, and Rural Domestic Preparedness Consortium. FEMA collects information from students who have completed courses at the National Fire Academy (NFA) and the Emergency Management Institute (EMI) for the purpose of fulfilling the student's request to provide a copy of their transcript for their personal records and/or for transmittal to an institution of higher education that delivers training and education also in support of the FEMA mission.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Estimated Number of Respondents: 4,500.

Estimated Number of Responses: 4,500.

Estimated Total Annual Burden Hours: 225 hours.

Estimated Total Annual Respondent Cost: $7,978.50.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $28,899.24.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Rachel Frier,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2018–13291 Filed 6–20–18; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2018–0024; OMB No. 1660–0140]

Agency Information Collection Activities: Proposed Collection; Comment Request; Integrated Public Alert and Warning Systems (IPAWS) Memorandum of Agreement Applications

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension, without change, of a currently approved

information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Integrated Public Alert and Warning Systems (IPAWS) Memorandum of Agreement Applications.

DATES: Comments must be submitted on or before August 20, 2018.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2018–0024. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW, 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Wade Witmer, Deputy for the Integrated Public Alert and Warning System (IPAWS) Program, FEMA, Continuity Communications Division, (202) 646–2523, *wade.witmer@fema.dhs.gov.* You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: Public Law 114–143, The IPAWS Modernization Act of 2015, and Presidential Executive Order 13407 establishes the policy for an effective, reliable, integrated, flexible, and comprehensive system to alert and warn the American people in situations of war, terrorist attack, natural disaster, or other hazards to public safety and wellbeing. The Integrated Public Alert and Warning System (IPAWS) is the Department of Homeland Security's (DHS) response to the Executive Order. The Stafford Act (U.S.C. Title 42, Chapter 68, Subchapter II) requires that FEMA make IPAWS available to Federal, State, and local agencies for the purpose of providing warning to governmental authorities and the civilian population in areas endangered by disasters. The information collected is used by FEMA to create a Memorandum of Agreement (MOA) that regulates the management, operations, and security of the information technology system connection between a Federal, State, territorial, tribal or local alerting authority and IPAWS–OPEN (Open Platform for Emergency Notifications).

Collection of Information

Title: Integrated Public Alert and Warning Systems (IPAWS) Memorandum of Agreement Applications.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0140.

FEMA Forms: FEMA Form 007–0–25, IPAWS Memorandum of Agreement (MOA) Application; FEMA Form 007–0–26, Memorandum of Agreement Application for Tribal Governments.

Abstract: A Federal, State, territorial, tribal, or local alerting authority that applies for authorization to use IPAWS is designated as a Collaborative Operating Group or ''COG'' by the IPAWS Program Management Office (PMO). Access to IPAWS is free; however, to send a message using IPAWS, an organization must procure its own IPAWS compatible software. To become a COG, a Memorandum of Agreement (MOA) governing system security must be executed between the sponsoring organization and FEMA.

Affected Public: State, Local or Tribal Government.

Estimated Number of Respondents: 160.

Estimated Number of Responses: 160.

Estimated Total Annual Burden Hours: 160 hours.

Estimated Total Annual Respondent Cost: $8,150.4.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $115,890.42.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Rachel Frier,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2018–13290 Filed 6–20–18; 8:45 am]

BILLING CODE 9111–AB–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–MB–2017–0092; 91200–FF09M20300–189–FXMB123109EAGLE]

Updated Collision Risk Model Priors for Estimating Eagle Fatalities at Wind Energy Facilities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and request for comments.

SUMMARY: The U.S. Fish and Wildlife Service (Service) uses a collision risk model (CRM) to predict the number of golden and bald eagles that may be killed at new wind facilities. The model incorporates existing information on eagle exposure and collision probability in the form of prior distributions (priors). The Service has undertaken an analysis to update the priors using all available data that meet specific criteria for both species of eagle. This notice announces the availability of a summary report of that analysis, which generates new exposure and collision priors for both species of eagle. We are soliciting public comments on the summary report, which will be considered by the Service before using the new priors in the CRM.

DATES: To ensure consideration of written comments, they must be submitted on or before August 20, 2018.

ADDRESSES: You may submit written comments by one of the following methods:

Electronically: Go to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Search for FWS–HQ–MB–2017–xxxx, which is the docket number for this notice, and follow the directions for submitting comments.

By hard copy: Submit by U.S. mail or hand-delivery to Public Comments Processing, Attn: FWS–HQ–MB–2017–0092; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service; MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Request for Information below for more information).

We request that you send comments by only one of the methods described above. We will post all information received on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Availability of Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Eliza Savage, at 703–358–2329 (telephone), or *eliza_savage@fws.gov* (email). Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service (Service) uses a collision risk model (CRM) to predict the number of golden and bald eagles that may be killed at new wind facilities (USFWS 2013; New et al. 2015). The CRM incorporates existing knowledge of eagle use around a proposed wind facility (exposure) and the probability of an eagle colliding with an operating turbine (collision probability). Essentially, the CRM uses three estimates to generate an annual eagle fatality estimate in the form of a probability distribution. These estimates are: (1) A project-specific estimate of eagle exposure; (2) a project-specific estimate of the amount of hazardous area and time that will be created by the project; and (3) an estimate of the probability that an exposed eagle that enters the hazardous area will be struck and injured or killed by a turbine blade. The median (50th quantile) fatality rate of the CRM-generated probability distribution is the point on the distribution at which there is an equal risk of under- and overestimating eagle fatalities. The Service uses the 80th quantile of the CRM fatality probability distribution to determine the take limit for incidental take permits, which lowers the risk of underestimating eagle take to a 20% chance.

In our 2016 revision to the eagle take regulations (81 FR 91494, Dec. 16, 2016), the Service reaffirmed both our intent to use the CRM to obtain initial estimates of eagle fatalities at new wind facilities, and that we would undertake a review of the background data used in the model to generate the estimates. The model is constructed using a Bayesian framework, and as such incorporates existing information on eagle exposure and collision probability in the form of prior distributions (priors). The priors are formally combined with site-specific data on exposure and the amount of hazardous area and operational time for a site to estimate the expected number of annual eagle collision fatalities.

The current priors for the CRM use data for golden eagles from nine sites with complete survey effort information for exposure, and four sites for collision probability (New et al. 2015). There were no data available to estimate parameters specific to bald eagles when we initially developed the model, so the golden eagle priors were used as surrogates for bald eagles. Public comments on the 2016 eagle rule revision were critical of the Service's CRM because the priors for golden eagles had not been updated to include new information, and because priors have not been developed for bald eagles even though data on exposure and collision probability are now available for this species. In response to these comments, the Service committed to updating the golden eagle priors, and to explore whether sufficient data exist to develop separate bald eagle exposure and collision priors.

The Service has undertaken that analysis using all available data that meet specific criteria for both species of eagle. This notice announces the availability of a summary report of that analysis, which includes new exposure and collision priors for both species of eagle. The report may be downloaded from the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Search for FWS–HQ–MB–2017–0092. You can also find the report on the Service's website at: *https://www.fws.gov/birds/management/managed-species/eagle-management.php.* The Service intends to incorporate these updated priors into our CRM after considering comments received in response to this notice; that update will be in the form of a revised version of Appendix D of the Eagle Conservation Plan Guidance (USFWS 2013).

For this update, the Service reviewed data sets for 419 wind energy facilities, but many did not meet our criteria for incorporation into the priors (see the summary report for criteria used to filter projects). Data from 71 new and the nine original wind projects were used for the updated exposure priors. Of these 80 sites, 61 provided data for golden eagles and 59 for bald eagles. For the collision priors, 18 new sites in addition to the original four sites were identified as having data sufficient to include in the updated collision priors. We used data from 21 sites for golden eagles and 14 for bald eagles in the collision-prior update. The updated exposure prior is lower for both species than the prior currently in use. The updated collision prior is slightly lower than the current prior for golden eagles and higher for bald eagles.

Many of the commenters on the 2016 eagle rule revision encouraged the Service to develop a specific bald eagle prior because they believe collision risk for bald eagles is lower than for golden eagles. The data available to the Service suggest that there is more variation in both exposure and collision risk for bald eagles, and that uncertainty results in a higher expected collision probability for this species. The Service does not regard this outcome as counter-intuitive, because the range in abundance of bald eagles across the landscape is far greater than for golden eagles, and where bald eagles are abundant, they engage in social behaviors and intra-specific interactions that may make them more vulnerable than golden eagles to collisions (81 FR 91552). Thus, the implication that bald eagles are at high risk at a few wind facilities, while their risk is much lower at many others, is tenable. The Service acknowledges, however, that the bald eagle collision prior is based on data from relatively few sites that do not span the range of bald eagle density conditions that exist across the country, and therefore may not be representative of all locations. Given this, the Service is considering three alternatives for how to incorporate species-specific priors for bald eagles into the CRM and fatality modeling process:

(1) Use the updated species-specific priors, and use the 80th quantile of the CRM fatality estimates as the initial permitted take number for permits, as is the current practice.

(2) Use the updated species-specific priors, but because the status of bald eagles is secure, adopt a risk-tolerant policy for bald eagles and select a more liberal quantile on the CRM fatality distribution as the initial permitted take number for this species.

(3) Given the limitations in data available to inform the bald eagle priors, initiate an expert elicitation process to further refine the bald eagle priors.

Under any of these scenarios, the Service would use data submitted under

permits to make updates to the priors in the future.

Alternative 1 would mean that for a similar level of eagle use observed at a project site, the Service would use higher fatality estimates for bald eagles than for golden eagles. Alternative 2 would be a decision by the Service to be more 'risk-tolerant' for bald eagles. This would mean that initial fatality predictions would be lower, however it would also likely mean that more permits would have to be amended to increase the permitted take over time (*i.e.,* the Service would be underestimating take more often). Alternative 3 would be a decision by the Service that more information is needed to understand the potential variability of exposure and collision probability for bald eagles. Such a process could result in either higher or lower (or more variable) priors. With this notice, we are soliciting input from the public on these three alternatives, and we will take those comments into consideration in making a final decision.

Many commenters on the draft 2016 rule urged the Service to adopt changes to the golden eagle CRM priors based on a recent peer-reviewed scientific article by Bay et al. (2016). Service staff coordinated with authors of the Bay et al. paper in development of this update, and all data used in the Bay et al. paper that were available to us and that met our criteria were incorporated. The Service decided not to incorporate the results of the Bay et al. paper directly, however, for two main reasons. First, the Service could access and utilize more data than were used in the Bay et al. paper, and so our updated priors incorporate more recent information from a wider range of projects and sites than were used by Bay et al. Second, the Bay et al. analysis used a fatality estimator that did not account for the possibility of undetected eagle deaths during mortality monitoring when no dead eagles were found. The Service uses models in our update that account for imperfect detection when dead eagles are not encountered during monitoring, because there is ample evidence that finding no dead eagles does not mean there were no eagle fatalities. Thus, although the Service's updated collision probability for golden eagles is higher than that reported by Bay et al., our approach is more accurate and consistent with our risk-averse policy with respect to estimating and managing eagle take.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that the 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. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Literature Cited

Bay, K., Nasman, K., Erickson, W., Taylor, K., Kosciuch, K. (2016). Predicting Eagle Fatalities at Wind Facilities, Journal of Wildlife Management 80:1000–1010.

New, L., Bjerre, E., Millsap, B., Otto, M.C., Runge, M.C. (2015). A Collision Risk Model to Predict Avian Fatalities at Wind Facilities: An Example Using Golden Eagles, Aquila chrysaetos, *PLOS ONE*, journal.pone.0130978.

U.S. Fish and Wildlife Service. 2013. Eagle conservation plan guidance. Module 1–land-based wind energy. Version 2. Division of Migratory Bird Management, Washington, DC. URL *http://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf.*

Dated: April 6, 2018.

Susan Combs,

Senior Advisor to the Secretary, Exercising the Authority of the Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2018–13358 Filed 6–20–18; 8:45 am]

BILLING CODE 4333–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX18LC00BM3FD00; OMB Control Number 1028–0079]

Agency Information Collection Activities; North American Breeding Bird Survey

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the U.S. Geological Survey (USGS) is proposing to renew an information collection (IC).

DATES: Interested persons are invited to submit comments on or before August 20, 2018.

ADDRESSES: Send your comments on the information collection request (ICR) by mail to the U.S. Geological Survey, Information Collections Clearance Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0079 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Keith Pardieck by email at *kpardieck@usgs.gov* or by telephone at 301–497–5843.

SUPPLEMENTARY INFORMATION: We, the U.S. Geological Survey, in accordance with the Paperwork Reduction Act of 1995, provide the general public and other Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

Abstract: Respondents supply the U.S. Geological Survey with avian population data for more than 600 North American bird species. The survey data, resulting population trend estimates, and relative abundance estimates will

be made available via the internet and through special publications, for use by Government agencies, industry, education programs, and the general public. We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its' implementing regulations (43 CFR part 2), and under regulations at 30 CFR 250.197, ''Data and information to be made available to the public or for limited inspection.'' Responses are voluntary. No questions of a ''sensitive'' nature are asked.

Title of Collection: North American Breeding Bird Survey.

OMB Control Number: 1028–0079.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Respondents: 1,600.

Total Estimated Number of Annual Responses: 2,600.

Estimated Completion Time per Response: 11 minutes.

Total Estimated Number of Annual Burden Hours: 28,600.

Respondent's Obligation: Voluntary.

Frequency of Collection: Annually.

Total Estimated Annual Non-hour Burden Cost: $141,700. Mileage costs are on average $54.50 per response, based on approximate 100-mile round trip for data collection per response and 2018 federal mileage rate of $0.545 per mile.

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 authorities for this action are the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

John French,

Patuxent Wildlife Research Center Director.

[FR Doc. 2018–13274 Filed 6–20–18; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR01016000; XXXR4524KK; RX.41129361.1010000]

Notice of Intent To Contract for Hydroelectric Power Development on the Bureau of Reclamation's North Unit Main Canal, Deschutes Project, Madras, Oregon

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent to accept proposals, select lessee(s), and contract for hydroelectric power development.

SUMMARY: The Bureau of Reclamation (Reclamation) has received a proposal to allow hydroelectric power development on the North Unit Main Canal (NUMC) under a Lease of Power Privilege (LOPP). To ensure fair and open competition, Reclamation is soliciting competing proposals at this time.

DATES: Submit the written proposal on or before November 19, 2018. Late proposals will not be considered. Delayed delivery to the Regional Power Manager's office due to failures or misunderstandings of the entity and/or of mail, overnight, or courier services will not excuse lateness, and accordingly, are advised to provide sufficient time for delivery.

ADDRESSES: Send eight copies of the written proposal to Mr. Joseph Summers, Regional Power Manager, Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, ID 83706; telephone (208) 378–5290.

FOR FURTHER INFORMATION CONTACT: Questions regarding proposal requirements or technical data available for the North Unit Main Canal may be directed to Mr. Jake Nink, Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, ID 83706; telephone (208) 378–5090; email *jnink@usbr.gov.* Upon receipt of written request, Mr. Nink will also arrange an informational meeting and/or site visit with interested entities. In this regard, Reclamation reserves the right to schedule a single meeting and/or visit to address the questions of all entities that have submitted questions or requested site visits.

Specific information related to operations and maintenance of the canal system may be obtained from Mr. Mike Britton, Bureau of Reclamation, North Unit Irrigation District Manager, 2024 Northwest Beech Street, Madras, OR 97741; telephone (541) 475–3625; email to *mbritton@northunit.com.*

SUPPLEMENTARY INFORMATION:

General Overview. The North Unit Irrigation District (NUID) operates and maintains the NUMC on the Deschutes Project located in the Deschutes River Basin, which supplies irrigation water to nearly 59,000 acres of farmland in Jefferson County, Oregon. Reclamation is considering allowing hydroelectric power development on the NUMC under a Lease of Power Privilege (LOPP).

A LOPP is a congressionally authorized alternative to Federal hydroelectric power development. It is a contractual right given to a non-federal entity to use a Reclamation asset for electric power generation consistent with Reclamation project purposes. Terms of a LOPP shall not exceed 40 years. General authority under Reclamation law for a LOPP includes, among others, the Town Sites and Power Development Act of 1906 (43 U.S.C. 522), the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) (1939 Act), and the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act of 2013 (Act of August 9, 2013, 127 Stat. 498).

Reclamation will be responsible for compliance with the National Environmental Policy Act (NEPA) related to any project selected for consideration pursuant to this Notice of Intent. Reclamation will also lead necessary consultation with American Indian Tribal Governments and compliance with the National Historic Preservation Act, Endangered Species Act, and other related environmental regulations for all elements of the proposed project. A LOPP may be issued only after Reclamation has determined that NEPA and any other regulatory compliance requirements are completed.

Project Definition and Location

On August 7, 2017, Reclamation received a formal proposal for non-federal hydroelectric power development from Kinet Inc. at 12 sites on the NUMC. Kinet Inc. proposes to develop these sites utilizing a new technology called linear Pelton turbines. This solicitation is exclusive to the following 12 NUMC sites:

Site Name—Mile 2 South.
Latitude Longitude—44.082201–121.286401.
Canal Mile Maker—1.78
Head (m)—6.1.
Flow (cms)—20.

Site Name—Mile 2 North.
Latitude Longitude—44.086971–121.274233.
Canal Mile Marker—2.11.
Head (m)—6.1.
Flow (cms)—20.

Site Name—Mile 3.
Latitude Longitude—44.092839–121.256296.
Canal Mile Marker—3.52.
Head (m)—6.1.
Flow (cms)—20.

Site Name—Mile 18.
Latitude Longitude—44.251184–121.128517.
Canal Mile Marker—18.34.
Head (m)—6.71.
Flow (cms)—21.

Site Name—Mile 19.

Latitude Longitude—44.2666–121.12075.
Canal Mile Marker—19.
Head (m)—4.4.
Flow (cms)—16.

Site Name Mile—20.
Latitude Longitude—44.2838–121.11471.
Canal Mile Marker—20.
Head (m)—5.36.
Flow (cms)—21.

Site Name Mile—43.
Latitude Longitude—44.500374–121.154865.
Canal Mile Marker—45.
Head (m)—18.2.
Flow (cms)—7.1.

Site Name—Mile 48.
Latitude Longitude—44.5368587–121.153547.
Canal Mile Marker—47.98.
Head (m)—3.66.
Flow (cms)—7.2.

Site Name—Mile 50 East.
Latitude Longitude—44.571091–121.158783.
Canal Mile Marker—19.
Head (m)—51.
Flow (cms)—2.98.

Site Name—Mile 50 West.
Latitude Longitude—44.572148–121.160127.
Canal Mile Marker—19.
Head (m)—3.05.
Flow (cms)—7.0.

Site Name—Mile 52 South.
Latitude Longitude—44.601337–121.162522.
Canal Mile Marker—53.69.
Head (m)—3.05.
Flow (cms)—7.0.

Site Name—Mile 52 North.
Latitude Longitude—44.603526–121.161854.
Canal Mile Marker—19.
Head (m)—3.05.
Flow (cms)—7.0.

Reclamation notified NUID of the Kinet Inc. proposal and solicited NUID's interest in submitting a proposal as a preferred entity. In a subsequent letter dated September 21, 2017, NUID declined interest in hydroelectric power development at the proposed sites. As a result, Reclamation is soliciting proposals for consideration to allow hydroelectric power development under a LOPP on the NUMC system.

Fundamental Considerations and Requirements

1. Under this solicitation, Reclamation may only issue a LOPP for hydroelectric power development at the 12 identified NUMC sites described herein.

2. Any LOPP terms for hydroelectric power development on the NUMC must not interfere with existing contractual commitments related to operations and maintenance of the canal system. The lessee (*i.e.,* successful proposing entity) will be required to enter into a contract with Reclamation. This contract will, (1) address requirements related to coordination of operations and maintenance with Deschutes Project stakeholders (including the NUID); and (2) stipulate that the lessee will be responsible for any increase in operations or maintenance costs that are attributable to the hydroelectric power development.

3. The lessee would be responsible for securing transfer and marketing of the power generated by the proposed project.

4. All costs incurred by the United States related to a proposed LOPP project will be at the expense of the lessee. Such costs include management and coordination of necessary Reclamation activities, provision of information, conduct of or assistance with regulatory compliance (including NEPA), consultation during design development and related to operations and maintenance under a LOPP, development of the LOPP, necessary contracts with outside consultants, or any other cost for which the government would be reimbursed by an applicant or the general public. In addition, the lessee will be required to make annual payments to the United States for the use of a government facility in the amount of at least 2–3 mills per kilowatt-hour of gross energy produced by the facility, measured at the generator(s).

5. The LOPP will include provisions for the mill rate to increase each year commensurate with inflation based on the previous 5-year average of the Gross Domestic Product (GDP) Price Deflator; however, the rate of increase will be capped at 5 percent. If the 5-year GDP Price Deflator average shows no change or deflation, the mill rate will remain the same as the previous year's rate. Annual payments to the United States will be deposited as a credit to the Reclamation fund and project to be applied against the total outstanding reimbursable repayment obligation for reimbursable project construction costs of the Deschutes Project pursuant to the existing construction cost allocation (not applied only against power construction costs). If the outstanding reimbursable repayment obligation for project construction costs is satisfied, then the payments will be held as a statutory credit for the project or program until an eligible reimbursable project expense is incurred against which the credit can be applied.

Proposal Content Guidelines

Interested parties should submit proposals specifically addressing the following qualifications, capabilities, and approach factors. Proposals submitted will be evaluated and ranked directly based on these factors. Additional information may be provided at the discretion of those submitting proposals.

(a) *Qualifications of Proposing Entity:* Provide relevant information describing/documenting the qualifications of the proposing entity to plan, design, and implement such a project, including, but not limited to:

- Type of organization.
- Business history, including length of time in business, experience in funding, and design and construction of similar projects.
- Industry rating(s) that indicate financial soundness and/or technical and managerial capability.
- Experience of key management personnel.
- History of any reorganizations or mergers with other companies (if applicable).
- Preference status (as applied to a LOPP, the term ''preference entity'' means an entity qualifying for preference under Section 9(c) of the 1939 Act as a municipality, public corporation or agency, or cooperative or other nonprofit organization financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936, as amended).
- Any other information not already requested above or in the following evaluation categories that demonstrates the interested entity's organizational, technical, and financial ability to perform all aspects of the work.

(b) *Proposed Development Plan:* Describe and provide mapping and drawings of proposed facilities and equipment comprising the LOPP project. Include descriptions and locations of structures, turbines, penstocks, transmission lines, access roads, and other appurtenant facilities.

Describe proposed capacities and general operation of the hydroelectric projects to include generation capacity, power source and power consumption, configuration, turbine generating capacity, distribution transmission line size and route, and other relevant aspects of the project.

Describe the ability of generation to provide ancillary services, such as regulation, spinning reserves, and volt-ampere reactive support, and information on the reliability of the generation, potential maintenance outage schedule, and duration.

(c) *Proposed Approach to Acquisition of Necessary Property Rights:* Specify plans for acquiring title to or the right to occupy and use all lands necessary for the proposed development, including such additional lands as may be required during construction. Address lands necessary for electrical distribution lines, access roads, and all aspects of project development and operation and maintenance.

(d) *Long-Term Operation and Maintenance:* Provide a description (with relevant references) of the project proponent's experience in operation and maintenance of hydroelectric or similar facilities once they are operational and over the long-term (*i.e.,* the 40-year lease contemplated for the proposed development). Identify the organizational structure and plan for the long-term operation and maintenance of the proposed development. Define how the proposed development would operate in harmony with the NUMC system.

(e) *Contractual Arrangements:* Describe any anticipated contractual arrangements with project stakeholders of the Deschutes Project, including contractual arrangements to utilize water rights held by NUID. Define how the proposed development would operate in harmony with the NUMC system.

(f) *Management Plan:* Provide a management plan to accomplish such activities as planning, NEPA compliance, LOPP development, design, construction, facility testing, start-up of hydropower production, and preparation of an Emergency Action Plan. Prepare schedules of these activities as applicable. Describe what studies are necessary to accomplish the hydroelectric power development and how the studies would be implemented.

(g) *Environmental Impact:* Discuss potential significant adverse impacts from the proposed development on biophysical or sociocultural resource parameters. Of particular concern are potential impacts on any protected aquatic or terrestrial wildlife species or associated protected habitat. Other concerns may include, but are not limited to, the impact on land use adjacent to the proposed development, recreation at the surrounding areas, cultural resources, and Indian Trust assets. Provide information on the types and severity of expected impacts and proposed methods of resolving or mitigating these impacts.

Describe potential beneficial impacts that may be expected from the development to include such perspectives as energy conservation or using available water resources in the public interest.

Describe proposed studies to adequately define the extent of the adverse and beneficial impacts, potential severity, and potential alternatives to mitigate impacts.

(h) *Other Study and/or Permit Requirements:* Describe planned response to other applicable regulatory requirements, including the National Historic Preservation Act, Clean Water Act, Endangered Species Act, and state and local laws and licensing requirements. Also describe any known potential for impact on lands or resources of American Indian tribes, including trust resources.

(i) *Project Development Costs and Economic Analysis:* Estimate the costs of development, including the cost of studies to determine feasibility, environmental compliance, project design, construction, financing, and the amortized annual cost of the investment. Estimate annual operation and maintenance, replacement expenses, annual payments to the United States, and those potentially associated with the Deschutes Project. Estimate costs associated with any anticipated additional transmission or wheeling services. Identify proposed methods of financing the project. The anticipated return on investment should be estimated and an economic analysis should be presented that compares the present worth of all benefits and the costs of the project.

(j) *Performance Guarantee and Assumption of Liability:* Describe plans for (1) providing the government with performance bonds or irrevocable letter of credit covering completion of the proposed project, (2) assuming liability for damage to the operational and structural integrity of the NUMC or other aspects of the Deschutes Project caused by construction, operations and/or maintenance of the hydropower development, and (3) obtaining general liability insurance.

(k) *Other Information:* This final paragraph is provided for the applicant to include additional information considered relevant to Reclamation's selection process in this matter.

Selection of Lessee

Reclamation will evaluate proposals received in response to this published notice. Proposals will be ranked according to response to the factors described in Fundamental Considerations and Requirements and Proposal Content Guidelines sections of this notice. In general, Reclamation will give more favorable consideration to proposals that (1) are well adapted to developing, conserving, and utilizing the water resource and protecting natural resources; (2) clearly demonstrate that the offeror is qualified to develop the hydropower facility and provide for long-term operation and maintenance; and (3) best share the economic benefits of the hydropower development among parties to the LOPP. A proposal will be deemed unacceptable if it is inconsistent with Deschutes Project purposes, as determined by Reclamation.

Reclamation will give preference to those entities that qualify as preference entities (as defined under Proposal Content Guidelines, item (a), of this notice) provided that the preference entity is well qualified and their proposal is at least as well adapted to developing, conserving, and utilizing the water and natural resources as other submitted proposals. Preference entities will be allowed 30 days to improve their proposals, if necessary, to be made at least equal to a proposal(s) that may have been submitted by a non-preference entity.

Notice and Time Period To Enter Into LOPP

Reclamation will notify, in writing, all entities submitting proposals of Reclamation's decision regarding selection of the potential lessee. The selected potential lessee will have 15 months from the date of selection of the lessee to sign the preliminary lease, complete the requirements set forth in the preliminary lease, and to sign the LOPP. The lessee will then have up to 3 years from the date of the preliminary lease agreement to the beginning of construction. Maximum timeframes for construction will be determined by the Regional Director. Such timeframes may be adjusted for just cause resulting from actions and/or circumstances that are beyond the control of the lessee.

Dated: March 22, 2018.

Lorri J. Gray,

Regional Director, Pacific Northwest Region.

[FR Doc. 2018–13363 Filed 6–20–18; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade

Commission has received a complaint entitled *Certain Carburetors and Products Containing Such Carburetors, DN 3323;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Walbro, LLC on June 14, 2018. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain carburetors and products containing such carburetors. The complaint names as respondents: Ruixing Carburetor Manufacturing Co., Limited Zhejiang of China; Huayi Carburetor Factory of China; Tillotson of Ireland; Fujian Hualong Carburetor Co., Ltd. of China; Fuding Guangda General Machinery Co., Ltd. of China; Wuyi Henghai Tools Co., Ltd. of China; Fuding Youyi Trade Co., Ltd. of China; Amazon.com, Inc. of Seattle, WA; Amerisun Inc. of Itasca, IL; Ardisam, Inc. of Cumberland, WI; Buffalo Corporation of O'Fallon, MO; Cabela's Incorporated of Sidney, NE; Champion Power Equipment, Inc. of Santa Fe, CA; Feldmann Eng. & Mfg. Co., Inc. of Sheboygan Falls, WI; FNA Group, Inc. of Pleasant Prairie, WI; Frictionless World, LLC of Denver, CO; Generac Power Systems, Inc. of Waukesha, WI; Husqvarna Professional Products, Inc. of Charlotte, NC; Imperial Industrial Supply Co. d/b/a Duromax Power Equipment of Ontario, CA; Kmart Corporation of Hoffman Estates, IL; Lowe's Companies, Inc. of Mooresville, NC; Mat Industries, LLC of Lake Zurich, IL; Menards, Inc. of Eau Claire, WI; MTD Products Inc. of Valley City, OH; North American Tool Industries of Huntington, IN; Northern Tool & Equipment Co., Inc. of Burnsville, MN; QV Tools LLC of Las Vegas, NV; Sears, Roebuck and Co. of Hoffman Estates, IL; Target Corporation of Minneapolis, MN; Techtronics Industries Co. Ltd of d/b/a Techtronic Industries Power Equipment of Hong Kong; The Home Depot, Inc. of Atlanta, GA; Thunderbay Products of Clayton, WI; Tool Tuff Direct LLC of Golden, CO; Tractor Supply Company of Brentwood, TN; and Walmart Inc. of Bentonville, AR. The complainant requests that the Commission issue a general exclusion order, and in the alternative, issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3323'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electonic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: June 15, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–13286 Filed 6–20–18; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1120]

Certain Human Milk Oligosaccharides and Methods of Producing the Same Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 2, 2018, under section 337 of the Tariff Act of 1930, as amended, on behalf of Glycosyn LLC. An amended complaint was filed on May 16, 2018. An additional supplement to the complaint was also filed on May 25, 2018. The complaint, as amended and supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain human milk oligosaccharides by reason of infringement of U.S. Patent No. 9,453,230 (''the '230 patent'') and U.S. Patent No. 9,970,018 (''the '018 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2018).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on June 14, 2018, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of products identified in paragraph (2) by reason of infringement of one or more of claims 1–40 of the '230 patent; and claims 1–28 of the '018 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''2′-fucosyllactose oligosaccharides'';

(3) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) *The complainant is:* Glycosyn LLC, 890 Winter Street, Suite 208, Waltham, MA 95131.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: Jennewein Biotechnologie GmbH, Maarweg 32, D–53619 Rheinbreitbach, Germany.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

Issued: June 15, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–13285 Filed 6–20–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1190–0009]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change of a Currently-Approved Collection Title II of the Americans With Disabilities Act of 1990/Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form

AGENCY: Disability Rights Section, Civil Rights Division, U.S. Department of Justice.

ACTION: 30 Day Notice.

SUMMARY: The Department of Justice, Civil Rights Division, Disability Rights Section, has submitted the following information collection request to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995. The information collection extension is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** allowing for a 60-day public comment period.

DATES: The Department of Justice encourages public comment and will accept input until July 23, 2018.

FOR FURTHER INFORMATION CONTACT: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time should be directed to the Office of Management and Budget (OMB), Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

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 collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so, how, the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of This Information Collection

1. *Type of information collection:* Extension of Currently Approved Collection.

2. *The Title of the Form/Collection:* Title II of the Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form.

3. The agency form number and applicable component of the Department sponsoring the collection: The document has no agency form number. The applicable component within the Department of Justice is the Disability Rights Section, Civil Rights Division.

4. Affected public who will be asked to respond, as well as a brief abstract:

Primary: Individuals alleging discrimination by public entities based on disability. Under title II of the Americans with Disabilities Act, an individual who believes that he or she has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint. The Department of Justice must address the complaint or refer the complaint to the appropriate Federal agency. Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity must review the complaint to determine whether it has jurisdiction under Section 504. If the agency does not have jurisdiction under Section 504, it must determine whether it is the designated agency responsible for complaints filed against that public entity under title II of the ADA. If the agency does not have jurisdiction under section 504 and is not the designated agency under title II of the ADA, it must refer the complaint to the Department of Justice.

5. An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 11,192 respondents per year at 0.75 hours per complaint form.

6. An estimate of the total public burden (in hours) associated with the collection: The estimated annual public burden associated with this collection is 8,394 hours, which is equal to 11,192 respondents * .75 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.405A, Washington, DC 20530.

Dated: June 18, 2018.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2018–13312 Filed 6–20–18; 8:45 am]

BILLING CODE 4410–13–P

DEPARTMENT OF LABOR

Employment and Training Administration

[OMB Control Number 1205–0457]

Comment Request for Information Collection for Form ETA–9127, Foreign Labor Certification Quarterly Activity Report, Revision of a Currently Approved Collection

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL or Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the 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. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Employment and Training Administration (ETA) is soliciting comments concerning the collection of data through Form ETA–9127, *Foreign Labor Certification Quarterly Activity Report* (Office of Management and Budget (OMB)) Control Number 1205–0457), which expires October 31, 2018. The Form

ETA–9127 solicits information from State Workforce Agencies (SWAs) who are recipients of foreign labor certification grants about program-related activities performed by SWA staff in accordance with specific fiscal year annual plans. These activities include reviewing and transmitting H–2A and H–2B job orders, conducting H–2A prevailing wage and prevailing practice surveys, and performing H–2A related housing inspections of facilities offered to agricultural workers.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before August 20, 2018.

ADDRESSES: A copy of this information collection request (ICR), with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge by contacting William W. Thompson, II, Administrator, Office of Foreign Labor Certification, telephone number: 202–513–7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Requests may also be made by fax at 202–513–7395 or by email at *ETA.OFLC.Forms@dol.gov* subject line: Form ETA–9127.

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Room 12–200, 200 Constitution Avenue NW, Washington, DC 20210; by email: *ETA.OFLC.Forms@dol.gov* subject line: Form ETA–9127; or by Fax: 202–513–7395.

SUPPLEMENTARY INFORMATION:

I. Background

Under the foreign labor certification programs administered by ETA, SWAs are funded through annually reimbursable grants. These grants fund certain activities that support the processing of applications for temporary labor certification filed by U.S. employers in order to hire foreign workers in the H–2B or H–2A visa categories to perform nonagricultural or agricultural services or labor. Under the grant agreements, SWAs must review and transmit, through the intrastate and interstate systems, job orders submitted by employers in order to recruit U.S. workers prior to filling the job openings with foreign workers.

In order to effectively monitor the administration of foreign labor certification activities by the SWAs, the Department requires the SWAs to report their workloads related to these activities on a quarterly basis. This collection of information is conducted through Form ETA–9127, *Foreign Labor Certification Quarterly Activity Report.* This report is critical for ensuring accountability and for future program management, including budget and workload management. ETA intends to revise the information collection by clarifying the Form ETA–9127 instructions and making minor changes to the PRA disclosure on the form.

The Department has proposed changes to the collection. Specifically, the Form ETA–9127 has been changed to capture information currently needed to make decisions on grant fund distribution.

Two questions were removed from Form ETA–9127. The first question removed referenced union contacts made by the SWA. This question was removed because this data is not currently reviewed by the grants management unit of ETA's OFLC. Union contacts are made by SWAs when the Chicago National Processing Center Certifying Officers have determined that the occupation or industry is traditionally or customarily unionized. In such circumstances, the Certifying Officer collects this information when confirming referrals with the SWAs during the certification process. Therefore, this information is available to the Department without engaging in this data collection. Continuing to collect such information would result in unwarranted data collection creating an undue burden on those filing the Form ETA–9127.

The second question removed is located in both the H–2A and H–2B sections, and prompts the SWA to list the most common deficiencies on the job order. The collection of this data is no longer needed because the Chicago NPC, which receives the job orders from the SWA, has addressed previously common deficiencies found on job orders in published *Frequently Asked Questions* and outreach to SWAs and employers. Again, continuing to collect such information would result in unwarranted data collection creating an undue burden on those filing the Form ETA–9127.

The Form ETA–9127 instructions have been modified in order to promote clarity because of some confusion expressed by the SWAs. Two terms, interstate and intrastate, have been segmented and defined in plain language to reduce this confusion and minimize the burden to the SWAs.

II. Review Focus

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

Type of Review: Revision.

Title of Collection: Form ETA–9127, *Foreign Labor Certification Quarterly Activity Report.*

OMB Control Number: 1205–0457.

Affected Public: State, local or tribal governments.

Form(s): ETA–9127.

Total Estimated Annual Respondents: 54.

Annual Frequency: Quarterly.

Total Estimated Annual Responses: 216.

Average Time per Response: 1 hour and 45 minutes.

Total Estimated Annual Burden Hours: 378.

Total Estimated Annual Other Costs Burden: $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record. Commenters are encouraged not to submit sensitive information (*e.g.,* confidential business information or personally identifiable information such as a Social Security number).

Rosemary Lahasky,

Deputy Assistant Secretary for Employment and Training Administration.

[FR Doc. 2018–13315 Filed 6–20–18; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2018–0006]

Information Collection Requirements for OSHA's Alliance Program; Submission for Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to obtain OMB approval of the information collection requirements specified by OSHA's Alliance Program.

DATES: Comments must be submitted (postmarked, sent, or received) by August 20, 2018.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2018–0006, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the Agency name and the OSHA docket number (OSHA–2018–0006) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Christie Garner at the number below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Tom Mockler or Christie Garner, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone: (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (see 29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining said information (29 U.S.C. 657).

OSHA created the Alliance Program in 2002 as a structure for working with groups that are committed to worker safety and health. The program enables OSHA to enter into a voluntary, cooperative relationship at the national, regional, or area office level with industry, labor, and other groups to improve workplace safety and health; prevent workplace fatalities, injuries, and illnesses; and reach employers and workers that OSHA may not otherwise reach through its traditional methods. These groups include trade or professional organizations, businesses, unions, consulates, faith- and community-based organizations, and educational institutions. OSHA and the groups work together to share workplace safety and health information with workers and employers, encourage participation in OSHA initiatives, develop compliance assistance tools and resources, and educate workers and employers about their rights and responsibilities. Alliance Program participants do not receive exemptions from OSHA inspections or any other enforcement benefits.

OSHA collects information from organizations that are signatories to an Alliance agreement, known hereafter as ''alliance participants.'' Information is collected from the participants through meetings, informal conversations, and data forms to develop Alliance agreements, and to develop annual as well as program-wide reports.

Alliance participants work with OSHA to develop agreements with well-defined goals and specific objectives and activities. Agreements commonly identify specific hazard(s), operations, or other areas of concern; the targeted segment within the workforce; and the planned activities to meet the agreement's overarching goals and objectives. OSHA provides templates for Alliance agreements OSHA uses the information from the forms (national Alliance) and collaborative data gathering (Regional and Area Offices) to compile annual reports for individual Alliances and assess the effectiveness of the individual Alliance in meeting agreement goals and objectives. OSHA uses aggregate data from all active Alliances to assess the impact of the program as a whole in meeting the Agency's strategic plan goals and strategies related to outreach and communication.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other

technological information collection and transmission techniques.

III. Proposed Actions

This is an existing collection of information in use without an OMB number. The proposed ICR includes collection of information requirements for: (1) Alliance agreement development, (2) the biannual Alliance Data Reporting Form, and (3) annual reports. The burden hours for the information collection requirements contained in the proposed ICR would result in a total initial burden hour estimate of 2,210 hours.

The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to approve these information collection requirements, and the associated templates and forms.

Type of Review: Existing collection in use without an OMB control number.

Title: Information Collection Requirements for OSHA's Alliance Program.

OMB Control Number: 1218—0NEW.

Affected Public: Businesses or other for-profits.

Number of Respondents: 250

Frequency: Once, On occasion, Semi-annually, Annually.

Average Time per Response: Various.

Total Number of Responses: 690.

Estimated Total Burden Hours: 2,210.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2018–0006). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as their social security number and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on June 18, 2018.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2018–13324 Filed 6–20–18; 8:45 am]

BILLING CODE 4510–26–P

MILLENNIUM CHALLENGE CORPORATION

Privacy Act of 1974; New System of Records

AGENCY: Millennium Challenge Corporation (MCC).

ACTION: Notice of a new system of records.

SUMMARY: MCC proposes to add a new system of records to its inventory of records systems subject to the Privacy Act of 1974, as amended. This action complies with the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The system has been operational since June 29, 2016 without incident.

DATES: This action will be applicable without further notice 30 days after date of publication in the **Federal Register**.

ADDRESSES: Send written comments to the Millennium Challenge Corporation, ATTN: Vincent T. Groh, Chief Information Officer, Department of Administration and Finance, 1099 Fourteenth Street NW, Suite 700, Washington, DC, 20005–3550.

FOR FURTHER INFORMATION CONTACT: Miguel G. Adams, Chief Information Security Officer and Deputy Privacy Officer, Millennium Challenge Corporation, *adamsmg@mcc.gov,* 202–521–3574.

SUPPLEMENTARY INFORMATION: MCC is giving notice of a system of records pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) for the MCC–Business Relations System (MCC–BRS). MCC utilizes MCC–BRS to provide automated processing of business transactions related MCC's mission of reducing global poverty through growth. MCC–BRS utilizes the Salesforce Government Cloud information system for collecting, storing, and processing the information. Various elements within MCC will utilize MCC–BRS for their business functions; they include the departments of Congressional and Public Affairs (CPA) Department, and the Department of Compact Operations (DCO). Business functions within DCO include the Finance, Investment and Trade (FIT), Environmental and Social Performance (ESP), and the Office of Strategic Partnerships (OSP).

Salesforce Government Cloud meets the federal government's objectives of cloud computing to reduce procurement and operating costs to the federal government. In addition, Salesforce Government Cloud meets the Federal Information Processing Standards Publication (FIPS)—200, Minimum Security Requirements for Federal Information and Information Systems as an authorized Federal Risk and Authorization Management Program (FedRAMP) information system. MCC utilizes MCC–BRS to achieve the following business objectives: 1. To create and maintain a system that optimizes MCC's ability to analyze, manage, engage, and grow external stakeholders; 2. To create and manage business engagement opportunities that promote MCC's mission in an organized and efficient manner; 3. To provide in person or online event management and communications campaigns for external stakeholder engagement; and 4. To provide the agency with the means to: track and manage future financial

opportunity data, create and manage MCC event data, access dashboards, and generate accurate reporting and analytics.

SYSTEM NUMBER

MCC–001.

SYSTEM NAME:

MCC–Business Relations System (MCC–BRS).

SYSTEM CLASSIFICATION:

Unclassified.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records in this system process information on international and domestic contracting firm owners and employees, small to medium business owners and employees; and other individuals that are contacts or leads for potential vendors.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories include: 1. Personally identifiable information (PII); such as, name, company name, job title, business address, business phone number, country or country region, email, and notes on a meeting or event; and 2. Meeting notes.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

22 U.S.C. 7705, Chapter 84— Millennium Challenge.

PURPOSE OF THE SYSTEM:

MCC staff will use the system to collect, store, and process business contact information that will contain PII. The information collected achieves MCC's core functions of reducing global poverty through economic growth by aligning business contacts with MCC's mission. The PII information collected is similar to the information on a business card. Using a customer relations management (CRM) increases accuracy and business efficiencies. In addition, MCC will utilize the system to process, store, and retain personal notations on meeting or business events. Personal notations can include information that promotes efficiencies in previous contact meetings, discussions, or events that have transpired in the past. Additionally, the system utilizes encrypted links to provide efficiencies in communications campaigns through mass email distribution, and event engagement opportunities to event attendees, or vendor groups.

ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGEORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as determined to be relevant and necessary, outside MCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

- Financial project monitoring or collections;
- Due diligence background checks and screening;
- Litigation or arbitration purposes;
- Outside organizations contracted with OPIC for specific authorized activities;
- National Archives and Records Administration (NARA) for records management purposes;
- Contractors, interns, and government detailed personnel to perform OPIC authorized activities;
- Audits and oversight;
- Congressional inquiries;
- Investigations of potential violations of law.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

This system is electronically stored in a government cloud service centrally located at a Salesforce GSA data center.

SAFEGUARDS:

MCC safeguards the information in accordance with applicable laws, rules and policies, including the Federal Information Security Modernization Act of 2014; OMB Circular A–130, Management of Federal Resources; Federal Risk and Authorization Management Program (FedRAMP); and MCC policies and procedures. MCC protects records from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include restricting access to authorized personnel who have need-to-know, and the process of authentication using user identifications (IDs) and passwords that function as an identity and authentication method of access. Personnel with authorized access to the system have received training in the proper handling of Privacy Act information and in information security requirements for both paper copies and electronically stored information.

RETENTION AND DISPOSAL:

MCC retains records in accordance with the National Archives and Records Administration (NARA), General Records Schedule (GRS).

RETRIEVABILITY:

Records are retrievable by personal name, project name, or a combination of search functions available in the Salesforce CRM tool.

SYSTEM MANAGER AND ADDRESS:

Jason Bauer, Director of Finance, Investment and Trade (FIT), Department of Compact Operations, 1099 Fourteenth Street NW, Suite 700, Washington, DC, 20005–3550.

NOTIFICATION PROCEDURES:

Individuals seeking knowledge of the system's records must submit a written request to the MCC Privacy Officer, at the above mailing address, clearly marked as ''Privacy Act Request'' on the envelope and letter. The request must include the requestor's full name, current address, the name or number of the system to be searched, and if possible, the record identification number. The request must be signed by either notarized signature or by signature under penalty of perjury under 28 U.S.C. 1746.

RECORD ACCESS PROCEDURE:

Same as notification procedures.

CONTESTING RECORD PROCEDURE:

Same as the notification procedure above; the request should also clearly and concisely describe the information contested, the reasons for contesting it, and the proposed amendment sought, pursuant to 45 CFR 5b.7.

RECORD SOURCE CATEGORIES:

The federal employee collects and imports the contact information or event information directly to the system. Additionally, the *www.MCC.gov* public website events webform will import the contact information directly to the system.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: June 1, 2018.

Vincent T. Groh,

Privacy Officer for Millennium Challenge Corporation.

[FR Doc. 2018–13305 Filed 6–20–18; 8:45 am]

BILLING CODE 9211–03–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting; National Science Board

The National Science Board, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice of

the scheduling of a teleconference for the transaction of National Science Board business, as follows:

TIME AND DATE: Open meeting of the Executive Committee of the National Science Board, to be held Friday, June 22, 2018, from 4:00–5:00 p.m. EDT.

PLACE: This meeting will be held by teleconference at the National Science Foundation, 2415 Eisenhower Ave., Alexandria, VA 22314.

STATUS: Open.

MATTERS TO BE CONSIDERED: Committee Chair's Opening Remarks; approval of Executive Committee Minutes of April 2, 2018; discuss issues and topics for an agenda of the NSB Meeting scheduled for July 17–18, 2018.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: James Hamos, 2415 Eisenhower Ave., Alexandria, VA 22314. Telephone: (703) 292–8000.

You may find meeting information and updates (time, place, subject matter or status of meeting) at *http://www.nsf.gov/nsb/meetings/notices.jsp#sunshine.*

SUPPLEMENTARY INFORMATION: An audio listening line will be available for the public. Members of the public must contact the Board Office to request the number by sending an email to *nationalsciencebrd@nsf.gov* at least 24 hours prior to the teleconference.

Chris Blair,

Executive Assistant to the NSB Office.

[FR Doc. 2018–13490 Filed 6–19–18; 4:15 pm]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by July 23, 2018. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, at the above address, 703–292–8030, or *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541, 45 CFR 670), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

Application Details

1. *Applicant:* Permit Application: 2019–001.

Ron Naveen, Oceanites, Inc., PO Box 15259, Chevy Chase, MD 20825.

Activity for Which Permit is Requested: Take, Harmful Interference, Enter Antarctic Specially Protected Areas. The applicant proposes to continue data collections activities conducted to support the Antarctic Site Inventory. Visitor site surveys may include censusing penguin and seabird colonies throughout the Antarctic Peninsula. There is the potential for slight disturbance of the birds during surveying and censusing. This permit would address the potential for infrequent, minimal take or harmful interference of the following species: Adelie penguin (*Pygoselis adeliae*), chinstrap penguin (*P. antarctica*), gentoo penguin, (*P. papua*), southern giant petrel (*Macronectes giganteus*), southern fulmar (*Fulmarus glacialoides*), cape petrel (*Daption capense*), Antarctic blue-eyed shag (*Phalacrocorax atriceps*), Antarctic brown skua (*Catharacta antarctica*), south polar skua (*C. maccormicki*), kelp gull (*Larus dominicanus*), and Antarctic tern (*Sterna vittata*). While conducting visitor site surveys and censuses, the applicant would potentially enter a number of Antarctic Specially Protected Areas (ASPAs) in the Antarctic Peninsula region.

Location: Antarctic Peninsula region, including ASPA 107, Emperor Island; ASPA 108, Green Island; ASPA 109, Moe Island; APSA 110, Lynch Island; ASPA 111, Southern Powell Island and adjacent islands; ASPA 112, Coppermine Peninsula; ASPA 113, Litchfield Island; ASPA 114, Northern Coronation Island; ASPA 115, Lagotellerie Island; ASPA 117, Avian Island; ASPA 125, Fildes Peninsula; ASPA 126, Byers Peninsula; ASPA 128, Western Shore of Admiralty Bay; ASPA 129, Rothera Point; ASPA 132, Potter Peninsula; ASPA 133, Harmony Point; ASPA 134, Cierva Point and offshore islands; ASPA 139, Biscoe Point; ASPA 140, Parts of Deception Island; ASPA 144, Chile Bay (Discovery Bay); ASPA 145, Port Foster; ASPA 146, South Bay; ASPA 148, Mount Flora; ASPA 149, Cape Shirreff and San Telmo Island; ASPA 150, Ardley Island; ASPA 151, Lions Rump; ASPA 152, Western Bransfield Strait; and ASPA 153, Eastern Dallmann Bay.

Dates of Permitted Activities: September 1, 2018–August 31, 2023.

Nadene Kennedy,

Polar Coordination Specialist, Office of Polar Programs.

[FR Doc. 2018–13355 Filed 6–20–18; 8:45 am]

BILLING CODE 7555–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Survey of Multiemployer Pension Plan Withdrawal Liability Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) intends to request that OMB approve, under the Paperwork Reduction Act, a survey of terminated and insolvent multiemployer pension plans to obtain withdrawal liability information. PBGC needs the withdrawal liability information to estimate its multiemployer program liabilities for purposes of its financial statements. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments should be submitted by August 20, 2018.

ADDRESSES: Comments may be submitted by any of the following methods:

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

• *Email: paperwork.comments@pbgc.gov.* Refer to Withdrawal Liability Survey in the subject line.

• *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to the Withdrawal Liability Survey. All comments received will be posted without change to PBGC's website, *www.pbgc.gov,* including any personal information provided. Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026, or calling 202–326–4040 during normal business hours. TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4040.

FOR FURTHER INFORMATION CONTACT: Hilary Duke, Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026, 202–326–4400, extension 3839. TTY users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4400, extension 3839.

SUPPLEMENTARY INFORMATION: When a contributing employer withdraws from an underfunded multiemployer pension plan, the plan sponsor assesses withdrawal liability against the employer. The plan sponsor is required to determine and collect withdrawal liability in accordance with section 4219 of the Employee Retirement Income Security Act of 1974 (ERISA). The plan sponsor assesses withdrawal liability by issuing a notice to an employer, including the amount of the employer's liability and a schedule of payments. PBGC's regulation on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219) requires the plan sponsor to file with PBGC a certification that notices have been provided to employers.

PBGC is proposing to collect information about withdrawal liability that is owed by withdrawn employers of terminated [1] and insolvent [2] multiemployer pension plans. PBGC would distribute a survey that insolvent plans receiving financial assistance and terminated plans not yet receiving financial assistance would be required to complete and return to PBGC. Smaller plans with less than 500 participants would not be required to complete the survey. PBGC needs the information from the survey about withdrawal liability payments and settlements, and whether employers have withdrawn from the plan but have not yet been assessed withdrawal liability, to estimate with more precision PBGC's multiemployer liabilities for purposes of its financial statements.[3] PBGC would also use the information for its Multiemployer Pension Insurance Modelling System assumptions on collection of withdrawal liability. Information provided to PBGC would be confidential to the extent provided in the Freedom of Information Act and the Privacy Act.

The survey would be sent to approximately 65 plans.[4] PBGC estimates that each survey would require approximately 4 hours to complete by a combination of pension fund office staff (50%) and outside attorneys (50%). PBGC estimates an hour burden of 130 hours (based on pension fund office time). The estimated dollar equivalent of this hour burden, based on an assumed hourly rate of $75 for administrative, clerical, and supervisory time is $9,750. PBGC estimates a cost burden for the withdrawal liability survey of $52,000 (based on 130 attorney hours assuming an average hourly rate of $400). PBGC further estimates that the average burden will be 2 hours of pension fund office staff time and $800 per plan.

PBGC intends to request that OMB approve PBGC's use of this survey for three years. 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.

PBGC is soliciting public comments to—

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Issued in Washington, DC

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2018–13330 Filed 6–20–18; 8:45 am]

BILLING CODE 7709–02–P

[1] Under section 4041A(f)(2) of ERISA, PBGC may prescribe reporting requirements for terminated multiemployer pension plans, which PBGC considers appropriate to protect the interests of plan participants and beneficiaries or to prevent unreasonable loss to the corporation.

[2] Under section 4261(b)(1) of ERISA, PBGC provides financial assistance under such conditions as the corporation determines are equitable and are appropriate to prevent unreasonable loss to the corporation with respect to the plan.

[3] Section 4008 of ERISA requires the corporation, as soon as practicable after the close of each fiscal year, to transmit a report to the President and the Congress, including financial statements setting forth the finances of the corporation at the end of the fiscal year and the result of its operations (including the source and application of its funds) for the fiscal year.

[4] As of September 30, 2017, there were 68 terminated plans not yet receiving financial assistance and 72 insolvent plans that received financial assistance from PBGC. *See* PBGC FY 2017 Annual Report, page 94 at *https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2017.pdf.* Approximately 65 of the plans have 500 or more participants.

PRESIDIO TRUST

Notice of Public Meeting

AGENCY: The Presidio Trust.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Presidio Trust Act, and in accordance with the Presidio Trust's bylaws, notice is hereby given that a public meeting of the Presidio Trust Board of Directors will be held commencing 4:30 p.m. on July 25, 2018, at the Officers' Club, 50 Moraga Avenue, Presidio of San Francisco, California.

The purposes of this meeting are: To provide the Board Chair's report; to provide the Chief Executive Officer's report; to receive selected presentations of concept proposals for development of the Fort Scott site; to receive public comment on the selected concept proposals for the Fort Scott site; to consider and potentially select which proposers will be invited to respond to a Request for Proposal for the Fort Scott site; and to receive public comment on other matters pertaining to Trust business.

Individuals requiring special accommodation at this meeting, such as needing a sign language interpreter, should contact Mollie Matull at 415–561–5300 prior to July 18, 2018.

DATES: The meeting will begin at 4:30 p.m. on July 25, 2018.

ADDRESSES: The meeting will be held at the Officers' Club, 50 Moraga Avenue, Presidio of San Francisco.

FOR FURTHER INFORMATION CONTACT: Nancy J. Koch, General Counsel, the Presidio Trust, 103 Montgomery Street, P.O. Box 29052, San Francisco, California 94129–0052, Telephone: 415–561–5300.

Dated: June 15, 2018.

Nancy J. Koch,

General Counsel.

[FR Doc. 2018–13357 Filed 6–20–18; 8:45 am]

BILLING CODE 4310–4R–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83453; File No. SR–CBOE–2018–041]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for Cboe Options

June 15, 2018,

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 1, 2018, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fees for Network Access Ports used for Disaster Recovery, effective June 1, 2018. Currently, the Exchange assesses $250 per port, per month for 1 gigabit (Gbps) and 10 Gbps Network Access Ports that connect to the Exchange's Disaster Recovery Systems in Chicago (''Disaster Recovery Ports''). The Exchange proposes to increase its fees for Disaster Recovery Ports. Specifically, the Exchange proposes to assess a monthly fee of $2,000 per 1 Gbps Disaster Recovery Port and a monthly fee of $6,000 per 10 Gbps Disaster Recovery Port. This amount will continue to enable the Exchange to maintain the Disaster Recovery Ports in case they become necessary. The Exchange notes that the Disaster Recovery Ports may now also be used to access the Disaster Recovery Systems for the following affiliate exchanges: Cboe BZX Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BYX Exchange, Inc. and Cboe Futures Exchange, LLC (''Affiliated Exchanges''). The Exchange proposes to provide that market participants will only be assessed a single fee for any Disaster Recovery Port that also accesses the Disaster Recovery Systems for these exchanges.[3]

Lastly, the Exchange notes that the Fees Schedule currently provides that separate Network Access Port fees are assessed for unicast (orders, quotes) and multicast (market data) connectivity and includes a parenthetical that clarifies that ''if a TPH uses the 1 Gbps Disaster Recovery Network Access Port for unicast and multicast connectivity, the TPH will be charged $500 per month''. The exchange notes that certain Network Access Ports that connect to the Disaster Recovery Systems are able to receive both multicast and unicast traffic, whereas other Network Access Ports can only receive one type of connectivity each (thus requiring a market participants to maintain two ports if that market participant desires both types of connectivity). Accordingly, market participants are currently assessed fees based on connectivity (*i.e.,* a TPH is charged two port fees regardless of whether it receives both unicast and multicast connectivity over a single port or each type of connectivity over two separate ports). The Exchange notes that physical ports, including Disaster Recovery Ports, at its Affiliated Exchanges allow for unicast and multicast connectivity to be received through a single port and that those Exchanges therefore assess only a ''per port'' fee (instead of a ''per connectivity type'' fee). Since market participants will be able to use Disaster Recovery Ports to access the Disaster Recovery Systems of Cboe Options and its Affiliated Exchanges, the Exchange proposes to no longer charge for unicast and multicast connectivity separately for Disaster Recovery Ports. Therefore, the Exchange proposes to eliminate the clarification pertaining to Disaster Recovery Ports currently in the parenthetical in the Notes section. Similarly, the Exchange also proposes to make clear in the Fees Schedule that if a market participant maintains two Disaster Recovery Ports of the same size in order to receive unicast and multicast connectivity (*i.e.,* they cannot receive both connectivity types over 1 port), then the Exchange will only assess one Disaster Recovery Port fee (*e.g.,* if a TPH has two 1 Gb Disaster Recovery Ports, one of which receives unicast traffic and the other of which only receives multicast traffic, that TPH will be assessed $2,000, instead of $4,000).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] For example, if a market participant uses a 1 Gbps Disaster Recovery Port to connect to the Disaster Recovery Systems for both Cboe Options and EDGX, the market participant would only be assessed one monthly fee of $2,000.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee increase is reasonable because it will assist the Exchange in recouping costs associated with maintaining its Disaster Recovery Ports and Disaster Recovery Systems in case of necessity. The Exchange also notes that it hasn't amended the fee amount since it adopted the fee in 2012.[7] Additionally, the proposed fees are the same as are concurrently being proposed for its Affiliate Exchanges and other exchanges assess similar fees for connection to their Disaster Recovery Systems by their market participants.[8] The Exchange believes it's reasonable, equitable and not unfairly discriminatory to assess the Disaster Recovery Port fee only once if it connects with another affiliate exchange because only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Similarly, the Exchange believes it's reasonable to assess only one fee for multicast and unicast connectivity, regardless if both connectivity types are available on a single port or separate ports, because the Exchange's affiliate exchanges do not charge port fees based on connectivity types. Lastly, the Exchange believes the proposed changes are equitable and nondiscriminatory because it applies uniformly to all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change applies uniformly to all market participants. The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Market participants may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and paragraph (f) of Rule 19b–4[10] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2018–041 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2018–041. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2018–041 and should be submitted on or before July 12, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13302 Filed 6–20–18; 8:45 am]

BILLING CODE 8011–01–P

[6] *Id.*

[7] *See* Securities Exchange Act Release No. 68342 (December 3, 2012) 77 FR 73096 (December 7, 2012) (SR–CBOE–2012–114).

[8] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83454; File No. SR–NYSE–2018–28]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Make Permanent the Retail Liquidity Program Pilot, Rule 107C, Which Is Currently Set To Expire on June 30, 2018

June 15, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on June 4, 2018, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make permanent Rule 107C, which sets forth the Exchange's pilot Retail Liquidity Program. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make permanent Rule 107C, which sets forth the Exchange's pilot Retail Liquidity Program (the ''Program''). In support of the proposal to make the pilot Program permanent, the Exchange believes it is appropriate to provide background on the Program and an analysis of the economic benefits for retail investors and the marketplace flowing from operation of the Program.

Background

In July 2012, the Commission approved the Program on a pilot basis.[3] The purpose of the pilot was to analyze data and assess the impact of the Program on the marketplace. The pilot period was originally scheduled to end on July 31, 2013. The Exchange filed to extend the operation of the pilot on several occasions in order to prepare this rule filing. The pilot is currently set to expire on June 30, 2018.[4]

The Exchange established the Program to attract retail order flow to the Exchange, and allow such order flow to receive potential price improvement.[5] The Program is currently limited to trades occurring at prices equal to or greater than $1.00 a share.

As described in greater detail below, under Rule 107C, a new class of market participant called Retail Liquidity Providers (''RLPs'')[6] and non-RLP member organizations are able to provide potential price improvement to retail investor orders in the form of a non-displayed order that is priced better than the best protected bid or offer (''PBBO''), called a Retail Price Improvement Order (''RPI''). When there is an RPI in a particular security, the Exchange disseminates an indicator, known as the Retail Liquidity Identifier (''RLI''), that such interest exists. Retail Member Organizations (''RMOs'') can submit a Retail Order to the Exchange, which interacts, to the extent possible, with available contra-side RPIs and Mid-Point Passive Liquidity (''MPL'') Orders.[7] The segmentation in the Program allows retail order flow to receive potential price improvement as a result of their order flow being deemed more desirable by liquidity providers.[8]

In approving the pilot, the Commission concluded that the Program was reasonably designed to benefit retail investors by providing price improvement opportunities to retail order flow. Further, while the Commission noted that the Program would treat retail order flow differently from order flow submitted by other market participants, such segmentation would not be inconsistent with Section 6(b)(5) of the Act,[9] which requires that the rules of an exchange are not designed to permit unfair discrimination. As the Commission recognized, retail order segmentation was designed to create additional competition for retail order flow, leading to additional retail order flow to the exchange environment and ensuring that retail investors benefit from the better price that liquidity providers are willing to give their orders.[10]

As discussed below, the Exchange believes that the Program data supports these conclusions and that it is therefore appropriate to make the pilot Program permanent.[11]

[3] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55) (''RLP Approval Order''). In addition to approving the Program on a pilot basis, the Commission granted the Exchange's request for exemptive relief from Rule 612 of Regulation NMS, 17 CFR 242.612 (''Sub-Penny Rule''), which among other things prohibits a national securities exchange from accepting or ranking orders priced greater than $1.00 per share in an increment smaller than $0.01. *See id.*

[4] *See* Securities Exchange Act Release No. 82230 (December 7, 2017), 82 FR 58667 (December 13, 2017) (SR–NYSE–2017–64) (extending pilot to June 30, 2018). *See also* Securities Exchange Act Release No. 80844 (June 1, 2017), 82 FR 26562 (June 7, 2017) (SR–NYSE–2017–26) (extending pilot to December 31, 2017); Securities Exchange Act Release No. 79493 (December 7, 2016), 81 FR 90019 (December 13, 2016) (SR–NYSE–2016–82) (extending pilot to June 30, 2017); Securities Exchange Act Release No. 78600 (August 17, 2016), 81 FR 57642 (August 23, 2016) (SR–NYSE–2016–54) (extending pilot to December 31, 2016); Securities Exchange Act Release No. 77426 (March 23, 2016), 81 FR 17533 (March 29, 2016) (SR–NYSE–2016–25) (extending pilot to August 31, 2016); Securities Exchange Act Release No. 75993 (September 28, 2015), 80 FR 59844 (October 2, 2015) (SR–NYSE–2015–41) (extending pilot to March 31, 2016); Securities Exchange Act Release No. 74454 (March 6, 2015), 80 FR 13054 (March 12, 2015) (SR–NYSE–2015–10) (extending pilot until September 30, 2015); Securities Exchange Act Release No. 72629 (July 16, 2014), 79 FR 42564 (July 22, 2014) (NYSE–2014–35) (extending pilot until March 31, 2015); and Securities Exchange Act Release No. 70096 (Aug. 2, 2013), 78 FR 48520 (Aug. 8, 2013) (SR–NYSE–2013–48) (extending pilot to July 31, 2014).

[5] RLP Approval Order, 77 FR at 40674.

[6] The Program also allows for RLPs to register with the Exchange. However, any firm can enter RPI orders into the system. Currently, four firms are registered as RLPs but are not registered in any symbols.

[7] The Exchange adopted MPL Orders in 2014 and amended Rule 107C to specify that MPL Orders could interact with incoming, contra-side Retail Orders submitted by a RMO in the Program. *See* Securities Exchange Act Release No. 71330 (January 16, 2014), 79 FR 3895 (January 23, 2014) (SR–NYSE–2013–71) (''Release No. 71330'').

[8] RLP Approval Order, 77 FR at 40679.

[9] 15 U.S.C. 78f(b)(5).

[10] RLP Approval Order, 77 FR at 40679.

[11] Rule 107C has been amended several times. *See* Securities Exchange Act Release No. 68709 (January 23, 2013), 78 FR 6160 (January 29, 2013) (SR–NYSE–2013–04) (amending Rule 107C to clarify that Retail Liquidity Providers may enter Retail Price Improvement Orders in a non-RLP capacity for securities to which the RLP is not assigned); 69103 (March 11, 2013), 78 FR 16547 (March 15, 2013) (SR–NYSE–2013–20) (amending Rule 107C to clarify that a Retail Member Organization may submit Retail Orders to the Program in a riskless principal capacity as well as in an agency capacity, provided that (i) the entry of such riskless principal orders meets the requirements of FINRA Rule 5320.03, including that the RMO maintains supervisory systems to reconstruct, in a time-sequenced manner, all Retail Orders that are entered on a riskless principal basis; and (ii) the RMO does not include non-retail orders together with the Retail Orders as part of the riskless principal transaction); 69513 (May 3, 2013), 78 FR 27261 (May 9, 2013) (SR–NYSE–2013–08) (amending Rule 107C to allow Retail Member Organizations to attest that ''substantially all,'' rather than all, orders submitted to the Program qualifies as ''Retail Orders'' under the Rule); Release No. 71330, 79 FR at 3895 (amending Rule 107C to incorporate MPL Orders); and 76553 (December 3, 2015), 80 FR 76607 (December 9, 2015) (SR–NYSE–2015–59) (''Release No. 76553'')

Continued

Description of Pilot Rule 107C That Would Become Permanent

Definitions

Rule 107C(a) contains the following definitions:

• First, the term ''Retail Liquidity Provider'' is defined as a member organization that is approved by the Exchange under the Rule to act as such and to submit Retail Price Improvement Orders in accordance with the Rule.[12]

• Second, the term ''Retail Member Organization'' (''RMO'') is defined as a member organization (or a division thereof) that has been approved by the Exchange to submit Retail Orders.[13]

• Third, the term ''Retail Order'' means an agency order or a riskless principal order meeting the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. A Retail Order is an Immediate or Cancel Order and may be an odd lot, round lot, or partial round lot (''PRL'').[14]

• Finally, the term ''Retail Price Improvement Order'' means nondisplayed interest in NYSE-listed securities that is better than the best protected bid (''PBB'') or best protected offer (''PBO'') by at least $0.001 and that is identified as a Retail Price Improvement Order in a manner prescribed by the Exchange.[15]

RMO Qualifications and Application Process

Under Rule 107C(b), any member organization[16] can qualify as an RMO if it conducts a retail business or routes[17] retail orders on behalf of another broker-dealer. For purposes of Rule 107C(b), conducting a retail business includes carrying retail customer accounts on a fully disclosed basis. To become an RMO, a member organization must submit: (1) An application form; (2) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow;[18] and (3) an attestation, in a form prescribed by the Exchange, that any order submitted by the member organization as a Retail Order would meet the qualifications for such orders under Rule 107C.[19]

An RMO must have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the member organization to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of Rule 107C, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[20]

Following submission of the required materials, the Exchange provides written notice of its decision to the member organization.[21] A disapproved applicant can appeal the disapproval by the Exchange as provided in Rule 107C(4), and/or reapply for RMO status 90 days after the disapproval notice is issued by the Exchange. An RMO can also voluntarily withdraw from such status at any time by giving written notice to the Exchange.[22]

RLP Qualifications

To qualify as an RLP under Rule 107C(c), a member organization must: (1) Already be approved as a Designated Market Maker (''DMM'') or Supplemental Liquidity Provider (''SLP''); (2) demonstrate an ability to meet the requirements of an RLP; (3) have mnemonics or the ability to accommodate other Exchange-supplied designations that identify to the Exchange RLP trading activity in assigned RLP securities; and (4) have adequate trading infrastructure and technology to support electronic trading.[23]

RLP Application

Under Rule 107C(d), to become an RLP, a member organization must submit an RLP application form with all supporting documentation to the Exchange, which would determine whether an applicant was qualified to become an RLP as set forth above.[24] After an applicant submits an RLP application to the Exchange with supporting documentation, the Exchange would notify the applicant member organization of its decision. The Exchange could approve one or more member organizations to act as an RLP for a particular security. The Exchange could also approve a particular member organization to act as RLP for one or more securities. Approved RLPs would be assigned securities according to requests made to, and approved by, the Exchange.[25]

If an applicant were approved by the Exchange to act as an RLP, the applicant would be required to establish connectivity with relevant Exchange systems before the applicant would be permitted to trade as an RLP on the Exchange.[26] If the Exchange disapproves the application, the Exchange would provide a written notice to the member organization. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Rule 107C(i) and/or reapply for RLP status 90 days

(amending Rule 107C to distinguish between retail orders routed on behalf of other broker-dealers and retail orders that are routed on behalf of introduced retail accounts that are carried on a fully disclosed basis).

[12] *See* Rule 107C(a)(1).

[13] *Id.* at (2).

[14] *Id.* at (3).

[15] *Id.* at (4). Exchange systems prevent Retail Orders from interacting with Retail Price Improvement Orders if the RPI is not priced at least $0.001 better than the PBBO. An RPI remains non-displayed in its entirety (the buy or sell interest, the offset, and the ceiling or floor). An RLP would only be permitted to enter a Retail Price Improvement Order for the particular security or securities to which it is assigned as RLP. An RLP is permitted, but not required, to submit RPIs for securities to which it is not assigned, and will be treated as a non-RLP member organization for those particular securities. Additionally, member organizations other than RLPs are permitted, but not required, to submit RPIs. An RPI may be an odd lot, round lot, or PRL. *See id.*

[16] An RLP may also act as an RMO for securities to which it is not assigned, subject to the qualification and approval process established by the proposed rule.

[17] *See* Release No. 76553, 80 FR at 76607 (clarifying that one way to qualify as an RMO is to route retail orders on behalf of other broker-dealers).

[18] The supporting documentation may include sample marketing literature, website screenshots, other publicly disclosed materials describing the member organization's retail order flow, and any other documentation and information requested by the Exchange in order to confirm that the applicant's order flow would meet the requirements of the Retail Order definition. *See* Rule 107C (b)(2)(B).

[19] *See id.* at (b)(2)(A)–(C).

[20] *Id.* at (b)(6).

[21] *Id.* at (b)(3).

[22] *Id.* at (b)(5).

[23] *Id.* at (c)(1)–(4).

[24] *Id.* at (d)(1).

[25] *Id.* at (d)(2).

[26] *Id.* at (d)(3).

after the disapproval notice is issued by the Exchange.[27]

Voluntary Withdrawal of RLP Status

An RLP would be permitted to withdraw its status as an RLP by giving notice to the Exchange under proposed NYSE Rule107C(e). The withdrawal would become effective when those securities assigned to the withdrawing RLP are reassigned to another RLP. After the Exchange receives the notice of withdrawal from the withdrawing RLP, the Exchange would reassign such securities as soon as practicable, but no later than 30 days after the date the notice is received by the Exchange. If the reassignment of securities takes longer than the 30-day period, the withdrawing RLP would have no further obligations and would not be held responsible for any matters concerning its previously assigned RLP securities.[28]

RLP Requirements

Under Rule 107C(f), an RLP may only enter Retail Price Improvement Orders electronically and directly into Exchange systems and facilities designated for this purpose and only for the securities to which it is assigned as RLP. An RLP entering Retail Price Improvement Orders in securities to which it is not assigned is not required to satisfy these requirements.[29]

In order to be eligible for execution fees that are lower than non-RLP rates, an RLP must maintain (1) a Retail Price Improvement Order that is better than the PBB at least five percent of the trading day for each assigned security; and (2) a Retail Price Improvement Order that is better than the PBO at least five percent of the trading day for each assigned security.[30] An RLP's five-percent requirements is calculated by determining the average percentage of time the RLP maintains a Retail Price Improvement Order in each of its RLP securities during the regular trading day, on a daily and monthly basis.[31] The Exchange determines whether an RLP has met this requirement by calculating the following:

- The ''Daily Bid Percentage,'' calculated by determining the percentage of time an RLP maintains a Retail Price Improvement Order with respect to the PBB during each trading day for a calendar month;
- The ''Daily Offer Percentage,'' calculated by determining the percentage of time an RLP maintains a Retail Price Improvement Order with respect to the PBO during each trading day for a calendar month;
- The ''Monthly Average Bid Percentage,'' calculated for each RLP security by summing the security's ''Daily Bid Percentages'' for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month; and
- The ''Monthly Average Offer Percentage,'' calculated for each RLP security by summing the security's ''Daily Offer Percentage'' for each trading day in a calendar month and then dividing the resulting sum by the total number of trading days in such calendar month.

Finally, only Retail Price Improvement Orders would be used when calculating whether an RLP is in compliance with its five-percent requirements.[32]

The five-percent requirement is not applicable in the first two calendar months a member organization operates as an RLP and takes effect on the first day of the third consecutive calendar month the member organization operates as an RLP.[33]

Failure of RLP To Meet Requirements

Rule 107C(g) addresses the consequences of an RLP's failure to meet its requirements. If, after the first two months an RLP acted as an RLP, an RLP fails to meet any of the Rule 107C(f) requirements for an assigned RLP security for three consecutive months, the Exchange could, in its discretion, take one or more of the following actions:

- Revoke the assignment of any or all of the affected securities from the RLP;
- revoke the assignment of unaffected securities from the RLP; or
- disqualify the member organization from its status as an RLP.[34]

The Exchange determines if and when a member organization is disqualified from its status as an RLP. One calendar month prior to any such determination, the Exchange notifies an RLP of such impending disqualification in writing. When disqualification determinations are made, the Exchange provides a written disqualification notice to the member organization.[35] A disqualified RLP could appeal the disqualification as provided in proposed Rule 107C(i) and/or reapply for RLP status 90 days after the disqualification notice is issued by the Exchange.[36]

Failure of RMO To Abide by Retail Order Requirements

Rule 107C(h) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designates orders submitted to the Exchange as Retail Orders and the Exchange determines, in its sole discretion, that those orders fail to meet any of the requirements of Retail Orders, the Exchange may disqualify a member organization from its status as an RMO.[37] When disqualification determinations are made, the Exchange shall provide a written disqualification notice to the member organization.[38] A disqualified RMO could appeal the disqualification as provided in proposed Rule 107C(i) and/or reapply for RMO status 90 days after the disqualification notice is issued by the Exchange.[39]

Appeal of Disapproval or Disqualification

Rule 107C(i) describes the appeal rights of member organizations. A member organization that disputes the Exchange's decision to disapprove it under Rule 107C(b) or (d) or disqualify it under Rule 107C(g) or (h) may request, within five business days after notice of the decision is issued by the Exchange, that a Retail Liquidity Program Panel (''RLP Panel'') review the decision to determine if it was correct.[40] The RLP Panel would consist of the NYSE's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two officers of the Exchange designated by the CoHead of U.S. Listings and Cash Execution.[41] The RLP Panel would review the facts and render a decision within the time frame prescribed by the Exchange.[42] The RLP Panel can overturn or modify an action taken by the Exchange and all determinations by the RLP Panel would constitute final action by the Exchange on the matter at issue.[43]

Retail Liquidity Identifier

Under Rule 107C(j), the Exchange disseminates an identifier through proprietary Exchange data feeds or the Securities Information Processor (''SIP'') when RPI interest priced at least $0.001 better than the PBB or PBO for a

[27] *Id.* at (d)(4).
[28] *See id.* at (e).
[29] *Id.* at (f)(1).
[30] *Id.* at (f)(1)(A)–(B).
[31] *Id.* at (f)(2).
[32] *Id.* at (f)(2)(A)–(E).
[33] *Id.* at (f)(3).
[34] *Id.* at (g)(1)(A)–(C).
[35] *Id.* at (2).
[36] *Id.* at (3).
[37] *Id.* at (h)(1).
[38] *Id.* at (2).
[39] *Id.* at (3).
[40] *Id.* at (i)(1). In the event a member organization is disqualified from its status as an RLP pursuant to proposed Rule 107C(g), the Exchange would not reassign the appellant's securities to a different RLP until the RLP Panel has informed the appellant of its ruling. *Id.* at (i)(1)(A).
[41] *Id.* at (i)(2).
[42] *Id.* at (3).
[43] *Id.* at (4).

particular security is available in Exchange systems (''Retail Liquidity Identifier''). The Retail Liquidity Identifier shall reflect the symbol for the particular security and the side (buy or sell) of the RPI interest, but shall not include the price or size of the RPI interest.[44]

Retail Order Designations

Under Rule 107C(k), an RMO can designate how a Retail Order would interact with available contra-side interest as follows:

- A Type 1-designated Retail Order interacts only with available contra-side Retail Price Improvement Orders and MPL Orders but would not interact with other available contra-side interest in Exchange systems or route to other markets. The portion of a Type 1-designated Retail Order that does not execute against contra-side Retail Price Improvement Orders would be immediately and automatically cancelled.[45]
- A Type 2-designated Retail Order interacts first with available contra-side Retail Price Improvement Orders and MPL Orders and any remaining portion of the Retail Order would be executed as a Regulation NMS-compliant Immediate or Cancel Order pursuant to Rule 13.[46]
- A Type 3-designated Retail Order interacts first with available contra-side Retail Price Improvement Orders and MPL Orders and any remaining portion of the Retail Order would be executed as an NYSE Immediate or Cancel Order pursuant to Rule 13.[47]

Priority and Order Allocation

Under Rule 107C(l), Retail Price Improvement Orders in the same security are ranked and allocated according to price then time of entry into Exchange systems. When determining the price to execute a Retail Order, Exchange systems consider all eligible RPIs and MPL Orders. If the only interest is RPIs, then the executions shall occur at the price level that completes the incoming order's execution. If the only interest is MPL Orders, the Retail Order shall execute at the midpoint of the PBBO. If both RPIs and MPL Orders are present, Exchange systems will evaluate at what price level the incoming Retail Order may be executed in full (''clean-up price''). If the clean-up price is equal to the midpoint of the PBBO, RPIs will receive priority over MPL Orders, and the Retail Order will execute against both RPIs and MPL Orders at the midpoint. If the clean-up price is worse than the midpoint of the PBBO, the Retail Order will execute first with the MPL Orders at the midpoint of the PBBO and any remaining quantity of the Retail Order will execute with the RPIs at the clean-up price. If the clean-up price is better than the midpoint of the PBBO, then the Retail Order will execute against the RPIs at the clean-up price and will ignore the MPL Orders. Any remaining unexecuted RPI interest and MPL Orders will remain available to interact with other incoming Retail Orders. Any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with Rule 107C(k).

Examples of priority and order allocation are as follows:

Example 1:

PBBO for security ABC is $10.00–$10.05.

RLP 1 enters a Retail Price Improvement Order to buy ABC at $10.01 for 500.

RLP 2 then enters a Retail Price Improvement Order to buy ABC at $10.02 for 500.

RLP 3 then enters a Retail Price Improvement Order to buy ABC at $10.03 for 500.

An incoming Retail Order to sell ABC for 1,000 executes first against RLP 3's bid for 500, because it is the best priced bid, then against RLP 2's bid for 500, because it is the next best priced bid. RLP 1 is not filled because the entire size of the Retail Order to sell 1,000 is depleted. The Retail Order executes at the price that completes the order's execution. In this example, the entire 1,000 Retail Order to sell executes at $10.02 because it results in a complete fill.

However, assume the same facts above, except that RLP 2's Retail Price Improvement Order to buy ABC at $10.02 is for 100. The incoming Retail Order to sell 1,000 executes first against RLP 3's bid for 500, because it is the best priced bid, then against RLP 2's bid for 100, because it is the next best priced bid. RLP 1 then receives an execution for 400 of its bid for 500, at which point the entire size of the Retail Order to sell 1,000 is depleted. The Retail Order executes at the price that completes the order's execution, which is $10.01.

Example 2:

PBBO for security DEF is $10.00–10.01.

RLP 1 enters a Retail Price Improvement Order to buy DEF at $10.006 for 500.

RLP 2 enters a Retail Price Improvement Order to buy DEF at $10.005 for 500.

MPL 1 enters an MPL Order to buy DEF at $10.01 for 1,000.

RLP 3 enters a Retail Price Improvement Order to buy DEF at $10.002 for 1,000.

An incoming Retail Order to sell DEF for 2,500 arrives. The clean-up price is $10.002. Because the midpoint of the PBBO is priced better than the clean-up price, the Retail Order executes with MPL 1 for 1,000 shares at $10.005. The Retail Order then executes at $10.002 against RLP 1's bid for 500, because it is the best-priced bid, then against RLP 2's bid for 500 because it is the next best-priced bid and then RLP 3 receives an execution for 500 of its bid for 1,000, at which point the entire size of the Retail Order to sell 2,500 is depleted.

Assume the same facts above. An incoming Retail Order to sell DEF for 1,000 arrives. The clean-up price is $10.005. Because the clean-up price is equal to the midpoint of the PBBO, RPIs will receive priority over MPL Orders. As a result, the Retail Order executes first against RLP 1's bid for 500, because it is the best-priced bid, then against RLP 2's bid for 500 because it is the next best-priced bid, at which point the entire size of the Retail Order to sell 1,000 is depleted.[48]

Rationale for Making Pilot Permanent

In approving the Program on a pilot basis, the Commission required the Exchange to ''monitor the scope and operation of the Program and study the data produced during that time with respect to such issues, and will propose any modifications to the Program that may be necessary or appropriate.''[49] As part of its assessment of the Program's potential impact, the Exchange posted core weekly and daily summary data on the Exchanges' website for public investors to review,[50] and provided additional data to the Commission regarding potential investor benefits, including the level of price improvement provided by the Program. This data included statistics about participation, frequency and level of price improvement and effective and realized spreads.

In the RLP Approval Order, the Commission observed that the Program could promote competition for retail order flow among execution venues, and that this could benefit retail investors by creating additional price improvement

[44] *Id.* at (j).

[45] *Id.* at (k)(1). *See* note 7, *supra.*

[46] *Id.* at (2).

[47] *Id.* at (k)(3).

[48] *Id.* at (l).

[49] RLP Approval Order, 77 FR at 40681.

[50] *See https://www.nyse.com/markets/liquidity-programs#nyse-nyse-mkt-rlp.*

opportunities for marketable retail order flow, most of which is currently executed in the Over-the-Counter (''OTC'') markets without ever reaching a public exchange.[51] The Exchange sought, and believes it has achieved, the Program's goal of attracting retail order flow to the Exchange, and allowing such order flow to receive potential price improvement. As the Exchange's analysis of the Program data below demonstrates, the Program provided tangible price improvement to retail investors through a competitive pricing process. The data also demonstrates that the Program had an overall negligible impact on broader market structure.[52]

Between August 1, 2012, when the Program began, and January 2, 2018, orders totaling in excess of 6.8 billion shares were executed through the Program, providing retail investors with $12.3 million in price improvement. As Table 1 shows, during 2016, an average of 2–3 million shares per day was executed in the Program. In 2017, an average of 3–4 million shares per day were executed in the Program. During the period 2016–17, average effective spreads in RLP executions ranged between $0.012 and $0.019. Fill rates reached as high as 25.7% in May 2018. Overall price improvement averaged $0.0014 per share, approximately 40% above the minimum of $0.001.[53]

TABLE 1—SUMMARY EXECUTION AND MARKET QUALITY STATISTICS

Date	RPI Avg. volume	Avg. daily orders	Eff. spread	Effective/ quoted ratio	Price improvement	Realized spread	Fill rate (%)
Jan-16	3,257,495	11,495	$0.0167	0.736	$0.0017	$0.0051	14.7
Feb-16	3,119,642	10,400	0.0163	0.713	0.0018	0.0041	15.3
Mar-16	2,760,731	9,179	0.0142	0.706	0.0018	0.0029	16.5
Apr-16	2,277,189	8,432	0.0143	0.703	0.0018	0.0042	17.6
May-16	1,727,219	6,931	0.0151	0.693	0.0019	0.0054	16.4
Jun-16	2,003,149	9,122	0.0134	0.667	0.0019	0.0060	14.4
Jul-16	2,265,579	7,880	0.0126	0.668	0.0019	0.0034	18.1
Aug-16	2,009,630	5,626	0.0122	0.699	0.0017	−0.0019	16.4
Sep-16	1,620,236	4,801	0.0136	0.696	0.0017	0.0035	15.6
Oct-16	2,355,292	8,055	0.0143	0.693	0.0017	0.0041	19.7
Nov-16	2,702,894	9,915	0.0161	0.700	0.0018	0.0040	17.3
Dec-16	4,380,164	15,036	0.0142	0.710	0.0017	0.0034	20.5
Jan-17	2,921,604	11,184	0.0148	0.730	0.0016	0.0011	21.4
Feb-17	2,508,810	9,801	0.0165	0.754	0.0015	0.0023	20.3
Mar-17	2,585,694	9,517	0.0175	0.770	0.0015	0.0060	20.9
Apr-17	2,875,573	10,174	0.0156	0.764	0.0014	0.0056	23.5
May-17	3,741,955	15,179	0.0150	0.763	0.0014	0.0026	25.7
Jun-17	5,040,922	17,245	0.0155	0.688	0.0018	0.0046	19.2
Jul-17	3,906,133	14,582	0.0154	0.712	0.0017	0.0020	19.8
Aug-17	3,803,586	14,841	0.0174	0.700	0.0018	0.0055	19.5
Sep-17	3,398,110	12,782	0.0152	0.773	0.0014	0.0017	23.2
Oct-17	3,839,683	13,467	0.0156	0.773	0.0014	0.0022	25.2
Nov-17	4,193,873	14,499	0.0161	0.775	0.0014	0.0028	24.2
Dec-17	3,673,405	19,036	0.0180	0.782	0.0014	0.0027	19.0

As Table 2 shows, approximately 45% of all orders in the Program in 2016–17 were for a round lot or fewer shares. More than 60% of retail orders removing liquidity from the Exchange were for 300 shares or less. Further, the number of very large orders was relatively steady, with orders larger than 7,500 shares typically accounting for 4–5% of orders received. Despite relatively low fill rates, large orders account for a sizable portion of the shares executed in the Program.

TABLE 2—COMPOSITION OF RETAIL TAKING ORDERS BY ORDER SIZE CATEGORY

	<100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1001–2,000 (%)	2001–4,000 (%)	4001–7,500 (%)	7500–15,000 (%)	>15,000 (%)
Jan-16	36.31	19.06	9.74	11.64	7.60	6.48	4.38	2.70	2.09
Feb-16	35.88	18.81	9.96	11.82	7.72	6.42	4.31	2.82	2.26
Mar-16	35.67	18.69	9.90	11.83	7.82	6.70	4.52	2.92	1.94
Apr-16	38.22	19.39	9.87	11.48	7.16	5.73	3.89	2.54	1.73
May-16	37.64	19.81	10.12	11.57	7.51	5.60	3.74	2.35	1.65
Jun-16	39.46	18.98	9.66	11.22	7.13	5.32	3.95	2.60	1.68
Jul-16	40.22	18.59	9.45	11.10	6.75	5.40	4.05	2.65	1.78
Aug-16	33.59	17.45	9.24	11.66	8.30	7.17	5.71	4.33	2.54
Sep-16	33.40	17.83	9.13	11.55	8.33	7.32	5.69	4.17	2.59
Oct-16	39.50	19.03	9.42	11.16	7.33	5.66	3.77	2.53	1.59
Nov-16	38.72	19.67	9.80	11.40	7.19	5.27	3.63	2.64	1.70
Dec-16	39.41	19.52	9.41	11.26	7.33	5.40	3.55	2.66	1.47
Jan-17	42.16	19.82	9.22	10.62	6.92	4.84	3.05	2.08	1.30
Feb-17	41.90	19.51	9.34	10.79	7.03	4.82	3.09	2.08	1.44
Mar-17	41.55	18.98	9.12	11.04	7.30	5.18	3.40	2.07	1.36
Apr-17	44.32	18.50	8.55	10.21	6.65	5.07	3.31	2.17	1.21
May-17	52.39	17.82	7.14	8.08	5.32	4.03	2.64	1.72	0.87
Jun-17	44.76	15.48	7.53	9.59	6.87	6.06	4.67	3.50	1.53

[51] RLP Approval Order, 77 FR at 40679.

[52] *See id.* at 40682.

[53] In 2016, the average price improvement reached as high as $0.0017–$0.0018.

TABLE 2—COMPOSITION OF RETAIL TAKING ORDERS BY ORDER SIZE CATEGORY—Continued

	<100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1001–2,000 (%)	2001–4,000 (%)	4001–7,500 (%)	7500–15,000 (%)	>15,000 (%)
Jul-17	45.33	15.98	8.05	10.21	7.08	5.61	3.70	2.62	1.43
Aug-17	43.83	16.68	8.39	10.58	7.48	5.67	3.46	2.51	1.41
Sep-17	46.15	17.81	8.26	9.93	6.78	4.85	2.93	2.09	1.20
Oct-17	45.53	18.30	8.47	10.06	6.88	4.82	2.79	2.00	1.15
Nov-17	45.14	17.37	8.63	10.37	7.13	5.02	2.90	2.15	1.29
Dec-17	45.96	17.62	8.89	10.60	6.62	4.55	2.72	1.99	1.05

Tables 3 and 4 show the distribution of orders received by size and shares executed in 2016–17. During that period, the Program saw much lower execution sizes due to smaller retail providing orders (typically around 300 shares) breaking up fills and as a result of liquidity at multiple price improvement points.

TABLE 3—COMPOSITION OF SHARES PLACED BY ORDER SIZE CATEGORY

	<100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1001–2,000 (%)	2001–4,000 (%)	4001–7,500 (%)	7500–15,000 (%)	>15,000 (%)
Jan-16	1.11	2.17	2.28	5.01	6.21	10.14	12.73	14.71	45.64
Feb-16	1.09	2.09	2.25	4.92	6.09	9.67	12.01	14.90	46.97
Mar-16	1.15	2.23	2.40	5.28	6.61	10.79	13.50	16.37	41.68
Apr-16	1.45	2.75	2.84	6.09	7.21	10.93	13.90	16.82	38.02
May-16	1.47	2.81	2.93	6.16	7.59	10.70	13.39	15.81	39.14
Jun-16	1.43	2.67	2.80	6.06	7.29	10.28	14.15	17.28	38.04
Jul-16	1.38	2.50	2.61	5.67	6.57	10.05	13.95	16.71	40.57
Aug-16	0.88	1.71	1.86	4.30	5.88	9.78	14.44	19.69	41.45
Sep-16	0.92	1.78	1.84	4.24	5.89	10.04	14.44	19.38	41.48
Oct-16	1.60	2.76	2.77	6.00	7.52	11.19	13.79	17.15	37.21
Nov-16	1.49	2.70	2.72	5.84	6.99	9.77	12.62	16.97	40.90
Dec-16	1.69	2.98	2.88	6.29	7.82	11.13	13.57	18.68	34.96
Jan-17	2.08	3.51	3.29	6.89	8.59	11.57	13.51	17.30	33.26
Feb-17	1.96	3.33	3.21	6.70	8.39	11.12	13.29	16.59	35.40
Mar-17	1.90	3.16	3.05	6.72	8.50	11.64	14.12	15.93	34.97
Apr-17	2.29	3.34	3.10	6.72	8.38	12.32	15.07	18.00	30.78
May-17	4.06	4.02	3.23	6.65	8.42	12.26	14.97	17.66	28.74
Jun-17	1.36	2.15	2.15	5.07	6.99	11.88	16.71	22.63	31.06
Jul-17	1.45	2.49	2.58	6.02	8.03	12.20	14.85	19.55	32.83
Aug-17	1.52	2.67	2.76	6.42	8.79	12.70	14.21	19.41	31.50
Sep-17	2.01	3.29	3.08	6.74	8.98	12.38	13.73	18.52	31.27
Oct-17	1.99	3.45	3.21	6.94	9.26	12.39	13.30	18.03	31.42
Nov-17	1.85	3.10	3.11	6.80	9.07	12.20	13.06	18.30	32.51
Dec-17	2.06	3.54	3.60	7.78	9.43	12.58	13.73	19.12	28.16

TABLE 4—COMPOSITION OF SHARES EXECUTED BY ORDER SIZE CATEGORY

	<100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1001–2,000 (%)	2001–4,000 (%)	4001–7,500 (%)	7500–15,000 (%)	>15,000 (%)
Jan-16	6.25	10.48	9.45	17.31	14.62	10.14	10.60	8.43	8.90
Feb-16	5.94	9.72	9.20	16.39	13.89	9.67	10.88	9.53	11.14
Mar-16	5.79	9.59	9.07	16.56	14.13	10.79	11.31	9.99	9.13
Apr-16	6.84	11.14	10.10	17.62	13.89	10.93	10.47	9.28	7.38
May-16	7.38	11.61	10.14	17.20	13.47	10.70	9.84	8.47	8.99
Jun-16	7.10	10.66	9.04	15.22	13.52	10.28	11.45	10.13	10.13
Jul-16	6.18	9.52	8.28	14.74	12.55	10.05	13.28	11.29	10.57
Aug-16	4.48	7.45	6.93	12.87	12.48	9.78	15.50	15.54	10.23
Sep-16	4.73	7.83	6.94	12.86	12.43	10.04	16.13	14.42	10.16
Oct-16	6.76	10.32	8.76	15.87	14.13	11.19	11.68	10.00	8.23
Nov-16	7.02	11.19	9.76	17.17	14.19	9.77	10.31	8.99	8.58
Dec-16	6.99	10.91	9.22	17.06	15.32	11.13	10.68	9.16	6.67
Jan-17	8.21	12.23	9.82	17.25	15.76	11.57	9.59	7.24	6.40
Feb-17	8.20	12.39	10.36	18.42	15.80	11.12	9.45	6.93	5.64
Mar-17	7.67	11.72	10.02	19.32	16.40	11.64	9.76	6.64	4.93
Apr-17	8.48	11.45	9.57	18.22	15.60	12.32	10.32	7.81	4.50
May-17	14.15	12.70	9.29	16.65	14.45	12.26	9.45	7.18	3.52
Jun-17	5.58	8.07	7.39	15.41	14.63	11.88	13.89	13.50	6.20
Jul-17	5.67	9.03	8.53	17.83	16.45	12.20	11.56	9.71	6.11
Aug-17	5.78	9.30	8.88	18.25	17.51	12.70	10.54	8.75	5.72
Sep-17	7.32	10.97	9.79	18.78	17.26	12.38	9.53	7.60	4.98
Oct-17	6.53	10.74	9.74	18.74	17.63	12.39	9.21	8.01	5.35
Nov-17	6.28	10.18	9.41	18.28	17.38	12.20	9.80	8.44	6.08
Dec-17	6.50	10.99	10.31	20.09	16.89	12.58	9.35	7.30	4.60

As Table 5 shows, during 2016–17, fill rates trended near 80% for orders up to 300 shares, while the average shares available at the inside was 300 shares. Data published to the SIP indicates when liquidity is available for retail

liquidity seekers inside the spread, and on which side.

TABLE 5—FILL RATES BY RETAIL TAKE ORDER SIZE

	<100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1,001–2,000 (%)	2,001–4,000 (%)	4,001–7,500 (%)	7,500–15,000 (%)	>15,000 (%)
Jan-16	85.30	72.92	62.76	52.36	35.67	20.84	12.61	8.68	2.95
Feb-16	83.81	71.47	62.76	51.21	35.07	21.18	13.92	9.84	3.65
Mar-16	82.78	70.92	62.38	51.69	35.25	22.06	13.80	10.06	3.61
Apr-16	83.19	71.37	62.58	50.99	33.95	21.41	13.27	9.72	3.42
May-16	82.49	67.65	56.62	45.70	29.09	19.75	12.04	8.77	3.76
Jun-16	71.79	57.72	46.59	36.28	26.76	17.91	11.69	8.46	3.84
Jul-16	80.95	68.80	57.26	46.92	34.50	24.39	17.19	12.20	4.71
Aug-16	83.54	71.79	61.39	49.17	34.92	24.40	17.64	12.97	4.06
Sep-16	80.06	69.04	59.19	47.50	33.04	22.58	17.49	11.65	3.83
Oct-16	83.10	73.58	62.22	52.05	36.97	25.09	16.67	11.48	4.35
Nov-16	81.40	71.75	62.28	50.90	35.15	22.68	14.15	9.18	3.63
Dec-16	84.73	75.04	65.56	55.67	40.18	25.76	16.14	10.06	3.91
Jan-17	84.49	74.69	64.07	53.69	39.35	24.97	15.22	8.98	4.13
Feb-17	84.49	75.25	65.39	55.64	38.16	23.34	14.40	8.46	3.23
Mar-17	84.31	77.43	68.69	60.00	40.26	24.26	14.42	8.70	2.95
Apr-17	86.84	80.63	72.49	63.69	43.71	26.79	16.10	10.19	3.44
May-17	89.57	81.19	73.95	64.31	44.07	26.41	16.22	10.45	3.15
Jun-17	78.80	72.17	66.04	58.35	40.20	24.80	15.96	11.46	3.83
Jul-17	77.45	71.84	65.58	58.68	40.59	24.56	15.42	9.85	3.69
Aug-17	74.17	67.92	62.76	55.48	38.88	23.48	14.48	8.80	3.54
Sep-17	84.30	77.24	73.73	64.64	44.56	25.81	16.11	9.51	3.69
Oct-17	82.84	78.51	76.55	68.14	48.06	28.59	17.47	11.21	4.30
Nov-17	82.32	79.42	73.12	65.08	46.34	28.08	18.16	11.17	4.52
Dec-17	81.62	80.19	74.12	66.68	46.28	28.70	17.60	9.86	4.22

Table 6 shows the development of orders sizes received in the Program over time. Orders adding liquidity to the Exchange averaged in the mid-300 share range for most of the Program's recent history, although the median size has increased since August 2016. (The Exchange notes that the median order size is the average of the daily median order sizes across all orders received on a trade date for NYSE symbols.) After averaging near 2,000 shares at times, the size of retail orders removing liquidity from the Exchange has dropped over time, with median sizes periodically exceeding 300 shares. The slightly smaller take order sizes helps explain the better overall fill rates and improved effective spreads in the Program's recent history. However, as shown by the occasional oversized orders, there remains ample liquidity and opportunity in the Program to satisfy liquidity takers with meaningful price improvement.

TABLE 6—ORDER SIZE DETAILS

	Provide orders		Take orders	
	Average	Median	Average	Median
Jan-16	297	157	1,941	259
Feb-16	314	191	1,958	272
Mar-16	312	182	1,787	267
Apr-16	306	176	1,523	215
May-16	294	100	1,542	217
Jun-16	314	100	1,508	207
Jul-16	323	105	1,585	202
Aug-16	340	194	2,230	338
Sep-16	338	200	2,212	336
Oct-16	357	200	1,494	204
Nov-16	382	200	1,623	212
Dec-16	367	200	1,398	206
Jan-17	361	200	1,217	199
Feb-17	350	200	1,264	200
Mar-17	360	200	1,304	200
Apr-17	353	200	1,223	189
May-17	416	200	961	105
Jun-17	370	200	1,517	190
Jul-17	355	200	1,364	180
Aug-17	360	200	1,310	196
Sep-17	391	200	1,141	164
Oct-17	444	200	1,127	172
Nov-17	422	200	1,193	184
Dec-17	395	200	1,026	195

Although the Program provides the opportunity to achieve significant price improvement, the Program has not generated significant activity. As Table 7 shows, the average daily volume for the Program has hovered in the three to four million share range, and has accounted for less than 0.1% of consolidated NYSE-listed volume in 2016–17. The Program's share of NYSE volume during that period was below 0.4%. Moreover, no symbol during the past two years achieved as much as 1.6% of their consolidated average daily volume (''CADV'') in the Program, and all of the highest share symbols are low volume securities. As Table 2 shows, during the 2016–2017 period, only 1.0% of all day/symbol pairs exceeded 5% share of CADV, with another 8.2% of day/symbol pairs achieving a share of CADV between 1% and 5%. Fully 75% of all day/symbol pairs exhibited RLP share of 0.25% or less during that time. For ticker symbols that traded at least 100 days during the two-year period, more than half of all symbols over that period had less than 0.10% of their consolidated volume executed in the program, and 96% less than 0.50%. The Program's share of the total market in NYSE-listed securities is tiny considering that non-ATS activity in the U.S. equity markets, based on FINRA transparency data and NYSE Trade and Quote (''TAQ'') volume statistics, is estimated to be approximately 20–25% of all U.S. equity volume. In short, the Program represents a minor participant in the overall market to price improve marketable retail order flow. While participation was low, as noted above, retail investors that participated in the Program received price improvement on their orders, which was one of the stated goals of the Program. The NYSE therefore believes that the pilot data supports making the Program permanent.

TABLE 7

Distribution (%)	Daily results		Two year aggregate	
	Count	Percentage	Count	Percentage
>50	63	0.0088	0	0.0000
25.00–50.00	179	0.0251	0	0.0000
10.00–25.00	1,599	0.2238	0	0.0000
5.00–10.00	5,569	0.7795	0	0.0000
1.00–5.00	58,368	8.1696	6	0.1733
0.75–1.00	18,527	2.5932	18	0.5198
0.50–0.75	29,869	4.1807	111	3.2053
0.25–0.50	64,440	9.0194	764	22.0618
0.10–0.25	116,211	16.2657	736	21.2532
0.05–0.10	101,813	14.2504	538	15.5357
0.01–0.05	181,194	25.3611	1,161	33.5258
<0.01	136,624	19.1228	129	3.7251

Moreover, beyond providing a meaningful price improvement to retail investors through a competitive and transparent pricing process unavailable in non-exchange venues, the data collected during the Program supports the conclusion that the Program has not had any significant negative market impact. As set forth in Table 8, the Exchange measured the correlation between several critical market quality statistics and either RLP share of CADV, shares posted dark by providers seeking to interact with retail orders or the amount of time during the trading day that RLP liquidity was available. The correlations the Exchange measured were levels, not changes. As a result, fairly high correlation coefficients should suggest that the Program had a meaningful impact on the statistics. In no case did the Exchange observe a single correlation greater than an absolute value of 0.15, and even at the 90th percentile of all symbols, there was no correlation of even 0.30. In short, there was no measure the Exchange studied supporting the conclusion that the Program had any noticeable impact on market quality.

TABLE 8

Statistic 1	Statistic 2	Average correlation	90th percentile correlation
% Time With RLP Liquidity	Consolidated Spread	0.0001	0.0003
% Time With RLP Liquidity	Eff. Sprd. Ex RPI	0.0943	0.2925
RLP Size at PBBO	Consolidated Spread	0.0003	0.0005
RLP Size at PBBO	Eff. Sprd. Ex RPI	0.0617	0.2348
RLP Share of CADV	Eff. Sprd. Ex RPI	0.0010	0.1091
RLP Share of CADV	Share wtd. NBBO Spread	0.0152	0.1357
RLP Share of CADV	Time wtd. NBBO Spread	0.0002	0.0002
RLP Share of CADV	Time wtd. NYSE BBO Spread	0.0002	0.0002

The Exchange believes that the Program was a positive experiment in attracting retail order flow to a public exchange. The order flow the Program attracted to the Exchange provided tangible price improvement to retail investors through a competitive pricing process unavailable in non-exchange venues. As such, despite the low volumes, the Exchange believes that the Program satisfied the twin goals of attracting retail order flow to the Exchange and allowing such order flow to receive potential price improvement. Moreover, the Exchange believes that the data collected during the Program supports the conclusion that the Program's overall impact on market

quality and structure was not negative. Although the results of the Program highlight the substantial advantages that broker-dealers retain when managing the benefits of retail order flow, the Exchange believes that the level of price improvement guaranteed by the Program and the scant evidence that the Program negatively impacted the marketplace justifies making the Program permanent. The Exchange accordingly believes that the pilot Program's rules, as amended, should be made permanent.

The Exchange notes that the proposed change is not otherwise intended to address any other issues and the Exchange is not aware of any problems that member organizations would have in complying with the proposed rule change.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[54] in general, and Section 6(b)(5) of the Act,[55] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal is consistent with these principles because it seeks to make permanent a pilot and associated rule changes that were previously approved by the Commission as a pilot for which the Exchange has subsequently provided data and analysis to the Commission, and that this data and analysis, as well as the further analysis in this filing, shows that the Program has operated as intended and is consistent with the Act. The Exchange also believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and offer the potential for price improvement to retail investors.

The Exchange also believes the proposed rule change is designed to facilitate transactions in securities and to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system because making the Program permanent would attract retail order flow to a public exchange and allow such order flow to receive potential price improvement. The data provided by the Exchange to the Commission staff demonstrates that the Program provided tangible price improvement to retail investors through a competitive pricing process unavailable in non-exchange venues and otherwise had an insignificant impact on the marketplace. The Exchange believes that making the Program permanent would encourage the additional utilization of, and interaction with, the NYSE and provide retail customers with an additional venue for price discovery, liquidity, competitive quotes, and price improvement. For the same reasons, the Exchange believes that making the Program permanent would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition. For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that making the Program permanent would continue to promote competition for retail order flow among execution venues. The Exchange believes that the data supplied to the Commission and experience gained over nearly six years have demonstrated that the Program creates price improvement opportunities for retail orders that are equal to what would be provided under OTC internalization arrangements, thereby benefiting retail investors and increasing competition between execution venues. The Exchange also believes that making the Program permanent will promote competition between execution venues operating their own retail liquidity programs. Such competition will lead to innovation within the market, thereby increasing the quality of the national market system. Finally, the Exchange notes that it operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues. In such an environment, the Exchange must continually review, and consider adjusting the services it offers and the requirements it imposes to remain competitive with other U.S. equity exchanges.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2018–28 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2018–28. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

[54] 15 U.S.C. 78f(b).

[55] 15 U.S.C. 78f(b)(5).

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2018–28, and should be submitted on or before July 12, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13303 Filed 6–20–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83450; File No. SR–CboeEDGX–2018–016]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for EDGX

June 15, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 1, 2018, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend its fees and rebates applicable to Members [5] and non-Members of the Exchange pursuant to EDGX Rule 15.1(a) and (c) to modify its fees for physical ports.

The text of the proposed rule change is available at the Exchange's website at *www.markets.cboe.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to implement proposed changes to its fee schedule relating to physical connectivity fees, effective June 1, 2018. By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,000 per physical port for a 1 gigabyte circuit and $7,000 per physical port for a 10 gigabyte circuit. The Exchange proposes to increase the fees per physical ports from (i) $2,000 to $2,500 per month, per port for a 1 gigabyte circuit and (ii) $7,000 to $7,500 per month, per port for a 10 gigabyte circuit. The Exchange notes the proposed fees enable it to continue to maintain and improve its market technology and services and also notes that the proposed fee changes are in line with the amounts assessed by other exchanges for similar connections.[6]

The Exchange also proposes to adopt separate physical port fees for connection to its secondary data center, which is predominantly maintained for business continuity purposes (''Disaster Recovery Systems''). Particularly, the Disaster Recovery Systems can be accessed via physical ports in Chicago. Members and Non-Members may maintain physical ports in order to be able to connect to the Disaster Recovery Systems in case of a disaster. Currently, physical ports that are used to connect to the Disaster Recovery Systems are assessed the same fees as physical ports used to connect to the Exchange's trading system. The Exchange proposes to establish separate pricing for physical ports that are used to connect to the Disaster Recovery Systems (''Disaster Recovery Physical Ports''). Specifically, the Exchange proposes to assess a monthly fee of $2,000 per 1 gigabyte Disaster Recovery Physical Port and a monthly fee of $6,000 per 10 gigabyte Disaster Recovery Physical Port. This amount will continue to enable the Exchange to maintain the Disaster Recovery Physical Ports in case they become necessary. The Exchange notes that the Disaster Recovery Physical Ports may also be used to access the Disaster Recovery Systems for the following affiliate exchanges Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc. and Cboe Futures Exchange, LLC as well. The Exchange proposes to provide that market participants will only be assessed a single fee for any Disaster Recovery Physical Port that also accesses the Disaster Recover Systems for these exchanges.[7]

[56] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[6] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI, Direct Connectivity to Phlx.

[7] For example, if a market participant uses a 1 gigabyte Disaster Recovery Physical Port to connect to the Disaster Recovery Systems for both BYX and EDGX, the market participant would only be assessed one monthly fee of $2,000.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange.

The Exchange believes that the proposed changes are equitable and non-discriminatory in that it applies uniformly to all Members. Members and non-Members will continue to choose whether they want more than one physical port and/or Disaster Recovery Physical Port and choose the method of connectivity based on their specific needs. All Members that voluntarily select various service options will be charged the same amount for the same services.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of reasonable dues, fees, and other charges as the Exchange believes that the proposed increased physical port fees will enable it to cover its infrastructure costs associated with establishing physical ports to connect to the Exchange's systems. The additional revenue from the increased fees will also enable the Exchange to continue to maintain and improve its market technology and services. Similarly, the Exchange believes the proposed fees for the Disaster Recovery Physical Ports will allow the Exchange to maintain the Disaster Recovery Physical Ports in case they become necessary.

Lastly, the Exchange believes the fees remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.[10]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and paragraph (f) of Rule 19b–4 thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeEDGX–2018–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2018–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of this filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2018–016 and

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI, Direct Connectivity to Phlx.

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

should be submitted on or before July 12, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13299 Filed 6–20–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83451; File Nos. SR–LCH SA–2017–012 and SR–LCH SA–2017–013]

Self-Regulatory Organizations; LCH SA; Order Approving Proposed Rule Changes Related to LCH SA's Recovery and Wind Down Plans

June 15, 2018.

I. Introduction

On November 30, 2017, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change (LCH SA–2017–012) to adopt a recovery plan (the ''RP''). The proposed rule change was published for comment in the **Federal Register** on December 19, 2017.[3] On December 7, 2017, LCH SA filed with the Commission a proposed rule change (LCH SA–2017–013) to adopt a wind down plan (''WDP'').[4] The proposed rule change was published for comment in the **Federal Register** on December 19, 2017.[5] On January 23, 2018, pursuant to Section 19(b)(2) of the Act,[6] the Commission designated a longer period for Commission action on both proposed rule changes.[7] On March 19, 2018 the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule changes.[9] To date, the Commission has not received any comments on the proposed rule changes. For the reasons discussed below, the Commission is approving the proposed rule changes.

II. Description of the Proposed Rule Changes[10]

As a ''covered clearing agency,''[11] LCH SA is required to, among other things, ''establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which . . . includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.''[12] The Commission has previously clarified that it believes that such recovery and wind-down plans are ''rules'' within the meaning of Exchange Act Section 19(b) and Rule 19b–4 because such plans would constitute changes to a stated policy, practice or interpretation of a covered clearing agency.[13] Accordingly, a covered clearing agency, such as LCH SA, must file its RP and WDP with the Commission.

A. The RP (LCH SA–2017–012)

LCH SA's RP seeks to maintain the continuity of critical services in times of extreme stress and to facilitate the recovery of LCH SA from such stress. In particular, the RP describes (i) the scenarios and triggers for initiating recovery measures; (ii) various recovery tools used in such recovery; and (iii) the governance framework for managing the RP. Each of those aspects of the RP are discussed in more detail below.

The scenarios that could necessitate the implementation of the RP include the default of one or more clearing members, liquidity shortfalls as a result of the default of an investment counterparty of LCH SA or any other investment losses resulting from changes in the market value on the investments, a loss resulting from an event which impacts the critical services provided by LCH SA (*e.g.,* failure in the provision of service by a third party), loss of critical contracts with exchanges, or the operational or financial failure of a financial market infrastructure such as an allied clearing house or trade repository.[14]

The default management process is used to re-establish a matched book and return to business as usual and therefore LCH SA considers it to be a recovery tool.[15] When pre-funded resources, such as defaulter's margin, defaulter's default fund contributions, LCH SA's capital, and non-defaulters' default fund contributions, are no longer available to meet obligations due to member and non-member losses, the RP lists various measures and tools that LCH SA can use to return to business as usual.[16] The RP is organized to discuss each tool according to the nature of the loss the tool is designed to address (*e.g.,* clearing member default losses, liquidity shortfalls, operational, business, and investment risks). The RP also discusses the sequence in which these tools would be used and the relative strength of each.[17]

When pre-funded resources have been exhausted after a clearing member default, LCH SA can call a default fund assessment up to a cap, request voluntary payments from all non-defaulting members, and effectuate service closure.[18] In the event such tools are unavailable, certain other business-as-usual tools, such as default fund additional margin, may enable LCH SA to collect additional resources.

In the event of a liquidity shortfall, LCH SA may use its central bank credit line to deposit securities received on behalf of defaulting clearing members and obtain liquidity.[19] Other potential tools to manage a liquidity stress situation include limits with respect to illiquid collateral, the application of increased haircuts on certain types of collateral to incentivize the use of more liquid collateral, and specific liquidity margins.[20] LCH SA also could defer funding for the settlement platform for a limited period of time, but views this as a tool of last resort.[21]

For most investment, business, and operational losses, LCH SA can allocate

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 34–82316 (Dec. 13, 2017), 82 FR 60246 (Dec. 19, 2017) (SR–LCH–SA–2017–012) (''Notice 012'').

[4] Capitalized terms used in this order but not defined herein have the same meanings specified in LCH SA's rules.

[5] Securities Exchange Act Release No. 34–82317 (Dec. 13, 2017), 82 FR 60238 (Dec. 19, 2017) (SR–LCH SA–2017–013) (''Notice 013'').

[6] 15 U.S.C. 78s(b)(2).

[7] Securities Exchange Act Release No. 34–82570 (Jan. 23, 2018), 83 FR 4088 (Jan. 29, 2018) (SR–LCH–SA–2017–012) and Securities Exchange Act Release No. 34–82571 (Jan. 23, 2018), 83 FR 4081 (Jan. 29, 2018) (SR–LCH SA–2017–013).

[8] 15 U.S.C. 78s(b)(2)(B).

[9] Securities Exchange Act Release No. 34–82901 (March 19, 2018), 83 FR 12833 (March 23, 2018) (SR–LCH SA–2017–012; SR–LCH SA–2017–013).

[10] The descriptions of the proposed rule changes are substantially excerpted from Notice 012 and Notice 013.

[11] The term ''covered clearing agency'' is defined in SEC Rule 17Ad–22(a)(5), 17 CFR 240.17Ad–22(a)(5).

[12] 17 CFR 240.17Ad–22(e)(3)(ii).

[13] Standards for Covered Clearing Agencies, Securities Exchange Act Release No. 34–78961 (Sep. 28, 2016), 81 FR 70786, 70809 (Oct. 13, 2016).

[14] *See* Notice 012, 82 FR at 60247.

[15] *Id.*

[16] *Id.* at 60249.

[17] *Id.* at 60249–60250.

[18] *Id.* at 60249.

[19] *Id.*

[20] *Id.*

[21] *Id.*

its capital surplus against losses.[22] Further down the list of preferable recovery tools for non-clearing member defaults are the abilities to raise capital or utilize insurance meant to cover a specific operational risk event.[23] For any disruption or loss of a key third-party service provider, LCH SA would be able to exercise several contractual rights and maintains exit plans that are intended to safeguard the continuity of services.[24]

The RP discusses the governance surrounding its creation, invocation, and operation.[25] LCH SA relies upon its existing governance forums for both the creation and on-going monitoring and operation of the RP. Specifically, the LCH SA Management Committee is responsible for the preparation of the RP and the monitoring and implementation of the recovery tools set forth in the RP.[26] The LCH SA Risk Committee reviews and makes a recommendation to the Board, which ultimately has the power to approve the RP.[27] However, before submission to the LCH SA Risk Committee, the RP is reviewed and validated by the Executive Risk Committee of LCH SA's parent company, LCH Group.[28]

The Default Management Group is responsible for the management of clearing member defaults while all critical decisions are escalated and submitted to the LCH SA Default Crisis Management Team (''DCMT'').[29] The triggering of recovery measures is subject to discussion in the DCMT and approval by the LCH SA CEO.[30]

The management of non-clearing member events will vary based on the nature of the event.[31] For example, investment losses and liquidity shortfalls are managed by the departments responsible for controlling such risks within the parameters set by the Board.[32] Similarly, operational risks are managed by each business line in accordance with the operational risk policy approved by the Board.[33] Business risk is managed by individual business lines, with a second line challenge performed by the risk and finance departments to verify if sufficient capital buffers are available for the applicable business risks.[34] Matters are escalated to the Management Committee when the RP is triggered and the LCH SA Board will approve implementation of the RP.[35]

B. The WDP (LCH SA–2017–013)

In the event a recovery is not successful, LCH SA would invoke its WDP to wind down its operations to full service closure in an orderly manner, thereby minimizing the disruption to clearing members, market participants, and the broader financial system. The WDP would be triggered after a determination by the LCH SA Board that all the recovery tools have been exhausted and have failed to return LCH SA to business as usual.[36] A voluntary wind-down not precipitated by these extreme events is not considered under the WDP.[37] The WDP would set forth clear mechanisms for the transfer of LCH SA's membership and business, and would be designed to facilitate continued access to critical services and to minimize market impact.[38]

The decision to wind down would be taken by the Board and ultimately the LCH SA shareholders, upon advice of the Executive Risk Committee and Local Management Committee (''LMC'').[39] The LMC or DCMT would monitor the implementation of the WDP.[40] LCH SA would consult with all relevant regulatory authorities before making a decision to wind down and, unless all clearing services have already been closed, the French *Autorité de Contrôle Prudentiel et de Resolution* (''ACPR'') would have to approve such a decision.[41] LCH SA would also keep relevant regulatory authorities regularly informed of the plan's implementation.[42] If LCH SA was in resolution at the time, the relevant regulatory authority governing the resolution of LCH SA would need to make the decision to wind-down.[43]

The WDP assumes that LCH SA's businesses would be wound down until full closure, including the closure of all its business lines at the same time.[44] This is a worst case assumption, however, and the WDP acknowledges that it is likely that in the phases preceding the decision to wind-down, some business lines will have been closed, transferred, or scaled down.[45]

The WDP provides that LCH SA would publish written notice to the clearing members that a wind-down event has occurred and potential dates by which transactions will no longer be accepted for clearing.[46] In a non-default situation or in a situation where the corresponding business line is still active, LCH SA would attempt to give clearing members the maximum time necessary to clear transactions in the normal course, close-out positions, and switch to another central counterparty.[47]

In line with the RP, the WDP describes the functions of LCH SA and distinguishes critical functions that LCH SA provides to the market (all of LCH SA's clearing functions are considered critical); services that are critical to the support of LCH SA's critical functions (such as IT, risk, operations, and collateral and risk management); and non-critical support functions (such as finance, legal, and human resources). The WDP then provides detail about the closure of these functions. For instance, the treasury function would close once all clearing services have ceased and monies are paid by LCH SA and its members.[48] Further, once the WDP is implemented, LCH SA would deposit remaining cash in central bank accounts or invest the cash in instruments with maturities no longer than same-day repos.[49] LCH SA would keep active any other supporting operational, information technology, or risk functions until all positions are closed.[50] Finally, the WDP describes the closure of LCH SA's clearing services and provides citations to the various clearing services' rule book provisions giving a legal basis for the actions taken to effectuate the WDP.[51]

The WDP further notes that LCH SA's contractual agreements with third-party service providers, such as information technology or venue providers, contain wind-down provisions that permit LCH SA to exit the agreements under particular conditions.[52]

Separately from the WDP, but in line with the processes and timeline described in the WDP, LCH SA calculates the costs required for a wind down. These costs encompass staff salaries, indemnities for staff departure,

[22] *Id.*
[23] *See* Notice 012, 82 FR at 60249.
[24] *Id.* at 60250.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Notice 013, 82 FR at 60239.
[37] *Id.*
[38] *Id.* at 60239–60240.
[39] *Id.* at 60239.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 60239–60240.
[47] *Id.* at 60240
[48] *Id.* at 60240.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

costs to be paid to suppliers during notice periods, and all foreseeable costs that would be due in the event of a wind-down.[53] Based on these calculations, the WDP concludes that these costs would be less than the capital LCH SA holds under EU regulations (capital equal to the operating expenses for a six (6) month period) and that LCH SA would be in a position to close the company within six months of the decision to wind-down.[54]

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[55] For the reasons given below, the Commission finds that the proposed rule changes are consistent with Section 17A(b)(3)(F) of the Act[56] and Rules 17Ad–22(e)(2)(i), (iii), and (v), 17Ad–22(e)(3)(ii), and 17Ad–22(e)(15)(i)–(ii) thereunder.[57]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of LCH SA be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible, and, in general, to protect investors and the public interest.[58]

As described above, the RP would specify the steps that LCH would take in recovery and the governance framework applicable to taking such steps. It would analyze the anticipated impact of the recovery tools, the incentives created by such tools, and the risks associated with using such tools. It would also explain how the tools used in the plan are transparent, measurable, manageable, and controllable. The Commission believes that by specifying the steps LCH SA would take and the tools it would use to bring about recovery in the face of losses, the RP would increase the likelihood that recovery would be orderly, efficient, and successful. In increasing the likelihood that recovery of LCH SA would be orderly, efficient, and successful, the Commission believes that the RP would enhance LCH SA's ability to maintain the continuity of its critical services (including clearance and settlement services) during, through, and following periods of extreme stress giving rise to the need for recovery, thereby promoting the prompt and accurate clearance and settlement of CDS transactions. The Commission also believes that the RP would help assure the safeguarding of securities or funds in the custody or control of LCH SA by reducing the likelihood of a disorderly or unsuccessful recovery, which could otherwise disrupt access to such securities or funds. For the same reason, the Commission also believes the RP would be consistent with the protection of investors and the public interest.

Similarly, the Commission believes that the WDP would enhance LCH SA's ability to promote the prompt and accurate clearance and settlement of securities transactions and to safeguard securities and funds in its control by establishing a plan to effectuate an orderly wind down. Specifically, the WDP's governance process and notice provisions would facilitate the orderly close-out of positions and potential transfer of positions to other central counter parties. Therefore, the Commission believes that these provisions would enhance LCH SA's ability to maintain and continue the prompt and accurate clearance and settlement of CDS transactions by assuring that such transactions are closed-out and transferred to other central counterparties in an orderly and transparent manner. Moreover, by specifying in advance the steps LCH SA would take in a wind down, the WDP would assure an efficient and orderly wind down of LCH SA. The Commission believes that this, in turn, would assure the safeguarding of securities or funds in the custody or control of LCH SA by reducing the likelihood of an inefficient or disorderly wind down, which could disrupt access to such securities or funds. Finally, the Commission believes that the WDP's requirement that LCH SA deposit remaining cash in central bank accounts and limit investment options to short term highly-liquid instruments would further enhance LCH SA's ability to safeguard funds in its control by reducing the risk of liquidity constraints and investment losses during a wind down.

Therefore, the Commission finds that the proposed rule changes would promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds in LCH SA's custody and control, and, in general, protect investors and the public interest, consistent with the Section 17A(b)(3)(F) of the Act.[59]

B. Consistency With Rules 17Ad–22(e)(2)(i), (iii), and (v)

Rules 17Ad–22(e)(2)(i), (iii), and (v) require that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent, that support the public interest requirements in Section 17A of the Act applicable to clearing agencies, and the objectives of owners and participants, and that specify clear and direct lines of responsibility.[60]

The RP would identify clear lines of responsibility for its preparation and final approval, the monitoring of its use, and the functioning of the recovery tools. The RP would also specify the process LCH SA would take to receive input from various parties at LCH SA, including management committees and the Board. Further, the RP would enhance transparency by including member representatives in the review of the RP. The Commission believes that these lines of control and input from various LCH SA stakeholders can contribute to establishing, implementing, maintain and enforcing clear and transparent governance arrangements that support the public interest requirements in Section 17A of the Act applicable to clearing agencies, and the objectives of owners and participants.

The WDP similarly would identify clear lines of responsibility for the invocation, monitoring, and approval of the WDP, and ultimately, a wind down. It would enhance transparency by requiring final approval by the LCH SA shareholders and providing for communication to clearing members and other users of LCH SA's services. The Commission believes that both of these features of the WDP would represent clear and transparent governance arrangements.

Therefore, the Commission finds that the proposed rule changes would establish clear and transport governance arrangements for the RP and WDP,

[53] *Id.*

[54] *Id.*

[55] 15 U.S.C. 78s(b)(2)(C).

[56] 15 U.S.C. 78q–1(b)(3)(F).

[57] 17 CFR 240.17Ad–22(e)(2)(i), (iii), and (v); (e)(3)(ii); (e)(15)(i)–(ii).

[58] 15 U.S.C. 78q–1(b)(3)(F).

[59] 15 U.S.C. 78q–1(b)(3)(F).

[60] 17 CFR 240.17Ad–22(e)(2)(i), (iii), and (v).

consistent with Rules 17Ad–22(e)(2)(i), (iii), and (v).[61]

C. Consistency With Rule 17Ad–22(e)(3)(ii)

Rule 17Ad–22(e)(3)(ii) requires that LCH SA establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by LCH SA, which includes plans for the recovery and orderly wind-down of LCH SA necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[62]

The Commission believes that the information the RP would provide about the steps that LCH SA would take, and the tools it would use, to effectuate a recovery of LCH SA would enhance LCH SA's ability to recover from credit losses, liquidity shortfalls, general business risk losses, or other losses, consistent with Rule 17Ad–22(e)(3)(ii).[63] Specifically, the information from the RP would enable LCH SA to prepare in advance for the use of such tools and practice the use of such tools, which would in turn enhance LCH SA's ability to use such tools effectively to carry out a successful recovery. In addition, by establishing a single source of information about, and steps needed to effectuate, a recovery of LCH SA, the RP would allow LCH SA personnel to effectuate a recovery in a consistent and coordinated fashion, and would thereby increase the likelihood of a successful recovery. Moreover, by identifying and assessing available recovery tools, the Commission believes that the RP would enhance LCH SA's ability to use such tools effectively to bring about a recovery by identifying in advance which tools may be most effective for different situations or needs, consistent with Rule 17Ad–22(e)(3)(ii).[64]

Similarly, in providing detailed information about the governance requirements related to triggering and implementing the WDP discussed in more detail above, the Commission believes that the WDP would enhance LCH SA's ability to effectuate an orderly wind-down, consistent with Rule 17Ad–22(e)(3)(ii).[65] Specifically, by setting out in advance the steps LCH SA would take to trigger and effectuate a wind-down, the WDP would enable LCH SA to prepare in advance for a wind-down, and practice the steps needed to effectuate a wind-down, which the Commission believes would enhance LCH SA's ability to use the WDP effectively to carry-out an orderly wind-down. In addition, by establishing a single source of information about, and steps needed to effectuate, a wind-down of LCH SA, the Commission believes the WDP would allow LCH SA personnel to effectuate a wind-down in a consistent and coordinated fashion, and would thereby increase the likelihood of an orderly wind-down. Finally, the WDP would identify the legal basis for LCH's actions with respect to a potential wind-down, including relevant citations to provisions of the rule books of its various clearing services and contractual agreements, which the Commission believes would further facilitate a well-reasoned, legal, and orderly wind-down process by providing LCH SA with a single source of information and steps needed for a wind-down, consistent with Rule 17Ad–22(e)(3)(ii).[66]

Therefore, the Commission finds that the proposed rule changes would be plans for the orderly recovery and wind down of LCH SA, consistent Rule 17Ad–22(e)(3)(ii).[67]

D. Consistency With Rules 17Ad–22(e)(15)(i)–(ii)

Rules 17Ad–22(e)(15)(i)–(ii) require LCH SA to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that LCH SA can continue operations and services as a going concern if those losses materialize, including by (i) determining the amount of liquid net assets funded by equity based upon its general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken and (ii) holding liquid net assets funded by equity equal to the greater of either (x) six months of the LCH SA's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services.[68]

LCH SA's RP would include a quantitative assessment of the situations that could necessitate a recovery and related recovery tools. This quantitative assessment would consider the potential impact to LCH SA's liquid net assets funded by equity, including its surplus capital. It would also include an assessment of the time to implement the various recovery tools. Thus, the Commission finds that the RP would indicate the potential cost and length of recovery, consistent with Rules 17Ad–22(e)(15)(i)–(ii).[69]

Similarly, LCH SA's WDP would calculate costs related to a wind down. These costs would include staffing, technological, facilities, legal, and other resources necessary during the actual wind-down period. Further, the WDP concludes, based on recently audited amounts, that LCH SA would hold highly liquid resources corresponding to six months of operating expenses and that this amount would exceed the estimated costs of conducting a wind-down. The WDP also concludes that the length of time it would take LCH SA to wind-down and close clearing services would be six months from the decision to wind-down. Thus, the Commission finds that the WDP would indicate LCH SA's ability to effectuate a wind down within six months of the decision to wind-down at a lower cost than the amount of its liquid resources, consistent with Rules 17Ad–22(e)(15)(i)–(ii).[70]

Therefore, the Commission finds that the proposed rule changes would determine the length of time required to achieve a recovery or orderly wind-down of LCH SA and the associated costs and would further ensure that LCH SA holds liquid net assets greater than these costs, consistent with Rules 17Ad–22(e)(15)(i)–(ii).[71]

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule changes are consistent with the requirements of the Act, and in particular, Section 17A(b)(3)(F) of the Act[72] and Rules 17Ad–22(e)(2)(i), (iii), and (v), 17Ad–22(e)(3)(ii), 17Ad–22(e)(15)(i)–(ii) thereunder.[73]

It is therefore ordered pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR–LCH SA–

[61] 17 CFR 240.17Ad–22(e)(2)(i), (iii), and (v).

[62] 17 CFR 240.17Ad–22(e)(3)(ii).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] 17 CFR 240.17Ad–22(e)(15)(i)–(ii).

[69] 17 CFR 240.17Ad–22(e)(15)(i)–(ii).

[70] 17 CFR 240.17Ad–22(e)(15)(i)–(ii).

[71] 17 CFR 240.17Ad–22(e)(15)(i)–(ii).

[72] 15 U.S.C. 78q–1(b)(3)(F).

[73] 17 CFR 240.17Ad–22(e)(2)(i), (iii), and (v); (e)(3)(ii); (e)(15)(i)–(ii).

2017–012) be, and hereby is, approved.[74]

It is therefore ordered pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR–LCH SA–2017–013) be, and hereby is, approved.[75]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13300 Filed 6–20–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83449; File No. SR–CboeEDGA–2018–010]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for EDGA

June 15, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 1, 2018, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend its fees and rebates applicable to Members [5] and non-Members of the Exchange pursuant to EDGA Rule 15.1(a) and (c) to modify its fees for physical ports.

The text of the proposed rule change is available at the Exchange's website at *www.markets.cboe.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to implement proposed changes to its fee schedule relating to physical connectivity fees, effective June 1, 2018. By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,000 per physical port for a 1 gigabyte circuit and $7,000 per physical port for a 10 gigabyte circuit. The Exchange proposes to increase the fees per physical ports from (i) $2,000 to $2,500 per month, per port for a 1 gigabyte circuit and (ii) $7,000 to $7,500 per month, per port for a 10 gigabyte circuit. The Exchange notes the proposed fees enable it to continue to maintain and improve its market technology and services and also notes that the proposed fee changes are in line with the amounts assessed by other exchanges for similar connections.[6]

The Exchange also proposes to adopt separate physical port fees for connection to its secondary data center, which is predominantly maintained for business continuity purposes (''Disaster Recovery Systems''). Particularly, the Disaster Recovery Systems can be accessed via physical ports in Chicago. Members and Non-Members may maintain physical ports in order to be able to connect to the Disaster Recovery Systems in case of a disaster. Currently, physical ports that are used to connect to the Disaster Recovery Systems are assessed the same fees as physical ports used to connect to the Exchange's trading system. The Exchange proposes to establish separate pricing for physical ports that are used to connect to the Disaster Recovery Systems (''Disaster Recovery Physical Ports''). Specifically, the Exchange proposes to assess a monthly fee of $2,000 per 1 gigabyte Disaster Recovery Physical Port and a monthly fee of $6,000 per 10 gigabyte Disaster Recovery Physical Port. This amount will continue to enable the Exchange to maintain the Disaster Recovery Physical Ports in case they become necessary. The Exchange notes that the Disaster Recovery Physical Ports may also be used to access the Disaster Recovery Systems for the following affiliate exchanges Cboe BZX Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc. and Cboe Futures Exchange, LLC as well. The Exchange proposes to provide that market participants will only be assessed a single fee for any Disaster Recovery Physical Port that also accesses the Disaster Recover Systems for these exchanges.[7]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in

[74] In approving the proposed rule change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[75] In approving the proposed rule change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[76] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[6] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI, Direct Connectivity to Phlx.

[7] For example, if a market participant uses a 1 gigabyte Disaster Recovery Physical Port to connect to the Disaster Recovery Systems for both EDGA and EDGX, the market participant would only be assessed one monthly fee of $2,000.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange.

The Exchange believes that the proposed changes are equitable and non-discriminatory in that it applies uniformly to all Members. Members and non-Members will continue to choose whether they want more than one physical port and/or Disaster Recovery Physical Port and choose the method of connectivity based on their specific needs. All Members that voluntarily select various service options will be charged the same amount for the same services.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of reasonable dues, fees, and other charges as the Exchange believes that the proposed increased physical port fees will enable it to cover its infrastructure costs associated with establishing physical ports to connect to the Exchange's systems. The additional revenue from the increased fees will also enable the Exchange to continue to maintain and improve its market technology and services. Similarly, the Exchange believes the proposed fees for the Disaster Recovery Physical Ports will allow the Exchange to maintain the Disaster Recovery Physical Ports in case they become necessary.

Lastly, the Exchange believes the fees remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.[10]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and paragraph (f) of Rule 19b–4 thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeEDGA–2018–010 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2018–010. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of this filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2018–010 and should be submitted on or before July 12, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13298 Filed 6–20–18; 8:45 am]

BILLING CODE 8011–01–P

[10] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI, Direct Connectivity to Phlx.

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83455; File No. SR–C2–2018–014]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for C2

June 15, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 4, 2018, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is available at the Exchange's website at *www.markets.cboe.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule.[5]

Physical Connectivity

A physical port is utilized by a Trading Permit Holder (''TPH'') or non-TPH to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses fees for Network Access Ports for legacy physical connections to the Exchange. Specifically, TPHs and non-TPHs can currently elect to connect to C2's trading system via either a 1 gigabit per second (''Gbps'') Network Access Port or a 10 Gbps Network Access Port. The Exchange currently assesses a monthly fee of $500 per port for 1 Gbps Network Access Ports and a monthly fee of $1,000 per port for 10 Gbps Network Access Ports. Through June 30, 2018, C2 market participants will continue to have the ability to connect to C2's trading system via legacy Network Access Ports. The Exchange however, does not wish to assess fees for the legacy ports for the month of June. As such, the Exchange proposes to eliminate the $500 and $1,000 per port per month fees, effective June 1, 2018.

On May 14, 2018, the Exchange migrated its technology onto the same trading platform as its affiliates Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe BZX Exchange, Inc. (''Affiliated Exchanges'') (the ''migration''). In connection with the migration, effective May 14, 2018, TPHs and non-TPHs could alternatively elect to connect to C2 via new Physical Ports. The new Physical Ports allow TPHs and non-TPHs the ability to connect to the Exchange at the data centers where the Exchange's servers are located and TPHs and non-TPHs have the option to connect via 1 Gbps or 10 Gbps Physical Ports. The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses a monthly fee of $2,000 per port for 1 Gbps Physical Ports, and a monthly fee of $7,000 per port for 10 Gbps Physical Ports, for Physical Ports that connect to the primary data center. The Exchange proposes to increase the monthly Physical Port fees to $2,500 per port for 1 Gbps Physical Ports and to $7,500 per port for 10 Gbps Physical Ports. The Exchange notes the proposed fees enable it to continue to maintain and improve its market technology and services and also notes that the proposed fee changes are in line with the amounts assessed by other exchanges for similar connections. The Exchange also notes that the proposed changes to the Physical Port fees are also being proposed by its Affiliated Exchanges for June 1, 2018 effectiveness.

Disaster Recovery Physical Ports

The Exchange also proposes to adopt separate Physical Port fees for connection to its secondary data center, which is predominantly maintained for business continuity purposes (''Disaster Recovery Systems''). Particularly, the Disaster Recovery Systems can be accessed via Physical Ports in Chicago. TPHs and Non-TPHs may maintain Physical Ports in order to be able to connect to the Disaster Recovery Systems in case of a disaster. The Exchange proposes to establish separate pricing for Physical Ports that are used to connect to the Disaster Recovery Systems (''Disaster Recovery Physical Ports''). Specifically, the Exchange proposes to assess a monthly fee of $2,000 per 1 Gbps Disaster Recovery Physical Port and a monthly fee of $6,000 per 10 Gbps Disaster Recovery Physical Port. This amount will allow the Exchange to maintain the Disaster Recovery Physical Ports in case they become necessary. The Exchange notes that the Disaster Recovery Physical Ports may also be used to access the Disaster Recovery Systems for the following affiliate exchanges: Cboe BZX Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe BYX Exchange, Inc., Cboe Exchange Inc., and Cboe Futures Exchange, LLC. The Exchange proposes to provide that market participants will only be assessed a single fee for any Disaster Recovery Physical Port that also accesses the Disaster Recovery Systems for these exchanges.

Logical Connectivity

The Exchange currently assesses $650 per port for BOE and FIX Logical Ports. Additionally, the Fees Schedule provides that each BOE or FIX Logical Port incur the standard logical port fee when used to enter up to 20,000 orders per trading day per logical port as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The Exchange initially filed the proposed changes on June 1, 2018 (SR–C2–2018–013). On June 4, 2018, the Exchange withdrew that filing and submitted this filing.

measured on average in a single month and that each incremental usage of up to 20,000 per day per logical port will incur an additional logical port fee of $650 per month. The Exchange proposes to increase the number of average daily orders used to determine incremental usage from 20,000 orders per trading day per logical port to 70,000 orders per day per logical port. The Exchange believes that the pricing implications of going beyond 70,000 orders, instead of 20,000 orders, per trading day per Logical Port still encourage users to mitigate message traffic as necessary.

Cboe Data Services—Port Fees

The Exchange lastly proposes to amend the ''Port Fee'' under the Cboe Data Services (''CDS'') fees section. Currently, the Port Fee is payable by any Customer that receives data through a direct connection to CDS (''direct connection'') or through a connection to CDS provided by an extranet service provider (''extranet connection''). The Port Fee applies to receipt of any C2 Options data feed but is only assessed once per data port. The Exchange proposes to amend the monthly CDS Port Fee to provide that it is payable ''per source'' used to receive data, instead of ''per data port''. The Exchange also proposes to increase the fee from $500 per data port/month to $1,000 per data source/month.

Clean-Up

The Exchange lastly proposes to correct an inadvertent error with respect to a reference to a C2 Rule in the Fees Schedule. Particularly, the Exchange notes that under the Regulatory Options Fee section of the Fees Schedule, a reference to C2 Rule 6.36 is made. The Exchange notes that such rule was recently replaced with C2 Rule 6.15. The Exchange proposes to update that reference and notes that no substantive changes are being made by this clean-up update.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Permit Holders and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Physical Connectivity

The Exchange believes it's reasonable, equitable and not unfairly discriminatory to not assess Network Access Port fees for the month of June as market participants will no longer pay fees for these ports. TPHs and non-TPHs will continue to pay the Physical Port fees for Physical Port connections. The Exchange believes the proposed change is equitable and not unfairly discriminatory because it applies uniformly to market participants.

The Exchange believes increasing the fees for the Physical Ports is reasonable because the proposed fees enable the Exchange to continue to maintain and improve its market technology. The Exchange also notes that the proposal represents an equitable allocation of reasonable dues, fees and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected TPHs and non-TPHs may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. The Exchange also notes that the proposed amounts are in line with the costs of physical connectivity at other Exchanges.[9] The Exchange believes the proposed Physical Port fees are equitable and not unfairly discriminatory because it applies to all market participants.

Similarly, the Exchange believes the proposed fees for the Disaster Recovery Physical Ports are reasonable as it will allow the Exchange to maintain the Disaster Recovery Physical Ports in case they become necessary. The Exchange also believes the proposed fees are reasonable as they remain competitive with those charged by other venues.[10] The Exchange believes the proposed rule change is equitable and non-discriminatory because it applies to all market participants equally.

Logical Connectivity

The Exchange believes the proposed increase to the maximum average orders per day per logical port for BOE and FIX Logical Port usage provides market participants adequate capacity and ability to submit orders, while still encouraging users to mitigate message traffic as necessary, which removes impediments to and perfects the mechanism of a free open market and a national market system, and, in general, protects investors and the public interest. The proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all market participants.

Cboe Data Services—Port Fees

The Exchange believes the proposed change is reasonable, equitable and not unfairly discriminatory because it applies uniformly to all market participants. The Exchange believes assessing the fee per data source, instead of per port, is reasonable because it may allow for market participants to maintain more ports at a lower cost and applies uniformly to all market participants. The Exchange believes the proposed increase is reasonable because, as noted above, market participants will likely still pay lower fees as a result of charging per data source and not per data port.

Miscellaneous Changes

The Exchange believes the proposed rule change to correct an inadvertent rule reference error alleviates potential confusion. The alleviation of confusion removes impediments to and perfects the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

[9] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI, Direct Connectivity to Phlx.

[10] *See e.g.,* NYSE Arca Equities Fees and Charges, NYSE Arca Marketplace: Other Fees and Charges, Connectivity Fees. *See also,* Nasdaq Phlx LLC Pricing Schedule, Section XI, Direct Connectivity to Phlx.

proposed change represents a significant departure from pricing offered by the Exchange's affiliates. Additionally, TPHs may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed change will impair the ability of TPHs or competing venues to maintain their competitive standing in the financial markets. The Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. Further, excessive fees for connectivity, would serve to impair an exchange's ability to compete for order flow rather than burdening competition. The Exchange also does not believe the proposed rule change would impact intramarket competition as it would apply to all TPHs and non-TPHs equally.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 [12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2018–014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2018–014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2018–014 and should be submitted on or before July 12, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13304 Filed 6–20–18; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83452; File No. SR–NYSEArca&2017–139]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF Under NYSE Arca Rule 8.200–E, Commentary .02

June 15, 2018.

On December 4, 2017, NYSE Arca, Inc. (''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade the shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF under NYSE Arca Rule 8.200–E, Commentary .02. The proposed rule change was published for comment in the **Federal Register** on December 26, 2017.[3] On January 30, 2018, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On March 23, 2018, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change.[7] The Commission has received 11 comments on the proposed rule change.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 82350 (Dec. 19, 2017), 82 FR 61100 (Dec. 26, 2017).

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 82602 (Jan. 30, 2018), 83 FR 4941 (Feb. 2, 2018).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 82939 (Mar. 23, 2018), 83 FR 13537 (Mar. 29, 2018). Specifically, the Commission instituted proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' *See id.* at 13538 (citing 15 U.S.C. 78f(b)(5)).

[8] *See* Letters from Abe Kohen, AK Financial Engineering Consultants, LLC (Dec. 27, 2017); Anita Desai (Apr. 6, 2018); Ed Kaleda (Apr. 6, 2018); Scott Moberg (Apr. 6, 2018); Adam Malkin (Apr. 8, 2018); Gisan Mohammed (Apr. 11, 2018); Shravan Kumar (Apr. 11, 2018); Louise Fitzgerald (Apr. 19, 2018);

Section 19(b)(2) of the Act [9] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on December 26, 2017. June 24, 2018 is 180 days from that date, and August 23, 2018 is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[10] designates August 23, 2018 as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSEArca–2017–139).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–13301 Filed 6–20–18; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15559 and #15560; NEW HAMPSHIRE Disaster Number NH–00043]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of New Hampshire

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Hampshire (FEMA–4371–DR), dated 06/08/2018.

Incident: Severe Winter Storm and Snowstorm.

Incident Period: 03/13/2018 through 03/14/2018.

DATES: Issued on 06/08/2018.

Physical Loan Application Deadline Date: 08/07/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 03/08/2019.

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 President's major disaster declaration on 06/08/2018, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications 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: Carroll, Rockingham, Strafford

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.500
Non-Profit Organizations without Credit Available Elsewhere	2.500
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.500

The number assigned to this disaster for physical damage is 15559B and for economic injury is 155600.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2018–13284 Filed 6–20–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15567 and #15568; HAWAII Disaster Number HI–00049]

Presidential Declaration of a Major Disaster for the State of Hawaii

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of HAWAII (FEMA–4366–DR), dated 06/14/2018.

Incident: Kilauea Volcanic Eruption and Earthquakes.

Incident Period: 05/03/2018 and continuing.

DATES: Issued on 06/14/2018.

Physical Loan Application Deadline Date: 08/13/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 03/14/2019.

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 President's major disaster declaration on 06/14/2018, 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 (Physical Damage and Economic Injury Loans): Hawaii

Contiguous Counties (Economic Injury Loans Only): None

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	3.875
Homeowners without Credit Available Elsewhere	1.938
Businesses with Credit Available Elsewhere	7.220
Businesses without Credit Available Elsewhere	3.610
Non-Profit Organizations with Credit Available Elsewhere ...	2.500
Non-Profit Organizations without Credit Available Elsewhere	2.500
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.610
Non-Profit Organizations without Credit Available Elsewhere	2.500

The number assigned to this disaster for physical damage is 15567D and for economic injury is 155680.

Joshua Rousseau (Apr. 30, 2018); Thomas W. Fink (May 3, 2018); and Sharon Brown-Hruska, Managing Director, and Trevor Wagener, Consultant, NERA Economic Consulting (May 18, 2018). All comments on the proposed rule change are available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2017-139/nysearca2017139.htm.*

[9] 15 U.S.C. 78s(b)(2).

[10] *Id.*

[11] 17 CFR 200.30–3(a)(57).

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2018–13283 Filed 6–20–18; 8:45 am]

BILLING CODE 8025–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 290 (Sub-No. 5) (2018–3)]

Quarterly Rail Cost Adjustment Factor

AGENCY: Surface Transportation Board.

ACTION: Approval of rail cost adjustment factor.

SUMMARY: The Board approves the third quarter 2018 Rail Cost Adjustment Factor (RCAF) and cost index filed by the Association of American Railroads. The third quarter 2018 RCAF (Unadjusted) is 1.061. The third quarter 2018 RCAF (Adjusted) is 0.449. The third quarter 2018 RCAF–5 is 0.419.

DATES: *Applicable Date:* July 1, 2018.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez, (202) 245–0333. Federal Information Relay Service (FIRS) for the hearing impaired: (800) 877–8339.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision, which is available on our website, *http://www.stb.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Decided: June 14, 2018.

By the Board, Board Members Begeman and Miller.

Brendetta Jones,

Clearance Clerk.

[FR Doc. 2018–13350 Filed 6–20–18; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Rescission of Record of Decision and Final Environmental Impact Statement

AGENCY: Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Notice to rescind the Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS).

SUMMARY: The FHWA is issuing this notice to advise the public that we are rescinding the 2003 Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) that proposed to construct a segment of Interstate 66 (I–66) between eastern Pike County, Kentucky and western Mingo County, West Virginia.

FOR FURTHER INFORMATION CONTACT: Thomas Nelson, Jr., Division Administrator, Federal Highway Administration, Kentucky Division, 330 South Broadway Street, Frankfort, Kentucky, 40601, Telephone: (502) 223–6720.

SUPPLEMENTARY INFORMATION: The FHWA, as the lead Federal agency, in cooperation with the Kentucky Transportation Cabinet (KYTC), is rescinding the Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) for the proposal to construct a segment of Interstate 66 in Pike County, Kentucky and Mingo County, West Virginia. The Notice of Intent (NOI) to prepare the Environmental Impact Statement (EIS) was published in the **Federal Register** on March 15, 2000. The ROD was issued in October 27, 2003. The FHWA has determined, in conjunction with the KYTC, that the ROD and the FEIS for the project shall be rescinded for the following reasons: No foreseeable connection to the King Coal Highway; significant impacts of the 2003 Selected Alternative; other regional improvements meet the purposes and needs of the project; and the lack of funding for the construction of the project.

Any future Federal-aided action within this corridor will comply with environmental review requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321), FHWA environmental regulations (23 CFR 771) and related authorities, as appropriate. Comments and questions concerning this action should be directed to FHWA at the address provided above.

Issued on June 15, 2018.

Thomas Nelson, Jr.,

Division Administrator, FHWA Kentucky Division, Frankfort, Kentucky.

[FR Doc. 2018–13332 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0053]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from eight individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before July 23, 2018

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2018–0053 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey

Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

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 *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the FMCSRs for a five-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the five-year period. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

The eight individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section *H. Epilepsy: § 391.41(b)(8),* paragraphs 3, 4, and 5.]

The advisory criteria states the following:

If an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the Medical Examiner in consultation with the treating physician. Before certification is considered, it is suggested that a six-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver had a seizure or an episode of loss of consciousness that resulted from a known medical condition (*e.g.,* drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a five-year period or more.

As a result of Medical Examiners misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified Medical Examiner based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a Notice of Final Disposition titled, Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders, (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' Since the January 15, 2013 notice, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in 49 CFR 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (MEP) (78 FR 3069).

II. Qualifications of Applicants

Ricky B. Alegre

Mr. Alegre is a 31 year-old class D driver in New Jersey. He has a history of a single provoked seizure and has been seizure free since April 2014. He takes anti-seizure medication with the dosage and frequency remaining the same since April 2014. His physician states that he is supportive of Mr. Alegre receiving an exemption.

Stephen M. Christner

Mr. Christner is a 39 year-old class C driver in Pennsylvania. He has a history of epilepsy and has been seizure free since 2000. He takes anti-seizure medication with the dosage and frequency remaining the same since 2007. His physician states that he is supportive of Mr. Christner receiving an exemption.

Paul J. Gomez

Mr. Gomez is a 56 year-old class C driver in California. He has a history of generalized convulsive epilepsy and has been seizure free since 2010. He takes anti-seizure medication with the dosage and frequency remaining the same since August 2010. His physician states that he is supportive of Mr. Gomez receiving an exemption.

[1] See *http://www.ecfr.gov/cgi-bin/text-idx?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391_171.a* and *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

Lawrence J. Knox

Mr. Knox is a 57 year-old class D driver in Massachusetts. He has a history of a seizure disorder and has been seizure free since 1988. He takes anti-seizure medication with the dosage and frequency remaining the same since May 2015. His physician states that he is supportive of Mr. Knox receiving an exemption.

Thomas A. Ork

Mr. Ork is a 56 year-old class C driver in New York. He has a seizure disorder and has been seizure free since 2004. He takes anti-seizure medication with the dosage and frequency remaining the same since 2004. His physician states that he is supportive of Mr. Ork receiving an exemption.

Constance Seale

Ms. Seale is a 64 year-old class CB CDL holder in Delaware. She has a history of a seizure disorder and has been seizure free since 1978. She takes anti-seizure medication with the dosage and frequency remaining the same since 1978. Her physician states that he is supportive of Ms. Seale receiving an exemption.

Anne M. Spencer-Brown

Ms. Spencer-Brown is a 38 year-old class A CDL holder in West Virginia. She has a history of a seizure disorder and has been seizure free since 2008. She takes anti-seizure medication with the dosage and frequency remaining the same since 2008. Her physician states that she is supportive of Ms. Spencer-Brown receiving an exemption.

Floyd C. Williams

Mr. Williams is a 53 year-old class D driver in Virginia. He has a history of a seizure disorder and has been seizure free since 2003. He takes anti-seizure medication with the dosage and frequency remaining the same since 2003. His physician states that he is supportive of Mr. Williams receiving an exemption.

III. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the dates section of the notice.

IV. Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2018–0053 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and materials received during the comment period. FMCSA may issue a final determination at any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2018–0053 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: June 15, 2018.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2018–13317 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0175]

Hours of Service of Drivers: American Concrete Pumping Association (ACPA); Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from the American Concrete Pumping Association (ACPA) for an exemption from the requirement that short-haul drivers utilizing the records of duty status (RODS) exception return to their normal work-reporting location within 12 hours of coming on duty. ACPA requests that concrete pump operators be allowed to use the short-haul exception but return to their work-reporting location within 14 hours instead of the usual 12 hours. The requested exemption would apply industry-wide to all concrete pump operators, concrete pumping companies, and drivers who operate concrete pumps. FMCSA requests public comment on ACPA's application for exemption.

DATES: Comments must be received on or before July 23, 2018.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2018–0175 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the *Public Participation and Request for Comments* section below for further information.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

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.*

FOR FURTHER INFORMATION CONTACT: For information concerning this notice,

please contact Ms. Pearlie Robinson, FMCSA Driver and Carrier Operations Division; Telephone: (202) 366–4225; Email: *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2018–0175), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2018–0175'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemption

ACPA seeks an exemption from the restriction of the RODS exception for short-haul operations available to drivers who return to their normal work reporting location and are released from work within 12 hours [49 CFR 395.1(e)(1)(ii)(A)]. Specifically, ACPA requests that concrete pump operators be treated the same as drivers operating ready-mixed concrete delivery vehicles as provided in § 49 CFR 395.1(e)(1)(ii)(B). Section 395.1(e)(1)(ii)(B) allows drivers of ready-mixed concrete delivery vehicles to rely on the short-haul exception provided they return to their work-reporting locations and are released from work within 14 consecutive hours. The requested exemption would apply industry-wide to all concrete pump operators, concrete pumping companies, and drivers who deliver, set-up, and operate concrete pumps across the United States.

ACPA currently represents more than 600 member companies employing over 7,000 workers nationwide. The exemption would be applied to all interstate concrete pumper trucks and their operators. Although many of the trucks operate intrastate and would therefore not be covered by an FMCSA exemption, an unknown number of the pumping trucks are operated in metropolitan areas and do routinely cross State lines.[1]

[1] FMCSA does not generally have jurisdiction over intrastate transporation; however, most States have commercial motor vehicle statutes and regulations that are compatible with Federal regulations. With few exceptions, an FMCSA exemption only applies to interstate transportation, although some States honor them for intrastate traffic.

ACPA explained that, like ready-mixed concrete delivery trucks and asphalt pavement delivery trucks, concrete pumps work with a perishable product delivered on a just-in-time basis. Timing and scheduling are critical to ensure a high-quality result. Allowing concrete pump drivers to use the short-haul exception, but return to their reporting location within 14 hours instead of 12 hours, would harmonize the hours-of-service rules for drivers of concrete pumps with the rules for drivers of the vehicles that supply the concrete.

ACPA explained that only a small percentage of the concrete pump operator's time is spent driving. On average, concrete pump operators spend between 25–32% of their time driving during a shift, and average daily driving distances are 20–25 miles. A pump operator has plenty of rest time with breaks ranging from 33%–55% of their total time pumping. The majority of an operator's time is spent waiting on ready-mixed concrete.

ACPA further explained that a concrete pump cannot operate without a ready-mixed truck. Having conflicting requirements creates confusion on job sites. Clear and consistent requirements between the concrete pumps and the ready-mixed trucks will help ensure an equivalent level of safety on the job site. ACPA adds that concrete pumping and placement companies work in collaboration with ready-mixed companies. Scheduling local business contracts in compliance with State and Federal regulations is complicated, given that some concrete companies operate under different FMCSA rules.

ACPA asserts that the concrete pumping industry has a solid safety record. Break periods, spent waiting for the ready-mixed trucks deliveries, provide opportunity for concrete pump operators to rest and relax. The ACPA Operator Certification Program ensures, encourages, and educates the concrete pump operators on safe concerete pumping and placement procedures. These safety practices allow concrete operators to maintain their safety record through careful training and well-developed safety guidelines. Because of the concrete pump operators' training and preparation and numerous rest breaks, providing the additional 2 duty hours to concrete pump operators will have no impact on the level of safety provided under the short-haul exception. The requested exemption is for 5 years, with opportunity for renewals.

A copy of the ACPA's application for exemption is available for review in the docket for this notice.

Issued on: June 15, 2018.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2018–13316 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0124; FMCSA–2013–0125]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 3 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on March 27, 2018. The exemptions expire on March 27, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

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 *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On April 27, 2018, FMCSA published a notice announcing its decision to renew exemptions for 3 individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (83 FR 18623). The public comment period ended on May 29, 2018, and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to driver a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

III. Discussion of Comments

FMCSA received no comments in this preceding.

Conclusion

Based upon its evaluation of the 3 renewal exemption applications, FMCSA announces its' decision to exempt the following drivers from the hearing requirement in 49 CFR 391.41(b)(11):

As of March 27, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 3 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (FR 83 18623).

Marquarius Boyd, (MS); Keith Craig Drown, (ID); and James Gooch, (KS).

The drivers were included in docket number FMCSA–2013–0124 and FMCSA 2013–0125.

Their exemptions are applicable as of March 27, 2018, and will expire on March 27, 2020.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: June 15, 2018.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2018–13318 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0118]

Agency Information Collection Activities; Revision of an Approved Information Collection: Inspection, Repair and Maintenance

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. The information collection concerns records of inspection, repair, and maintenance of commercial motor vehicles (CMVs). The FMCSA requests approval to revise and renew an ICR entitled, ''Inspection, Repair and Maintenance.'' FMCSA collects this information to ensure that motor carriers have adequate documentation of their inspection, repair, and maintenance programs necessary to reduce the likelihood of CMV crashes.

DATES: Please send your comments by July 23, 2018. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management

System (FDMS) Docket Number FMCSA–2018–0118. 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/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_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.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Huntley, Vehicle and Roadside Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–9209; email *michael.huntley@dot.gov.* Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Title: Inspection, Repair and Maintenance.

OMB Control Number: 2126–0003.

Type of Request: Revision of a currently approved information collection.

Respondents: Motor carriers and commercial motor vehicle drivers.

Estimated Number of Respondents: 543,061 motor carriers and 5,739,712 drivers.

Estimated Time per Response: Varies according to the requirements for specific records.

Expiration Date: July 31, 2018.

Frequency of Response: Varies according to requirements for specific records.

Estimated Total Annual Burden: 13,791,001 hours [7,558,390 hours for inspection, repair, and maintenance + 5,536,622 hours for driver vehicle inspection reports + 194,586 hours for disposition of roadside inspection reports + 469,414 hours for periodic inspections + 16,904 hours for records of inspector qualifications + 15,085 hours for records of brake inspector qualifications].

Background: The Secretary of Transportation (Secretary) is authorized under the provisions of 49 U.S.C. 31502 to prescribe requirements for, among other things, safety of operations of equipment of motor carriers that operate CMVs in interstate commerce. Under 49 U.S.C. 31136, the Secretary also has authority to prescribe regulations to ensure that CMVs are maintained, equipped, loaded and operated safely. And under 49 U.S.C. 31142 the Secretary must establish standards for annual or more frequent inspections of CMVs. The Secretary's authority to establish improved standards or methods to ensure brakes and brake systems of CMVs are inspected by appropriate employees and maintained properly is provided under 49 U.S.C. 31137(g).

Motor carriers must maintain, or require maintenance of, records documenting the inspection, repair and maintenance activities performed on their owned and leased vehicles. There are no prescribed forms. Electronic recordkeeping is allowed (see 49 CFR 390.31(d)). Documents requiring a signature must be capable of replication (*i.e.,* photocopy, facsimile, etc.) in such form that will provide an opportunity for signature verification upon demand. Also, if electronic recordkeeping is used, all of the relevant data on the original documents must be included in the electronic transmission for the records to be valid.

The motor carrier industry has never questioned the need to keep CMV maintenance records. In fact, most motor carriers would keep some records without any regulatory requirements to do so. Records of inspection, repair, and maintenance; roadside inspection reports; driver vehicle inspection reports; the documentation of periodic inspections; the evidence of the qualifications of individuals performing periodic inspections; and the evidence of brake inspectors' qualifications contain the minimum amount of information necessary to document that a motor carrier has established a system of inspection, repair, and maintenance for its equipment which meets the standards in 49 CFR part 396.

FMCSA and its representatives use these records to verify motor carriers' compliance with the inspection, repair, and maintenance standards in part 396. This ICR supports the Department of Transportation's strategic goal of safety. The ICR also ensures that motor carriers have adequate records to document the inspection, repair, and maintenance of their CMVs, and to ensure that adequate measures are taken to keep their CMVs in safe and proper operating condition at all times. Compliance with the inspection, repair, and maintenance regulations helps to reduce the likelihood of accidents attributable, in whole or in part, to the mechanical condition of the CMV.

The Agency does not intend to revise the substantive contents of this information collection, the frequency of information collection, or how it uses the information. Because the previous four updates to this information collection were developed in conjunction with rulemaking actions, only those sections of the information collection affected by the specific rulemaking changes were amended during the previous four updates and a comprehensive update of the information collection has not been done since 2006. This renewal includes updated data regarding the number of motor carriers subject to the Federal Motor Carrier Safety Regulations, vehicle counts, inspections, and other underlying data used to estimate the total burden hours. In addition, this revision corrects the manner in which: (1) The burden associated with routine inspection, repair and maintenance records is calculated, by including non-powered CMVs in addition to power units; and (2) the burden associated with periodic inspection records is calculated, by using only the records associated with the once-per-year inspection conducted in accordance with 49 CFR Chapter III, Subchapter B, Appendix G. Finally, this revision corrects the calculation of the burden associated with Driver-Vehicle Inspection Reports (DVIRs) by including the 30 seconds required for motor carrier certification of corrective action for defect DVIRs that was inadvertently omitted in the calculation of this estimate in the December 2014 No-Defect DVIR rule.

If the recordkeeping were required to be completed less frequently, it would greatly hinder the ability of FMCSA and State officials and representatives to ascertain that CMVs are satisfactorily maintained. The timely documentation of CMV inspection, repair, and maintenance enables FMCSA and State officials to evaluate the present state of a motor carrier's CMV maintenance program and to check the current level of regulatory compliance at any point in a carrier's maintenance schedule or program.

The FMCSA has identified periodic inspection standards of 22 States, the District of Columbia, the Alabama Liquefied Petroleum Gas Board, 10 Canadian Provinces, and one Canadian Territory that are comparable to, or as effective as, the Federal periodic inspection requirements. The FMCSA does not require Federal periodic inspections and the related recordkeeping for motor carriers that comply with these equivalent periodic inspection programs. The FMCSA is not aware of any other duplicative standards or recordkeeping

requirements that apply to motor carriers.

The FMCSA does not employ this collection of information for statistical use.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87 on: June 15, 2018.

G. Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2018–13319 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2018–0096]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel MAGICAL DAYS; Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before July 23, 2018.

ADDRESSES: Comments should refer to docket number MARAD–2018–0096. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. You may also send comments electronically via the internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov*.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MAGICAL DAYS is:

—*Intended Commercial Use of Vessel:* ''Private yacht available for charters of no more than 8 passengers''

—*Geographic Region:* ''Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York (excluding New York Harbor), New Jersey, Delaware, Washington, DC, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Puerto Rico''

The complete application is given in DOT docket MARAD–2018–0096 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy*. In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

Dated: June 18, 2018.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2018–13310 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2018–0095]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel MAYAN SOL; Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before July 23, 2018.

ADDRESSES: Comments should refer to docket number MARAD–2018–0095. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. You may also send comments electronically via the internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov*.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MAYAN SOL is:

—*Intended Commercial Use of Vessel:* ''Yacht charter operation in Marina del Rey harbor, Los Angeles, California''

—*Geographic Region:* ''California''

The complete application is given in DOT docket MARAD–2018–0095 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

Dated: June 18, 2018.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2018–13309 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0058]

Denial of Motor Vehicle Defect Petition

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

ACTION: Denial of a petition for a hearing on remedy of defect.

SUMMARY: This notice sets forth the National Highway Traffic Safety Administrations (NHTSA) decision and reasons for denying a petition, (DP15–001) submitted to NHTSA requesting that the agency conduct a hearing to examine the remedy for Ford recall 14S05 (NHTSA recall 14V–284) and to require Ford to provide an adequate remedy.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Lash, Vehicle Defects Division A, Office of Defects Investigation, NHTSA, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone 202–366–2370. Email *chris.lash@dot.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

After a vehicle or an item of motor vehicle equipment has been determined to contain a defect that relates to motor vehicle safety, any interested person may petition the National Highway Traffic Safety Administration (NHTSA) requesting that the agency hold a hearing to determine if a manufacturer has met the defect notification and remediation requirements imposed by the National Traffic and Motor Vehicle Safety Act (''the Safety Act''), 49 U.S.C. Chapter 301. 49 U.S.C. 30120(a)(2), 49 CFR 557. Upon receipt of a properly filed petition, the agency conducts a review of the petition, any material submitted with the petition, and any additional relevant information. *See* 49 U.S.C. 30120(c); 49 CFR 557.4. The review may consist solely of a review of information already in the possession of the agency, or it may include the collection of information from the motor vehicle manufacturer and/or other sources. After considering the available information and taking into account appropriate factors, including the nature of the complaint, seriousness of the alleged breach of the manufacturer's obligation to remedy, existence of similar complaints, ability of NHTSA to resolve the problem without a hearing, and assessing whether the remedy provided resolves the safety risk presented by the defect, the agency will grant or deny the petition for a hearing. *See* 49 U.S.C. 30120(e); 49 CFR 557.6.

Petition Background Information

In a submission dated February 3, 2015, Ms. Abigail Dayton (the Petitioner) filed a petition (DP15–001) requesting that NHTSA conduct a hearing to examine the remedy for Ford recall 14S05 (NHTSA Recall No. 14V–284) and require Ford to provide an adequate remedy. The Petitioner alleges that, after a dealer performed the recall remedy on her vehicle by performing a software update, she experienced a failure in the Ford Electric Power Assisted Steering (EPAS) system that required replacement of the steering column at her own expense. She further alleges that the EPAS failure necessitating the replacement of her steering column was ''the precise issue for which Ford issued recall 14S05 in the first place.'' The petition also presented accounts of similar post-remedy failures reported by other consumers on ''various forums and websites.''

NHTSA has reviewed the material cited by the Petitioner. The results of this review and our evaluation of the petition are set forth in the DP15–001 Petition Analysis Report, published in its entirety below.

The facts Petitioner alleges are cause for concern regarding the approach adopted by Ford and are a source of significant frustration for Petitioner and others similarly situated who simply want their vehicle to run the way it was designed to, particularly after being repaired by the vehicle manufacturer. However, in light of NHTSA's statutory authority, after thorough assessment of the material submitted by the Petitioner and the factors NHTSA is required to consider in determining the proper resolution of a petition for a hearing on whether a manufacturer has reasonably met its obligation to remedy, NHTSA has decided not to grant the petition to hold a hearing. Accordingly, and for the reasons more fully explained in the below Petition Analysis Report for DP15–001, the petition is denied.

Petition Analysis Report—DP15–001

1.0 Introduction

In a letter dated May 27, 2014, Ford Motor Company (Ford) submitted a Defect Information Report (DIR) to the National Highway Traffic Safety Administration (NHTSA) describing an Electric Power Assisted Steering (EPAS) system defect in certain model year 2008 through 2011 Ford Escape and Mercury Mariner vehicles (NHTSA Recall 14V–284, Ford 14S05) (the

recall).[1] The DIR described a defect in the EPAS torque sensor that could result in a loss of power steering assist while driving. The DIR did not identify any other defects in the EPAS system.

Ford's remedy involved updating the system's software to mitigate the occurrence of loss of power steering assist while driving due to the torque sensor defect. Vehicles diagnosed with a torque sensor fault code at the time of the recall repair would have the torque sensor replaced, while vehicles diagnosed with fault codes related to other EPAS components would have the steering column replaced.[2] Ford has not initiated any separate field actions to extend the warranty coverage for repairs of torque sensor failures, or any other EPAS component faults, occurring after the recall repairs were completed.[3]

In a petition dated February 3, 2015, and received by NHTSA on February 5, 2015, (DP15–001) Ms. Abigail Dayton (the Petitioner) requested that the agency conduct a hearing to examine the remedy for the recall and require Ford to provide an adequate remedy. On November 1, 2014, a dealer performed the recall remedy on the Petitioner's 2008 Ford Escape vehicle by performing the software update. On January 5, 2015, 65 days after the recall remedy was completed on her vehicle, the Petitioner's vehicle experienced a failure in the EPAS system requiring her to pay for replacement of the steering column. Replacement of the steering column was an alternative remedy in the recall depending on what fault codes were present at the time the repair was made by a Ford dealer. The Petitioner alleged that the post-remedy steering column EPAS failure was ''the precise issue for which Ford issued recall 14S05 in the first place.'' The Petitioner also alleged that a pattern of similar post-remedy failures reported by other consumers on ''various forums and websites'', along with several additional allegations, support her request that the agency hold a hearing and order Ford to provide a different remedy for the defect.

1.1 Petition Allegations

The Petitioner claims that the recall remedy conducted on her vehicle did not resolve the safety defect. Further, the Petitioner explains that she received a recall notice in July 2014 for NHTSA Recall No. 14V–284 and she obtained a repair from an authorized dealer in November 2014. However, Petitioner asserts that the remedy, in fact, did not repair the vehicle, as evidenced by the fact that the power steering assist failed ''soon thereafter.'' When Petitioner returned to the dealership in January 2015, the vehicle returned fault code B2277, which would authorize her for a different remedy under the recall had her vehicle not previously been repaired in November 2014. Petitioner goes on to surmise based on the alternative remedies available based on different fault codes, and the way that fault codes are pulled from the vehicles, that:

> Ford either knew the PSCM[4] would fail intermittently and would not always provide a fault codes (*sic*), knowing that requiring the dealership to pull a specific 'fault code' before replacing affected components may potentially not repair the defect or, alternatively, Ford's software update caused or accelerated issues with affected vehicles' PSCMs requiring eventual replacement of the affected components.

Pet. at 9.[5] Petitioner also notes that her own ''investigation quickly revealed'' at least 20 other individuals reported the same issue on various websites and online forums. Pet. at 4. Ultimately, through a series of related statements the Petitioner alleges that ''the software update does not mitigate the risk associated with the recall,'' ''the software update did not . . . 'repair' the defect associated with Recall 14S05'' and Ford's ''[f]ailure to repair the affected vehicles which experienced PCSM (*sic*) loss and/or torque sensor issues *after* receiving the software update does not address the concern and underlying reason for the recall: To prevent affected vehicles for (*sic*) safety related failures and resulting accidents and injuries.'' Pet. at 8.

2.0 Background

2.1 Legal Background

The Safety Act requires vehicle manufacturers to remedy safety-related defects in their vehicles by repairing the vehicle; replacing the vehicle with an identical or reasonably equivalent vehicle; or refunding the purchase price, less a reasonable allowance for depreciation. 49 U.S.C. 30120(a). The statute allows a manufacturer to choose its own remedy and NHTSA does not approve manufacturers' remedies. *See id.* If a manufacturer elects to repair a safety-related defect, the repair must be done adequately within a reasonable time. 49 U.S.C. 30120(c). If the repair is not done adequately within a reasonable time, the manufacturer must replace the vehicle with an identical or reasonably equivalent vehicle, or refund the purchase price, less a reasonable allowance for depreciation. *Id.*

2.2 Sequence of Events in NHTSA Recall No. 14V–284

As noted above, Ford initiated the recall by filing the DIR on May 27, 2014. The DIR described the defect as ''a poor signal to noise ratio in the torque sensor within the Electric Power Steering (EPS) that does not allow the PSCM to determine the driver's steering input.'' As noted above, the safety consequence was stated to be loss of power assist while driving. The DIR described the remedy as follows:

> Dealers will update the Power Steering Control Module (PSCM) and instrument cluster module software. The updated PSCM software changes the torque sensor fault strategy and will no longer remove power steering assist during an ignition cycle for a single torque sensor fault. Additionally, the software update will provide audible and visual warnings to the driver in the unlikely event that a torque sensor fault is detected.

Two days later, on May 29, 2014, Ford issued a bulletin to Ford dealers advising them of the recall. This bulletin described the defect as a fault in the torque sensor and stated that a complete Dealer Bulletin relating to the issue would be provided when software to perform the repair became available.

On May 30, 2014, Jennifer Timian, Chief of NHTSA's Recall Management Division, responded to the Ford DIR in an acknowledgement letter confirming receipt of the defect notice. Among other things, the letter described the remedy for the defect as follows:

> Ford will notify owners, and dealers will update the software for the power steering control module and the instrument cluster module, free of charge. The recall is expected to begin by July 25, 2014. Owners may contact Ford customer service at 1–800–392–3673. Ford's number for this recall is 14S05.

Ford filed an amended DIR on June 2, 2014. According to Ford's cover letter, this amended DIR provided additional detail pertaining to the remedy program. Thus, while Ford's description of the defect (encompassing only the torque sensor) remained unchanged, the amended remedy description stated:

[1] Documents related to the recall are available at *www.nhtsa.gov* under recall ID number 14V–284 *https://www.nhtsa.gov/recalls*).

[2] Replacement of the torque sensor with the redesigned service part or the steering column assembly, which includes the torque sensor, would serve the dual purpose of repairing the diagnosed fault condition and removing the defect identified in Ford's DIR.

[3] Warranty extension programs, also known as special policy adjustments, are field actions that are separate and distinct from safety recalls. Safety recalls require the manufacturer to identify the defect, develop a remedy, and apply the remedy to all of the affected vehicles to prevent a specific safety hazard from occurring. Warranty extensions adjust the vehicle age and mileage for which the manufacturer will cover the cost of repairing specific components after they have failed or display certain symptoms.

[4] Power Steering Control Module (PSCM).

[5] Excerpt from page 9 of the petition.

Dealers will check the Power Steering Control Module (PSCM) for Diagnostic Trouble Codes (DTC):

- If no loss of steering assist DTCs are present, dealers will update the PSCM and instrument cluster module software. The updated PSCM software changes the torque sensor fault strategy and will no longer remove power steering assist during an ignition cycle for a single torque sensor fault. Additionally, the software update will provide audible and visual warnings to the driver in the unlikely event that a torque sensor fault is detected.
- If upon initial inspection certain loss of steering assist DTCs are present, the dealer will either replace the torque sensor or the PSCM, depending on the DTC present.[6]

NHTSA acknowledged receipt of the June 2, 2014 amended DIR by a letter dated June 4, 2014. This June 4, 2014 letter described the remedy as follows:

Ford will notify owners, and dealers will update the software for the power steering control module (PSCM) and the instrument cluster module, free of charge. If a vehicle shows a history of a loss of the torque sensor signal or fault codes relating to the PSCM when the vehicle is brought in for the recall remedy, the affected components will be replaced, free of charge. The recall is expected to begin by July 25, 2014.

On July 1, 2014 Ford sent instructions to its dealers providing information about how to complete the recall. This notice advised dealers that the software needed to perform the recall repair was still not available and would be released on July 9, 2014. The July 1 dealer notice described the repair procedure for the defect:

Dealers are to check the Power Steering Control Module (PSCM) for Diagnostic Trouble Codes (DTCs).

- If DTC B1342, B2277, or B2278 are NOT present, reprogram the PSCM and the Instrument Cluster (IC) module.
- If only DTC B2278 is present, replace the torque sensor.
- If DTC B1342 or B2277 is present, replace the steering column assembly.

The July 1, 2014 dealer notice further stated that the software update remedy option would not be available until July 9, and that until that date vehicles should only be repaired if a ''vehicle arrives at your dealership with a customer complaint of loss of steering assist accompanied by one of the DTCs'' identified in that bulletin (*i.e.,* those requiring replacement of the torque sensor or steering column assembly). The ''Dealer Q&A'' portion of the bulletin also directed dealers to inform owners of vehicles that received the software update that any post-remedy replacement of the torque sensor or steering column would not be covered by Ford's recall because ''the modules were reprogrammed to prevent sudden loss of steering assist while driving.''

In its May 15, 2015 information request letter (IR letter) to Ford, NHTSA requested information to assist in the evaluation of DP15–001.[7] The IR letter asked Ford to explain why the remedy procedure for the recall provides for free replacement of the torque sensor or steering column for fault codes associated with the torque sensor, PSCM or EPAS motor or at the time the remedy is performed, but not after the remedy is performed. Ford's June 26, 2015 response to NHTSA's IR letter included the following explanation: [8]

The purpose of the remedy procedure is to mitigate the occurrence of the loss of power steering assist while driving due to the torque sensor, and to provide audible and visual warnings to the driver if a torque sensor fault is detected by updating the PSCM software. Additionally, if DTC's related to the PSCM (B2277 and B1342) or Torque Sensor (B2278) are present at the time of service, additional parts were replaced to better manage customer expectations.

Ford's strategy appears to have been effective in managing customer expectations when dealers performed the recall repairs on the subject vehicles, as there have been very few complaints related to that service. However, the strategy appears to have produced additional customer expectations regarding how Ford would manage post-remedy EPAS repairs to the torque sensor and other EPAS components covered by Ford as part of the recall repair procedure (*i.e.,* PSCM or motor faults requiring steering column replacement). Most of the post-remedy complaints received by NHTSA through the end of 2017 include references to unhappiness with Ford's policy for handling repair costs associated with torque sensor repairs and a variety of other EPAS conditions after performing recall repairs.

2.3 NHTSA's Analysis of Safety Hazards Associated With Loss of Power Steering

Prior investigations and recalls associated with defect conditions that may result in loss of power steering assist have established that such failures may result in an increased risk of crashes during low-speed vehicle maneuvers when they occur while driving and without warning. Testing conducted as part of several defect investigations by NHTSA's Vehicle Research and Test Center (VRTC) in East Liberty, Ohio, and others have found that the increases in driver hand-wheel efforts that result from loss of power steering assist are greater at parking lot speeds. The greatest efforts are required when the vehicle is stationary and the steering torque must overcome the static frictional forces from the tire contact patch with the road surface. Front-axle weight, tire size and tire inflation pressure are the primary factors affecting tire-road frictional forces when stopped and in low-speed parking and turning maneuvers.[9] [10] Additional increases in steering torque in low-speed maneuvers are primarily influenced by steering angle.[11] Changes in steering torque in higher speed maneuvers are primarily influenced by the lateral acceleration of the vehicle. Steering torque requirements decrease with increasing speed, as the safe and normal ranges of steering angles and lateral accelerations become smaller and smaller. At all speeds, while more difficult, drivers are able to maintain vehicle control after losing power steering assist because the mechanical linkage between the steering wheel and the road is maintained at all times.

There are very few published studies related to the effects of loss of power steering assist on vehicle directional control and crash risk. A study conducted by Transport Canada focused on the effects in low-speed turns, evaluating driver response to unexpected loss of assist in right-hand turns at a simulated traffic light at approximately 10 km/h (6 mph).[12] The study included vehicles ranging in size from compact passenger cars to a large sport utility vehicle and a mixed demographic group of drivers. The study found that, for each of the

[6] Ford's amended report should have indicated replacement of the steering column assembly rather than the PSCM. Steering column replacement is required to repair faults in the PSCM or motor, neither of which can be serviced separately. This error was corrected in subsequent dealer instructions sent by Ford on July 1, 2014.

[7] Jeffrey Quandt, letter to Todd Fronckowiak, May 15, 2015 (*https://static.nhtsa.gov/odi/inv/2015/INIM-DP15001-62000.pdf*).

[8] Wayne Bahr, letter to Frank Borris, June 26, 2015 (*https://static.nhtsa.gov/odi/inv/2015/INRL-DP15001-62304P.pdf*).

[9] There are multiple other factors affecting steering torque, including rack friction, steering and suspension ball joint friction, and scrub radius. Additional factors affecting manual steering effort include steering ratio and steering wheel diameter. These effects are normally minor in comparison with front axle weight.

[10] For purposes of this discussion, speeds less than 20 km/h (13 mph) are considered low speed.

[11] Sharp, R.S., Granger, R. (2003). *On Car Steering Torques at Parking Speeds,* Electrical and Electronic Engineering, Imperial College of Science, Technology and Medicine, Exhibition Road, London SW7 2BT.

[12] Harbluk, J.L., Burns, P.C., Malone, D., Hamilton, J. (2014). *Power Steering Assist Failures: Driver Behavior, Safety Impacts, and Implications for Automated Vehicles,* Proceedings of the Human Factors and Ergonomics Society 58th Annual Meeting, 2073–2077.

vehicles evaluated, at least 40 percent of drivers were not able to safely complete the turning maneuvers after an unexpected loss of steering assist.[13] The same study found that, when aware of the loss of power steering assist, drivers were able to negotiate the course without any unsafe turns at the same speeds as recorded with full power steering assist. Similar results have been noted in human factors testing conducted by VRTC in support of NHTSA loss of power steering investigations.[14]

NHTSA considers the facts and evidence for each issue independently when deciding when to investigate allegations of loss of power steering assist. Based in part on vehicle testing and analysis of field data from prior investigations, NHTSA considers multiple factors, including: Operating mode, warning, vehicle factors, system factors and failure rate.[15] Conditions that result in loss of assist at start-up or after prior visual, audible and/or tactile warning do not present a significant risk of crash or injury.

2.3.1 Ford EPAS: System Design

In the Ford EPAS system, a column-mounted electric motor drives the steering gear to provide steering assist to the driver using battery power. The system senses the speed, direction, and amount of effort, or torque, applied to the steering wheel by means of a torque sensor located in the steering column assembly. The signal from the torque sensor is relayed to an electronic control unit (the PSCM). A PSCM control algorithm generates a signal to drive the motor to provide steering assistance in proportion to the driver's steering effort and vehicle speed. The system reduces the amount of assist supplied to the driver as vehicle speed increases to provide the desired road feel at the steering wheel.

The Ford EPAS system continuously performs diagnostics to identify faults that could potentially result in safety hazards (*e.g.,* unintended steering torques) or damage to the system. The system responds to fault detection by transitioning to appropriate failsafe operating modes, including removing assist and transitioning to manual steering mode. Table 1 shows the primary fault conditions and failsafe modes associated with the subject EPAS system prior to the software update associated with the subject recall.

TABLE 1—FAULT CONDITIONS AND FAILSAFE MODES RELATED TO REDUCED OR REMOVED ASSIST FOR SUBJECT VEHICLES BEFORE THE RECALL SOFTWARE UPDATE

Fault code	Fault name	Failsafe mode	Conditions to restore EPAS
C195C	Low voltage (<11V)	Reduced performance state following voltage capability of the vehicle.	Voltage returns to value within specified tolerance within same ignition cycle.
B1317	High voltage (>16V)	Ramp out to zero assist.	
B1318	High voltage (>18V) or Low voltage (<9 V).	Remove assist.	
B1342	Micro test failure	Remove assist	Reevaluate at next ignition cycle if condition still exists.
B2277	Motor failure	Remove assist.	
B2278	Torque sensor failure	Remove assist.	

As shown in Table 1, prior to the remedy software update, the EPAS system responded to certain faults detected in the torque sensor, PSCM or motor by removing assist and transitioning to manual steering. The system remains in the failsafe mode until the conditions are met for clearing the fault and restoring normal EPAS. For faults detected in the torque sensor, PSCM, or motor, the vehicle remains in failsafe mode for the remainder of the ignition cycle in which the fault is detected—meaning that the vehicle must be turned off and restarted to clear the fault code and re-establish power steering. The system restores steering assist if the fault condition is no longer present on a subsequent ignition cycle.

Each of the fault codes associated with the subject EPAS system, including those shown in Table 1, are stored for 64 ignition cycles before the system clears them from memory.

2.3.2 Ford EPAS: Temporary Reduced Assist

In its June 26, 2015 response to NHTSA's IR letter, Ford identified several factors that may result in temporary ''reduced assist'' in the subject EPAS system and which may be reported by some owners as a loss of power steering assist. For example, Ford provided the following description of how the system may temporarily reduce assist during periods of low battery voltage:

> Some of the reports pertain to reduced assist resulting from low battery voltage, such as when the vehicle is exposed to low ambient conditions, and operated at near idle engine speed, and with heavy electrical load. When the electric power assist system detects low system voltage, it will reduce the amount of assist it provides. Reduced assist is a protective response from the EPAS system to prevent engine stalling due to the low system voltage. It is not a defect of the EPAS system but instead a symptom of a potentially failing battery or other electrical system concern. Service bulletin SSM 20895 and the workshop manual direct the technician to inspect the vehicle electrical system for the root cause of the low system voltage. This condition of *reduced* assist could mistakenly be reported as a *loss* of assist.

In addition to low battery voltage, Ford indicated that the EPAS may also temporarily reduce assist when the steering is fully turned to one side or the other (*i.e.,* the steering is turned near the physical rack stops) or during extreme usage conditions that result in PSCM overheating due to heavy sustained use by the driver. Reductions in steering assist that result from these factors are most likely to be experienced in low-speed parking maneuvers with significant steering inputs, such as parallel parking.

2.3.3 Ford EPAS: Torque Sensor Failures

The EPAS system at issue uses a contact-type torque sensor to measure driver steering input. Over time, the

[13] The study classified turns as safe if the driver completed the maneuver without stopping or departing the intended lane of travel to any degree.

[14] See document files for investigation ID's RQ10–004 and PE10–038 at *www.nhtsa.gov* (*https://www.nhtsa.gov/recalls*).

[15] Vehicle factors include size/mass (*i.e.,* steer axle weight) and steering design factors that influence the magnitude and proportion of the change in steering effort when transitioning to manual mode; system factors include the likelihood of the fault occurring in a critical operating state and the harshness of the steering feedback, if any, in the transient state.

subject torque sensors may develop a poor signal-to-noise ratio (noisy signal) due to degradation of the sensor conductive surfaces. This may result in distortion, interruption or dropout of the signals, resulting in a Steering Shaft Torque Sensor Malfunction fault (DTC B2278). Early in MY 2011 production, Ford began using an improved torque sensor with lubricant added to the conductive surfaces to reduce long-term degradation. Vehicles built on or after September 11, 2010 were equipped with steering column assemblies containing the improved design and thus, were not included in the recall.

Ford's analysis found that the conductive surface degradation occurs at or near the on-center position where the steering wheel is held for the majority of road travel time and miles. This can result in noisy signals from the torque sensor, which may initially cause a perceptible steering wheel dither condition for some period prior to a loss of power steering.[16] Complaints describe the dither condition as a shimmy, vibration, pulsing, or shaking of the steering wheel. The condition is most evident when the vehicle is stopped and idling and the steering wheel is in a position that aligns with the degraded contact surfaces.[17] Prior to being remedied, noisy signals from the torque sensor may result in detection of a Steering Shaft Torque Sensor Malfunction (DTC B2278) fault, which would immediately remove the power assist with no audible or visual warning provided to the driver. Ford provided the following description of the dither condition in its IR response letter:

> Steering wheel dithering prior to a loss of assist has been noted in a number of reports, providing tactile feedback that the system is not functioning normally. As previously noted, the degradation of the conductive surface of the torque sensor may result in increased levels of signal noise to the PSCM. This increased signal noise may result in the steering wheel dither experienced by the driver. The amount of input supplied by the EPAS system to the steering column during this dithering is limited to approximately 2 Nm maximum and, while readily noticeable, can be easily managed by the driver. The updated PSCM software provided with the recall remedy is more tolerant of the signal noise. However, if the signal noise increases beyond this level, a diagnostic trouble code (DTC B2278) for the torque sensor will be stored in the system and a visual and audible warning will be given to the driver. Should the signal noise persist and/or increase, the PSCM may eventually remove power steering assist, but only at the beginning of the next key cycle (with the accompanying visual and audible warnings). The repair for this condition, as defined in the workshop manual, is torque sensor replacement.

Prior to February 2014, the torque sensor was not available as a separate replacement part and repairing failed torque sensors required replacement of the entire steering column assembly. This changed in February 2014 when Ford issued Technical Service Bulletin TSB 14–0016 and began providing torque sensor kits as service parts for faulty torque sensors, thereby reducing the repair cost for torque sensor failure by over 50 percent.[18]

In May 2014, Ford submitted the DIR to NHTSA for the subject recall. As previously noted, the recall remedy involved updating the PSCM software to change the conditions under which the EPAS removes power assist following detection of torque sensor faults related to the noisy signal condition. Once the EPAS software update is completed, the system alerts the driver with an audible chime and warning lamp when EPAS detects the torque sensor fault; however, the system maintains full power steering assist through that ignition cycle and the fault does not result in a sudden loss of assist while driving. If the torque sensor fault persists or worsens, the system may remove power steering assist when the driver starts the vehicle at the beginning of the next ignition cycle. Owner notification for the recall started in July 2014.

2.3.4 Ford EPAS: Recall 14V–284 Defect Description

Ford's Part 573 letter for the subject recall described the defect condition as follows:

> In some of the affected vehicles, a poor signal to noise ratio in the torque sensor within the Electric Power Steering (EPS) system does not allow the PSCM to determine the driver's steering input. Once this condition is detected, the system removes power steering assist, and defaults to manual steering mode. In the event of a loss of power steering assist, the mechanical linkage between the steering wheel and the road is maintained at all times. Loss of power steering assist while driving would require higher steering effort at lower vehicle speeds, which may result in an increased risk of a crash.

As defined by Ford and confirmed by NHTSA's examination of available data, the defect here consists of a torque sensor design that is prone to contaminant accumulation leading to incomprehensible, noisy or intermittent signals being sent to the PSCM (which results in loss of power steering assist while the vehicle is being driven). Accordingly, Ford's defect report described the safety risk as a loss of power steering assist *while driving.* The defect identified does not include other torque sensor failure conditions, failures in other EPAS components such as the PSCM or PSM, EPAS faults at vehicle start-up (*i.e.,* not while driving), and faults that are not associated with the EPAS system.

3.0 Analysis of the Petition

Per the regulatory requirements, NHTSA's analysis of the petition includes the following factors: The nature of the complaint; the seriousness of the alleged breach of the vehicle manufacturer's obligation to remedy defects; the existence of similar complaints; NHTSA's ability to resolve the problem without holding a hearing; and other pertinent matters.

The nature of the Petitioner's complaint is that the remedy provided by ''Ford has failed to adequately remedy'' the safety defect. As evidence for this, the Petitioner points to her own experience with loss of power steering assist after receiving the remedy:

> Soon thereafter, I started experiencing issues with my power steering (*i.e.,* excessive shaking, loss of power steering). I took my vehicle back to the dealership in January 2015. According to the technician, my torque sensor failed and they needed to replace my entire steering column. *Specifically, the technician pulled fault code B2277 at this time.*

Pet. at 3 (emphasis in original).

The Petitioner's description of the post-remedy problem includes evidence of the torque sensor fault addressed by the subject recall (*e.g.,* excessive shaking of the steering wheel and a technician's reference to a torque sensor failure). However, it also includes evidence indicating that a different or additional fault occurred. The Petitioner states, with emphasis, that ''the technician pulled fault code B2277 at this time'' and references B2277 four more times in the petition. As shown in Table 1, B2277 is the fault code for a power steering motor failure. The recommended repair cited by the Petitioner, steering column replacement, also suggests that the failure in the Petitioner's vehicle may not have been related, or limited, to the defect underlying the recall, which is

[16] ''Dither'' is a term used by Ford and other automotive companies to describe a low-amplitude oscillation of the steering wheel.

[17] Torque sensor signal dropouts generally occur near the center or zero-degree steering position.

[18] The torque sensor kit included a redesigned torque sensor service part (Part Number CL8Z–3F818–A) and instructions for replacing the torque sensor. The repair costs for replacing the torque sensor using the kit may range from $500 to $700, while costs for steering column replacement may range from $1,200 to $1,500 on average.

ordinarily repaired by torque sensor replacement.[19]

NHTSA identified 632 complaints alleging post-remedy EPAS system problems in the subject vehicles and received by the Agency from August 2014 through the end of 2017. In general, the complaints lack sufficient detail to determine the root cause, failure mode, or operating state for each of the reported incidents. The complaints include multiple fault conditions (*e.g.,* torque sensor, PSCM, motor), failure modes (loss of power steering, temporary reduction of power steering assist, steering dither and EPAS warning message or wrench lamp illumination [20]); and operating states (incidents occurring while driving, at start-up or during parking maneuvers). NHTSA's analysis of post-remedy EPAS complaints in the subject vehicle focused on two separate issues: (1) Evidence of any other EPAS component defects that were not addressed by the recall remedy; and (2) the effectiveness of the software update in mitigating the risk of loss of power steering while driving from torque sensor faults.

3.1 Analysis: EPAS Fault Field Experience by Causal Component

NHTSA's analysis of recall repair data, part sales, and owner complaints all indicate that the torque sensor continues to be the primary cause of EPAS system malfunctions in the subject vehicles after completion of the recall remedy. Through August 2017, Ford had completed the recall remedy in approximately 79 percent of affected vehicles, with approximately 2.8 percent of the repairs requiring replacement of the torque sensor or steering column due to faults detected in the torque sensor, PSCM, or power steering motor at the time the recall remedy was performed. The torque sensor kit accounted for almost two-thirds (64%) of such repairs. Similarly, analysis of part sales data determined that torque sensor kit sales make up 63 percent of EPAS part sales over the last 12 months.[21] Although most of the complaints reviewed by ODI lacked sufficient detail to determine the causal component or driving state, the torque sensor was identified in approximately 73 percent of the complaints that did provide enough detail to identify the faulty component.[22] The data do not identify a significant rate or trend for any other EPAS component or condition.

3.2 Analysis: Post-Remedy Torque Sensor Failures

NHTSA's analysis of complaints alleging post-remedy EPAS malfunctions diagnosed as torque sensor faults indicates that the faults are usually being detected before a loss of assist occurs (*e.g.,* by a warning message or from symptoms related to dithering condition) and/or result in loss of assist at vehicle start-up, when the safety risk has been minimized. The Petitioner takes issue with Ford's characterization of these events as being ''unlikely'' and NHTSA agrees that the rate of torque sensor failures is higher than it would have been if the signal degradation issue identified by Ford did not exist. However, based on the information available to NHTSA, the likelihood of failure is low in comparison to other defect conditions related to loss of power steering assist that have been addressed by recalls by Ford and other manufacturers, as evidenced by analysis of total part sales through the end of 2017, when the subject vehicles range in age from 6 to 11 years in service. This analysis indicates fewer than 10 percent of all 2008 through 2011 Escape and Mariner vehicles have required a steering column or torque sensor replacement that could be related to a torque sensor fault.[23] Furthermore, Ford's remedy removes the safety hazard, *i.e.,* sudden loss of power steering assist while driving, resulting from such failures.

As noted in the petition, a key metric of remedy effectiveness is its effect on crash and injury trends related to EPAS issues in the subject vehicles.[24] NHTSA has reviewed all crash and injury allegations related to the EPAS system in the subject vehicles by recall remedy completion status (see Table 2). Through the end of 2017, NHTSA had received 22 complaints alleging crashes resulting from loss of power steering while driving, including 10 alleging injuries. Many of these incidents were very minor. For example, NHTSA was able to verify evidence of collision damage repairs for just 9 of the 22 vehicles identified in the crash allegations, including 8 of the 10 alleging injuries.

TABLE 2—CRASH ALLEGATIONS BEFORE AND AFTER RECALL REMEDY COMPLETION

Crash severity	Injury allegations	14V284 Recall remedy status		
		Not completed	Completed	Total
Evidence of collision repair	All crashes	8	1	9
	Injury crashes	8	0	8
	Injuries	8	0	8
No evidence of collision repair	All crashes	7	6	13
	Injury crashes	2	0	2
	Injuries	2	0	2
Total	All crashes	15	7	22
	Injury crashes	10	0	10
	Injuries	10	0	10

[19] Steering column replacement is the repair required for power steering motor failure and other EPAS faults not related to the torque sensor (*e.g.,* PSCM failure).

[20] Vehicles with the lowest level cluster option provide a wrench light instead of a warning message when the EPAS system detects a torque sensor fault after the PSCM has received the recall remedy update.

[21] Since June 2014, approximately 27 percent of torque sensor kit sales and 22 percent of steering column sales have been associated with repairs performed under the subject recall.

[22] One-hundred ninety-five (195) complaints identified the torque sensor (143), PSCM (46), or motor (6) as the component diagnosed by the servicing facility as the faulty part.

[23] NHTSA defect investigations that have influenced recalls related to loss of power steering while driving have identified specific fault conditions affecting a defined population of vehicles that have resulted in warranty claim rates well over 1% of vehicles sold after about 3 years-in-service (YIS) and 10 YIS failure rates estimated by statistical modeling that range from 16 to 68% of vehicles sold. See files for investigation ID numbers PE10–005, PE10–021, EA11–005, EA11–014, PE12–017 and PE14–030 at *www.nhtsa.gov* (*https://www.nhtsa.gov/recalls*).

[24] A petition footnote cites concerns that an ineffective remedy would result in continued incidents resulting in injuries, ''As of August 20, 2013, Ford was aware of five accident allegations and six injury allegations potentially pertaining to this subject. More recent data on injuries potentially pertaining to this subject were not available, but Petitioner assumes this number has increased since that time, and will continue to increase until Ford actually repairs the recall on affected vehicles.''

None of the injury allegations and only one of the incidents severe enough to require collision repairs involved a vehicle that had been remedied under the recall and that crash was reported as a minor parking lot collision resulting in $1,100 of front end damage. NHTSA's analysis of crash and injury allegations indicates that Ford's recall remedy appears to have been effective in mitigating the safety hazards associated with loss of power steering assist while driving in the subject vehicles.

3.3 Analysis: Summary

The Petitioner references the similar experience of others as identified in complaints to NHTSA and through various websites and online forums in support of the position that Ford's remedy was not adequate. The Petitioner's claim is serious and the frustration Petitioner experienced is understood by NHTSA. However, the defect identified by Ford was ''[l]oss of power steering assist while driving'' caused by a particular defect in the torque sensor and not, as Petitioner understands it, by any EPAS malfunction requiring replacement of the steering column or torque sensor, under any operating condition, regardless of cause. NHTSA's research and knowledge on this subject supports Ford's conclusion that the safety risk is limited to the loss of power steering assist while driving.

In contrast, a driver who does not have power steering assist when starting the vehicle will know that immediately, as it will be difficult to turn the steering wheel at low speeds, and will be prepared to compensate for it while driving (or may choose not to drive). Ford's software update remedy, as explained in Ford's DIRs, ''changes the torque sensor fault strategy and will no longer remove power steering assist during an ignition cycle for a single torque sensor fault. Additionally, the software update will provide audible and visual warnings to the driver in the unlikely event that a torque sensor fault is detected.''

Because Ford's change in fault logic prevents the loss of power steering assist while the vehicle is in operation (if there is only one fault), the safety risk, *i.e.* the loss of power steering assist while driving, is addressed. Instead, the vehicle will turn off the power steering assist when the vehicle is turned off (or, as Ford puts it, after that ''ignition cycle''). Thus, the safety risk of losing power steering assist while driving has been resolved. Further, the addition of visual and audio warnings to the driver in the event a torque sensor fault is detected alerts the driver to the need for service to the EPAS system prior to a loss of power steering assist and to the need for additional effort required to maneuver the vehicle if power steering assist is removed by the system before service repairs are performed. Thus, Ford's software update remedy does address the safety risk identified, which is the loss of power steering assist while driving, and without warning.

This is not to say that the Petitioner may not have good reason to be displeased with the result. Approximately two months after receiving Ford's recall repair, Petitioner's vehicle suffered the problem that two months earlier would have entitled her to a remedy that instead would cost her approximately $1,000 to obtain. This is certainly cause for frustration. However, NHTSA's authority over vehicle manufacturers is limited to issues related to safety. In this instance, Ford's software update remedy removed the safety risk of a driver losing power steering assist, without warning, while operating the vehicle.

Because the nature of the complaint does not allow NHTSA to grant the petition, we will only briefly address the other factors set out in the regulations. On those points the agency notes that while the alleged breach of the obligation to remedy is serious, there is no factual breach in this instance and that NHTSA does not have any ability to resolve the problem because the problem is outside the agency's authority to enforce automotive safety. Further, the existence of similar complaints, both in online forums (as noted by the Petitioner) and in NHTSA's databases searched in reference to this petition, does not support granting this petition because, again, there is no factual breach. Additionally, given the circumstances here, a hearing is not necessary to evaluate the alleged problem. Therefore, NHTSA has decided a hearing should not be held.

4.0 Conclusion

The Petitioner alleges facts that understandably have caused frustration surrounding the repair and operation of her vehicle covered by NHTSA Recall No. 14V–284. However, the issues raised in the petition do not warrant a public hearing because the remedy Ford provided addresses the safety risk posed by loss of power steering assist. That safety risk arises from the unexpected change in steering effort the driver may experience while driving. Since Ford's remedy resolves the safety risk over which NHTSA has legal authority, NHTSA has decided not to hold a hearing on whether Ford has reasonably met the remedy requirements of the Safety Act.

For the reasons set forth above, NHTSA hereby denies Defect Petition DP15–001.

Authority: 49 U.S.C. 30120(e); 49 CFR part 557; delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,

Associate Administrator for Enforcement.

[FR Doc. 2018–13307 Filed 6–20–18; 8:45 am]

BILLING CODE 4910–59–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Meetings

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public meetings.

SUMMARY: Notice is hereby given of meetings of the U.S.-China Economic and Security Review Commission to review and edit drafts of the 2018 Annual Report to Congress. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on the ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold public meetings to review and edit drafts of the 2018 Annual Report to Congress.

DATES: The meetings are scheduled for Thursday, July 12, 2018, from 9:00 a.m. to 5:00 p.m.; Friday, July 13, 2018, from 9:00 a.m. to 5:00 p.m.; Thursday, August 2, 2018, from 9:00 a.m. to 5:00 p.m.; Friday, August 3, 2018, from 9:00 a.m. to 5:00 p.m.; Thursday, September 6, 2018, from 9:00 a.m. to 5:00 p.m.; Friday, September 7, 2018, from 9:00 a.m. to 5:00 p.m.; Thursday, October 4, 2018, from 9:00 a.m. to 5:00 p.m.; and Friday, October 5, 2018, from 9:00 a.m. to 5:00 p.m.

ADDRESSES: 444 North Capitol Street NW, Room 231, Washington, DC 20001. Public seating is limited and will be available on a ''first-come, first-served'' basis. *Reservations are not required to attend the meetings.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning these meetings should contact Kerry Sutherland, 444 North Capitol Street NW, Suite 602, Washington, DC 20001; telephone: 202–624–1454, or via email at *ksutherland@uscc.gov. Reservations are not required to attend the meetings.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: Pursuant to the Commission's mandate, members of the Commission will meet to review and edit drafts of the 2018 Annual Report to Congress.

The Commission is subject to the Federal Advisory Committee Act (FACA) with the enactment of the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006 that was signed into law on November 22, 2005 (Pub. L. 109–108). In accordance with FACA, the Commission's meetings to make decisions concerning the substance and recommendations of its 2018 Annual Report to Congress are open to the public.

Topics To Be Discussed: The Commission will consider draft report sections addressing some or all of the following topics:

- U.S.-China Economics and Trade Relations, including: Year in Review: Economics Trade; U.S.-China Economic Challenges; and China's Agricultural Policies: Trade, Investment, Safety, and Innovation.
- U.S.-China Security Relations, including: Year in Review: Security and Foreign Affairs; and China's Military Modernization.
- China and the World, including: Belt and Road Initiative; China's Relations with U.S. Allies; China and Taiwan; China and Hong Kong; and China and North Korea Contingencies.
- China's High Tech Development, including: Next Generation Connectivity.

Required Accessibility Statement: These meetings will be open to the public. The Commission may recess the meetings to address administrative issues in closed session.

The Commission will also recess the meetings around noon for a lunch break. At the beginning of the lunch break, the Chairman will announce what time the meetings will reconvene.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Pub. L. 109–108 (November 22, 2005), as amended by Pub. L. 113–291 (December 19, 2014).

Dated: June 18, 2018.

Daniel W. Peck,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2018–13354 Filed 6–20–18; 8:45 am]

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Part II

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2510
Definition of ''Employer'' Under Section 3(5) of ERISA—Association Health Plans; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AB85

Definition of ''Employer'' Under Section 3(5) of ERISA—Association Health Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final regulation under Title I of the Employee Retirement Income Security Act (ERISA) that establishes additional criteria under ERISA section 3(5) for determining when employers may join together in a group or association of employers that will be treated as the ''employer'' sponsor of a single multiple-employer ''employee welfare benefit plan'' and ''group health plan,'' as those terms are defined in Title I of ERISA. By establishing a more flexible ''commonality of interest'' test for the employer members than the Department of Labor (DOL or Department) had adopted in sub-regulatory interpretive rulings under ERISA section 3(5), and otherwise removing undue restrictions on the establishment and maintenance of Association Health Plans (AHPs) under ERISA, the regulation facilitates the adoption and administration of AHPs and expands access to affordable health coverage, especially for employees of small employers and certain self-employed individuals. At the same time, the regulation continues to distinguish employment-based plans, the focal point of Title I of ERISA, from commercial insurance programs and other service provider arrangements. The final rule also sets out the criteria that would permit, solely for purposes of Title I of ERISA, certain working owners of an incorporated or unincorporated trade or business, including partners in a partnership, without any common law employees, to qualify as employers for purposes of participating in a bona fide group or association of employers sponsoring an AHP and also to be treated as employees with respect to a trade, business or partnership for purposes of being covered by the AHP. The regulation would affect AHPs, bona fide groups or associations of employers sponsoring such plans, participants and beneficiaries with health coverage under an AHP, health insurance issuers, and purchasers of health insurance not purchased through AHPs.

DATES:

Effective date. This final regulation is effective on August 20, 2018.

Applicability dates. See Section D of the **SUPPLEMENTARY INFORMATION** section for applicability dates for the final rule for fully-insured AHPs and self-insured AHPs. As discussed more fully below, the Department has established an applicability date of September 1, 2018, for fully-insured AHPs, an applicability date of January 1, 2019, for existing self-insured AHPs complying with the Department's pre-rule test, and an applicability date of April 1, 2019, for new self-insured AHPs formed pursuant to this final rule. The Department has concluded that a staggered approach to implementation of this final rule is consistent with the objective of allowing stakeholders, including States and State insurance regulators, an appropriate amount of time to tailor their groups, associations, plans, and regulations to the final rule and to address a range of oversight and compliance assistance issues, especially with respect to self-insured AHPs.

FOR FURTHER INFORMATION CONTACT: Amber Rivers or Suzanne Adelman, Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, (202) 693–8335 or Janet K. Song, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

A. Background

On October 12, 2017, President Trump issued Executive Order 13813, ''Promoting Healthcare Choice and Competition Across the United States,'' stating that ''[i]t shall be the policy of the executive branch, to the extent consistent with law, to facilitate the purchase of insurance across State lines and the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people.'' [1] To advance this policy, the Executive Order directed the Secretary to consider issuing regulations or revising guidance, consistent with law, that would expand access to more affordable health coverage by permitting more employers to form AHPs. The Executive Order specifically directed the Secretary to consider expanding the conditions that satisfy the commonality of interest requirements under existing DOL advisory opinions interpreting the definition of an ''employer'' under ERISA section 3(5) and also to consider ways to promote AHP formation on the basis of common geography or industry.

AHPs are an innovative option for expanding access to employer-sponsored coverage (especially for small businesses). Through AHPs, employers band together to purchase health coverage. By participating in AHPs, employees of small employers and working owners are able to obtain coverage that is not subject to the regulatory complexity and burden that currently characterizes the market for individual and small group health coverage and, therefore, can enjoy flexibility with respect to benefit package design comparable to that enjoyed by large employers. AHPs may also help reduce the cost of health coverage to participating employer members by giving groups of employers increased bargaining power vis-à-vis hospitals, doctors, and pharmacy benefit providers, and creating new economies of scale, administrative efficiencies, and a more efficient allocation of plan responsibilities (as the day-to-day administration of the benefit program is transferred from participating employers, who may have little expertise in these matters, to the AHP sponsor).

The Department expects that a substantial number of uninsured people will enroll in AHPs because the Department expects the coverage will be more affordable than what would otherwise be available to them, and other people who currently have coverage will replace it with AHP coverage because the AHP coverage will be more affordable or better meet their needs. The Department also notes the U.S. Congressional Budget Office (CBO) predicted that 400,000 people who would have been uninsured will enroll in AHPs and 3.6 million people will enroll in AHPs who would have had other coverage, resulting in 4 million additional people enrolling in AHPs.[2]

Under current federal law and regulations, health insurance coverage offered or provided through an employer trade association, chamber of commerce, or similar organization, to individuals and small employers is generally regulated under the same federal standards that apply to insurance coverage sold by health

[1] See Executive Order 13813 at 82 FR 48385 (Oct. 17, 2017).

[2] U.S. Congressional Budget Office, ''Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028.'' *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53826-healthinsurancecoverage.pdf.* The Department did not rely on the information contained in the CBO report to reach its conclusions regarding the effects of the final rule, but notes that the CBO's findings are consistent with the Department's own findings.

insurance issuers [3] directly to these individuals and small employers, unless the coverage sponsored by the group or association constitutes a single ERISA-covered plan. Whether, and the extent to which, various regulatory requirements apply to association health coverage depends on whether the coverage is individual or group coverage and, in turn, whether the group coverage is small or large group coverage. Generally, unless the arrangement sponsored by the group or association constitutes a single ERISA-covered plan, the current regulatory framework disregards the group or association in determining whether the coverage obtained by any particular participating individual or employer is individual, small group, or large group market coverage (the ''look through'' doctrine). Instead, the test for determining the type of coverage focuses on whether the coverage is offered to individuals or employers. And, if the coverage is offered to employers, whether the group coverage is large group or small group coverage depends on the number of employees of the particular employer obtaining the coverage. Thus, unless the association plan is treated as a single ERISA-covered employee welfare benefit plan, the size of each individual employer participating in the group or association determines whether that employer's coverage is subject to the small group or large group market rules (or the individual market rules, if the participant is an individual and not an employer that can establish and maintain a group health plan). Accordingly, different group or association members will have coverage that is subject to the individual market, small group market, and/or large group market rules concurrently, as determined by each member's circumstances, making the arrangement very difficult to administer and discouraging employers from banding together to sponsor association health coverage.

The term ''employee welfare benefit plan'' is defined in section 3(1) of ERISA to include, among other arrangements, ''any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants, or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .'' Thus, to be an employee welfare benefit plan, the plan, fund or program must, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization. With respect to groups or associations of employers, only a group or association acting as an ''employer'' under ERISA section 3(5) is capable of establishing an employee welfare benefit plan.

The term ''employer'' is defined in section 3(5) of ERISA as ''. . . any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.'' Thus, ERISA defines the term ''employer'' to include the ''direct'' (or common law) employer of the covered employees or ''any other person acting indirectly in the interest of'' the common law employer. Based on definitions in Title I of ERISA, and because Title I's overall structure contemplates employment-based benefit arrangements, DOL historically has recognized that, in the absence of the involvement of an employee organization, a group or association of employers may sponsor a single ''multiple employer'' plan, if certain factors are present.[4] The key factors have been commonality of interests of employer members and control of the benefit arrangement by the employer members. These factors are present when an organized group or association of employers with common interests unrelated to the provision of benefits, acting in the interest of its employer members, establishes a benefit program for the employees of member employers and exercises control over the amendment process, plan termination, and other similar functions on behalf of these members with respect to the plan and any trust established under the program. DOL guidance generally refers to these entities as ''bona fide'' employer groups or associations. *See, e.g.,* Advisory Opinions 2008–07A, 2003–17A and 2001–04A; *see also* Advisory Opinion 96–25A (if an employer adopts for its employees a program of benefits sponsored by an employer group or association that does not itself constitute an ''employer,'' such an adopting employer may have established a separate, single-employer benefit plan covered by Title I of ERISA).[5]

In defining the type of employer group or association that can act as an ERISA section 3(5) employer in sponsoring a single ''multiple employer'' plan, DOL has long considered whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the plan. This ''commonality of interest'' standard is intended to distinguish bona fide groups or associations of employers that provide coverage to their employees and the families of their employees from arrangements that more closely resemble State-regulated private insurance offered to the market at large. *See, e.g.,* Advisory Opinion 94–07A; Advisory Opinion 2001–04A.[6]

Courts have also held that there must be some cohesive relationship between the provider of benefits and the recipient of benefits under the plan so that the entity that maintains the plan and the individuals who benefit from the plan are tied by a common economic or representational interest. *Wisconsin Educ. Assn. Ins. Trust* v. *Iowa State Bd.*

[3] A ''health insurance issuer'' or ''issuer'' means an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA). Such term does not include a group health plan. 29 CFR 2590.701–2. The terms ''health insurance issuer'' and ''issuer'' are used interchangeably in this preamble.

[4] Congress did not intend to treat commercial insurance products marketed by private entrepreneurs as ERISA-covered welfare benefit plans. Shortly after ERISA's passage, Congress expressly noted these concerns in *The Report of the Committee on Education and Labor,* HR. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977):

Certain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is in profiting from the provision of administrative services are establishing insurance companies and related enterprises. The entrepreneur will then argue that [its] enterprise is an ERISA benefit plan which is protected, under ERISA's preemption provision, from state regulation . . . [W]e are of the opinion that these programs are not 'employee benefit plans' . . . [T]hese plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. . . . They are no more ERISA plans than is any other insurance policy sold to an employee benefit plan.

[5] See AO 2008–07 at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2008-07a;* AO 2003-17A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2003-17a;* AO 2001-04A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2001-04a;* AO 96-25A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1996-25a.*

[6] See AO 94–07A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1994-07a* and AO 2001–07A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2001-07a.*

of Public Instruction, 804 F.2d 1059, 1063–1064 (8th Cir. 1986); *see also MD Physicians & Associates, Inc.* v. *State Bd. of Ins.,* 957 F.2d 178, 183–186 (5th Cir. 1992); *National Business Assn. Trust* v. *Morgan,* 770 F. Supp. 1169 (W.D. Ky. 1991).[7]

DOL advisory opinions and court decisions have applied a facts-and-circumstances approach to determining whether a group or association of employers is a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. This analysis has focused on three broad sets of issues, in particular: (1) Whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance.

The Department's historical approach to these issues was designed to ensure that the Department's regulation of employee benefit plans is focused on employment-based arrangements, as contemplated by ERISA, rather than merely commercial insurance-type arrangements that lack the requisite connection to the employment relationship. But neither the Department's previous advisory opinions, nor relevant court cases, foreclose DOL from adopting a more flexible test in a regulation, or from departing from particular factors previously used in determining whether a group or association can be treated as acting as an ''employer'' or ''indirectly in the interest of an employer'' for purposes of the statutory definition. Rather, the terms ''employer'' and ''indirectly in the interest of an employer'' are ambiguous as applied to a group or association in the context of ERISA section 3(5), and the statute does not specifically refer to or impose the ''commonality'' test on the determination of whether a group or association acts as the ''employer'' sponsor of an ERISA-covered plan within the scope of ERISA section 3(5).

In addition to the text and structure of Title I of ERISA, a regulation under ERISA section 3(5) should be guided by ERISA's purposes and appropriate policy considerations, including the need to expand access to healthcare and to respond to changes in law, market dynamics, and employment trends. Thus, Executive Order 13813 directed the Department to address the problem that too many legitimate employer associations cannot sponsor ERISA-covered plans because they do not satisfy the requirements for being treated as an ''employer'' or as ''acting in the interest of'' an employer under the Department's previous sub-regulatory guidance (''pre-rule guidance''). Instead, too many association arrangements for health coverage are treated as a mere collection of distinct plans, each separately sponsored by individual employers. Under the Department's pre-rule guidance, the association in most cases is treated as the mechanism by which each individual employer obtains benefits and administrative services for its own separate plan. To the extent the separate employers are small employers, their insurance is subject to regulation as small group coverage for purposes of the Patient Protection and Affordable Care Act (ACA). Similarly, in the case of sole proprietors and other business owners that do not also employ other individuals, the insurance coverage they obtain for themselves through an association is treated as individual coverage. As a result, associations that want to form AHPs and existing AHPs currently face a complex and costly compliance environment insofar as the various employer members of the association and the association's health insurance coverage arrangement may simultaneously be subject to large group, small group, and individual market regulation, which undermines one of the core purposes and advantages of an association forming and its employer members joining an AHP (*i.e.,* to help small employers obtain better terms on health coverage by allowing them to group together to spread risk and administrative costs in a large group environment).

After Executive Order 13813 was issued, on January 5, 2018, the Department published a proposed regulation (''Proposed Rule'') on the definition of ''employer'' in ERISA section 3(5) that would broaden the types of employer groups or associations that may sponsor a single group health plan under ERISA for the benefit of the employees of the group or association's member employers. The Proposed Rule would broaden the criteria for a group or association to satisfy the ''commonality of interest'' requirement, and provide additional flexibility for employer groups or associations to offer health coverage in a manner that would be considered a single group health plan. Specifically, under the Proposed Rule, employer groups or associations would meet the commonality of interest criteria if their members were in the same trade, industry, line of business, or profession, or maintained their principal places of business in a region that does not exceed the boundaries of the same State, or in the same metropolitan area (even if the metropolitan area includes more than one State).

The Proposed Rule also included a provision that would establish clear criteria under which working owners, such as sole proprietors and other self-employed individuals, could participate in AHPs. Furthermore, while the Department's regulation at 29 CFR 2510.3–3(b) (which excludes ''plans without employees'' from the definition of employee benefit plans covered by Title I of ERISA) does not prevent sole proprietors or other working owners from being participants in broader plan arrangements, such as AHPs, the Proposed Rule also included an amendment to that regulation that would expressly permit participation of working owners without any common law employees in AHPs. Under the Proposed Rule, the participants in an AHP thus could consist of common law employees, common law employees and working owners, or solely of working owners. In all cases, the working owner would be treated as an employee and the business as the individual's employer for purposes of being an employer member of the bona fide group or association and an employee participant in the AHP.

The Department received over 900 comments in response to the Proposed Rule from a wide range of stakeholders, including group health plan participants, consumer groups, employer groups, individual employers (including sole-proprietors), employer associations and other business groups, individual health insurance issuers, trade groups representing health insurance issuers, State regulators, and existing AHPs. The public comments submitted in response to the Proposed Rule were posted on the Department's website at *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85.* A significant number of commenters, including small business owners and self-employed individuals, expressed serious concerns regarding the rising cost of healthcare. Many of these small business owners currently do not offer health coverage to their employees, citing ever-increasing costs

[7] Brief of the Secretary of Labor as amicus curiae, *MD Physicians & Associates, Inc.* v. *State Bd. of Ins.,* 957 F.2d 178 (5th Cir. 1992) (No. CA–2–90–0054), 1991 WL 11248117.

as the primary reason they cannot offer affordable health coverage to their employees and their families. Similarly, small business owners that provide health coverage stressed that the premiums are exceedingly costly, and the increases in premiums are frequent and unsustainable. Many self-employed individuals, for example real estate agents, stated that they are forced to purchase insurance in a volatile individual insurance market, which tends to offer fewer choices at much higher costs. The small business owners who submitted these comments said that they were very supportive of the Proposed Rule as a way to expand the options they have to obtain more affordable healthcare coverage for themselves and their employees.

After careful consideration of the issues raised by the written public comments, the Department decided to adopt the Proposed Rule as a final rule, with certain modifications made in response to public comments. Small businesses are crucial to the U.S. economy. Small business owners are often anxious about their ability to obtain healthcare coverage for their employees through employee benefit plans. Similarly, sole proprietors and other self-employed individuals who do not have employees also find it difficult to obtain affordable coverage for themselves and their families through employee benefit plans, or through individual coverage. The Department believes that this final rule will promote broader availability of group health coverage for these small business owners and self-employed people, and help alleviate their problems of limited or non-existent affordable healthcare options for these small businesses and self-employed people. The Department believes it is important to provide an alternative to the restrictions present in the Department's pre-rule guidance that have hampered the ability of small businesses to join together to purchase and provide affordable, quality health coverage for themselves, their employees and their families. The Department continues to believe that providing additional opportunities for employer groups or associations to offer health coverage to their members' employees under a single plan may, under the final rule, provide many more small businesses and self-employed individuals affordable alternatives not currently available in the individual or small group markets. The provisions in the final rule are designed to achieve the same goals that the Department's guidance regarding AHPs has always pursued—*i.e.,* making AHPs available while helping to prevent fraud and distinguishing AHPs from commercial health insurance issuers—in light of compelling policy objectives, including especially the need to provide more, and more affordable, healthcare coverage for employees of small businesses and self-employed individuals.

The Department also continues to believe that the final rule will prompt some working owners who were previously uninsured and some small businesses that did not previously offer health coverage to their employees, to enroll in AHPs, and similarly prompt some small businesses with insured health plans to switch from their existing individual or small group policies to AHPs. As under the Proposed Rule, AHPs that buy insurance would not be subject to the insurance look-through doctrine as set forth in 2011 guidance from the Centers for Medicare & Medicaid Services (CMS);[8] instead, because an AHP would constitute a single group health plan, whether the AHP would be buying insurance in the large or small group market would be determined by reference to the total number of employees of all the member employers participating in the AHP.

B. Overview of the Final Rule and Discussion of Public Comments

The final rule adopts a new regulation at 29 CFR 2510.3–5. Subsection (a) of the final rule describes the general purpose of the regulation as clarifying which persons may act as an ''employer'' within the meaning of ERISA section 3(5) in sponsoring a multiple employer group health plan. Subsection (b) sets forth criteria for a bona fide group or association of employers capable of establishing a group health plan that is an employee welfare benefit plan. Subsection (c) sets forth criteria for the requisite commonality of interest that employer members of a group or association must have to constitute a bona fide group or association of employers. Subsection (d) establishes nondiscrimination requirements for any health coverage offered by the bona fide group or association, including examples that illustrate the application of those requirements. Subsection (e) describes the types of working owners without common law employees who can qualify as employer members and also be treated as employees for purposes of being covered by the bona fide employer group or association's health plan. Subsection (f) describes the effective date and applicability dates for the final rule. Subsection (g) is a severability provision making it clear that individual provisions in the final rule are independent of, and severable from, other provisions of the final rule.

The final rule establishes alternative criteria from those in the Department's existing sub-regulatory guidance for a bona fide group or association of employers capable of establishing a multiple employer group health plan that is an employee welfare benefit plan and a group health plan as those terms are defined in ERISA. The final rule has been developed in consultation with the Department of Health and Human Services (HHS), the Centers for Medicare and Medicaid Services (CMS), the Department of the Treasury (Treasury), and the Internal Revenue Service (IRS), with which the Department is working to implement the ACA, Executive Order 13813, and Executive Order 13765.[9] However, the final rule will apply solely for purposes of Title I of ERISA and for determining whether health insurance coverage of the AHP is regulated by Public Health Service Act (PHS Act) provisions that apply to the individual, small group, or large group market, and not, for example, for purposes of taxation under the Internal Revenue Code (Code).[10]

[8] Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations. September 1, 2011. Available at *https://www.cms.gov/CCIIO/Resources/Files/Downloads/dwnlds/association_coverage_9_1_2011.pdf.* Hereinafter referred to as ''2011 CMS guidance.''

[9] The Departments of Labor, HHS, and the Treasury operate under a Memorandum of Understanding that implements section 104 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and subsequent amendments, including certain sections of the Affordable Care Act, and provides for coordination and consultation. See 64 FR 70164 (December 15, 1999).

[10] Both the Proposed Rule and this final rule under ERISA section 3(5) are limited to health benefits and AHPs. Accordingly, for simplicity, the preamble to this final rule often refers only to health benefits, including when discussing the application of prior Departmental guidance. Thus, neither this preamble nor the final rule address the application of the ERISA section 3(5) statutory phrases, ''acting . . . indirectly in the interest'' or ''group or association of employers,'' in any context other than as applied to an employer group or association sponsoring an AHP. Several commenters asked that the final rule include provisions to expand the circumstances under which employers and self-employed individuals can sponsor and participate in ERISA-covered multiple employer plans (MEPs) that provide retirement benefits within the meaning of ERISA section 3(2) or other welfare benefits listed in ERISA section 3(1). The Department notes that as more Americans engage in part-time, contract, self-employment, or other alternative work arrangements, it is increasingly important that retirement plans and employee benefit regulation in general allow for more flexible, portable benefit

Continued

1. Continued Availability of ''Bona Fide Group or Association of Employers'' Definition Under the Department's Pre-Rule Guidance

The principal objective of the final rule is to expand employer and employee access to more affordable, high-quality coverage. Some commenters expressed concern, however, that application of the final rule's requirements to existing AHPs could reduce coverage. They argued that existing AHPs that relied on the Department's pre-rule guidance on ''bona fide group or association of employers'' did not design their operations with the new requirements in mind. As a consequence, existing AHPs may not be able to comply with the new conditions without reducing existing options for affordable healthcare. The Department agrees that would be an undesirable result. Accordingly, the Department notes that AHPs may continue to rely upon the Department's previous guidance.[11] This final rule provides an *additional* mechanism for groups or associations to meet the definition of an ''employer'' and sponsor a single ERISA-covered group health plan; it is not the sole mechanism.[12]

A central aim of the new regulation is to provide an additional opportunity beyond those available under pre-rule guidance for employer groups or associations to offer health coverage to their members' employees under a single plan. While the Department believes that it is appropriate to expand the availability of AHPs to the new arrangements permitted under the final rule, it does not suggest that arrangements that comply with its pre-rule guidance fail to meet the statutory definition of employer. An employer group or association that complies with either the requirements under the new rule or the pre-rule guidance is considered to be acting in the interest of participating employers. In either case, the group or association acts as an ''employer'' within the meaning of ERISA section 3(5), and has a sufficient nexus to employers and employees in the AHP to distinguish it from a mere commercial health insurance issuer that lacks the requisite connection to the employment-based relationships that ERISA regulates.[13]

Accordingly, the final rule includes additional regulatory text to make it clear that this final rule does not supplant the Department's previously issued guidance under ERISA section 3(5), but rather provides an additional basis for meeting the definition of an ''employer'' under ERISA section 3(5). The Department emphasizes that both existing and new employer groups or associations that conform to the Department's pre-rule guidance can sponsor an AHP.

2. Bona Fide Groups or Associations of Employers Under the Final Rule

Paragraph (b) of the Proposed Rule defines certain criteria for a ''bona fide group or association of employers'' that may establish a group health plan that is an employee welfare benefit plan as those terms are defined in ERISA.[14] Some commenters suggested broadening the definition of ''bona fide groups or associations'' to include a variety of tax-exempt organizations under Code section 501(c), such as scientific, literary, and educational organizations whose members are not necessarily employers. These commenters urged the Department to expand the regulation to allow groups or associations of individuals to sponsor an AHP, without regard to whether such individual's employer is a participating member or whether the individual is a ''working owner.'' They explained that many well established professional associations include individuals in a common trade or business, but who are not self-employed and whose employers may not be participating members. Accordingly, they argued that the Department's Proposed Rule unduly limits these associations' ability to offer AHPs to their members, including members who are independent contractors or sole proprietors who could otherwise benefit from the new rule's extended coverage of ''working owners.'' Whatever the policy merits of these arguments, however, the Department's authority to define ''employer'' and ''group or association of employers'' under ERISA section 3(5) does not broadly extend to arrangements established to provide benefits outside the employment context and without regard to the members' status as employers. The final rule, like ERISA section 3(5), is limited to employers, including working owners, as discussed below. The Department cannot expand its definition beyond the statute's scope.

Some commenters additionally argued that the Department should remove the Proposed Rule's ''commonality of interest'' and ''control'' requirements altogether because, in the commenters' view, these requirements are not supported by the statutory text of ERISA. These commenters argued that ERISA section 3(5) does not expressly require either commonality or control but rather, requires only that the group or association of employers act indirectly in the interest of the group or association's employer members. They

programs. Although those issues are beyond the scope of this rulemaking, the Department will consider comments submitted in connection with this rule as part of its evaluation of MEP issues in the retirement plan and other welfare benefit plan contexts.

[11] *See, e.g.,* Advisory Opinion Nos. 94–07A, 2003–13A, and 2007–06A.

[12] Also, some commenters indicated that some existing multiple employer welfare arrangements (MEWAs) are not interested in obtaining single-employer AHP status under ERISA. These commenters requested clarification of whether a group or association that provides health coverage to more than one employer member must sponsor an AHP to provide those benefits. While the final rule describes when a group or association of employers is permitted to act as an ''employer'' under section 3(5) of ERISA, the final rule does not compel the group or association to sponsor an AHP on behalf of the group or association's participating employer members. The Department believes that a group or association operating a MEWA can structure its operations to avoid being deemed an employer sponsoring a single ERISA-covered health plan for the employees of the participating members. Such a group or association is permitted to operate a MEWA under which each employer that gets its health coverage through the group or association is considered to have established a separate, single-employer health benefit plan covering its own employees. As under pre-rule guidance, the Department would look to the intent of all parties, as reflected in the plan documents, to determine whether there is a single multiple-employer plan or there are multiple single-employer plans. MEWAs are discussed further below.

[13] The Department's previously issued guidance established criteria for determining that an employer group or association is an employer within the meaning of ERISA section 3(5) for purposes of establishing an AHP (or other employee welfare benefit plan). Among the factors considered are the following: How members are solicited; who is entitled to participate and who actually participates in the group or association; the process by which the group or association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. The employer members must also have a sufficient employment-based common nexus or other genuine organizational relationship unrelated to the provision of benefits. That determination is made on the basis of all the facts and circumstances involved. The employers that participate in a benefit program must also exercise control over the group or association's group health plan, both in form and in substance, in order to act as a bona fide employer group or association with respect to the plan.

[14] One commenter also suggested that the term ''bona fide'' should be deleted from the rule because ERISA section 3(5) does not use that term but merely refers to ''group or association of employers.'' The Department has chosen not to adopt this change in nomenclature. The term ''bona fide'' properly indicates that the group or association of employers must meet certain criteria to be eligible to act as an employer sponsor of a single AHP, within the meaning of ERISA section 3(5). The Department could have used ''qualified'' or ''qualifying'' but chose to use ''bona fide'' because that is the term used in the Department's previously-issued sub-regulatory guidance under ERISA section 3(5).

further argued that the Department should apply in this situation its regulation at 29 CFR 2530.210(c)(3), which provides that, for employee pension plans subject to ERISA's participation and vesting requirements, ''multiple employer plan'' means a multiple employer plan as defined in Code section 413(b) and (c). The commenters maintained that neither Code section 413(c) nor Treasury Regulation section 1.413–2 requires a ''unique nexus'' between the employers that maintain a multiple employer plan. The commenters claimed that, for purposes of the Code and, therefore, ERISA, a multiple employer plan is simply a plan maintained by more than one employer with no ''nexus'' required. As discussed more fully below, with regard to ERISA section 3(5), the Department does not agree. Commonality and control requirements are retained in the final rule as elements that distinguish employment-based benefit arrangements from commercial insurance marketing programs.

Other commenters argued that the Department's proposal to redefine the criteria for a bona fide group or association such that the group or association of employers and the individuals that benefit from the plan are no longer required to be tied by a common economic or representation interest, unrelated to the provision of benefits, is inconsistent with allegedly unambiguous statutory language in ERISA and several decades of case law applying ERISA, is in excess of statutory authority, and is arbitrary and capricious under the Administrative Procedure Act (''APA''). As discussed more fully below, although the Department does not believe that the proposal was inconsistent with unambiguous statutory language or lacked reasoned analysis, the Department has decided that the final rule should require that a bona fide group or association of employers have at least one substantial business purpose unrelated to the provision of benefits to be eligible to sponsor an ERISA-covered group health plan, although the final rule makes clear that a group or organization's principal purpose may be the provision of benefits.

Several commenters also argued that the PHS Act, the ACA, and ERISA manifest a clear intent to treat the group markets and individual market as distinct, and that the Proposed Rule conflicts with the text of the ACA by allowing small employers and individuals, who are not subject to the employer shared responsibility provisions under section 4980H of the Code and who were supposed to be purchasing insurance coverage that is subject to the essential health benefits (''EHB'') requirements, to band together to obtain health insurance that does not comply with all the ACA insurance rules applicable to small group market insurance. The Department disagrees that the Proposed Rule is unlawful under the ACA. As explained in the 2011 CMS guidance, although the ACA revised and added to Title XXVII of the PHS Act, it did not modify the underlying PHS Act framework for determining whether health insurance coverage issued through associations was individual or group health insurance coverage. The PHS Act derives its definitions of group health plan and employer from the ERISA definitions and where the association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the ''employer,'' the association itself is considered a group health plan for purposes of the ACA provisions in Title XXVII of the PHS Act. Single plan MEWAs pre-date the ACA and continue to play an important role in the existing regulatory environment under the PHS Act, the ACA, and ERISA. Thus, employer groups already can group together to collectively sponsor ERISA plans, and those plans have to comply with applicable group market rules. In line with that recognized practice, here the # DOL has simply used its rulemaking authority to define a statutory term in a way that allows employers to join together more broadly to promote the adoption and administration of AHPs and expand access to affordable health coverage, especially among small employers and self-employed individuals.

a. Purpose of the Association

Paragraph (b)(1) of the Proposed Rule stated that a group or association may act as an employer within the meaning of ERISA section 3(5) for purposes of sponsoring a group health plan if the group or association exists for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members. This represented a departure from previously issued sub-regulatory guidance, which required a group or association acting as an employer to exist for purposes other than providing health benefits.

Many commenters, including some who were otherwise supportive of the Proposed Rule, objected to this provision. Several commenters believed that, because most small businesses already have the opportunity to belong to a chamber of commerce or other professional association, allowing a group or association to be formed solely for the purpose of sponsoring a group health plan is unnecessary to achieve the Department's goals. Commenters believed that a proliferation of groups or associations established for the exclusive purpose of sponsoring an AHP could oversaturate the market, diminishing the value of existing trade and professional groups or associations which, for decades, have focused on building and maintaining relationships with their members and serving their members' needs on a multitude of issues well beyond health benefits. Similarly, it could also diminish the market power of existing AHPs and those that may be formed by groups and associations that exist for other purposes, which could limit their opportunities to achieve the economies of scale that make AHPs an attractive vehicle for providing affordable coverage in the first place. Commenters also expressed the view that established industry and trade groups and associations have strong incentives to maintain their good reputation and favorable historical record of responsibly acting in the interests of their employer members. These reputational incentives mitigate the risk that they would set up poorly managed AHPs or provide inadequate coverage. In contrast, these commenters argued, allowing groups and associations formed for the sole purpose of offering an AHP to be considered bona fide groups or associations of employers could invite unscrupulous promoters to enter the market with mismanaged and thinly funded AHPs and could increase the prevalence of fraudulent and abusive practices. Additionally, according to such commenters, newly-formed groups and associations are likely to lack the knowledge and expertise necessary to prudently operate an AHP, subject to all of the complexities of modern health markets and regulatory structures. Commenters noted that individuals and small businesses are not typically sophisticated purchasers of group health coverage and may confront challenges in evaluating AHP options. As a result, these persons may be more likely to make imprudent decisions that would drive them to select plans with the lowest premiums without understanding the impact on access to care, the rights of their employees, and risks associated with fraud and insolvency. Several commenters stated that self-insured AHPs in particular were ripe for abuse and recommended that groups and associations that do not exist for purposes other than sponsoring

an AHP should be limited to offering fully-insured AHPs.

Commenters offered numerous suggestions for alternative criteria for determining a bona fide group or association of employers for purposes of the new rule with the aim that those eligible be limited to legitimate, well-managed, and well-intended organizations with the ability to properly operate an AHP. Some commenters supported retaining the requirement in the Department's pre-rule guidance that the group or association exist for other purposes unrelated to the provision of benefits in order for the group or association to qualify as bona fide. Some suggested requiring a group or association to exist for a specified minimum length of time before it could sponsor an AHP. Others suggested requiring that the group or association meet certain criteria for tax-exempt organizations, have minimum revenues unrelated to AHP operations, or demonstrate by other means the capacity to oversee the administrative requirements associated with managing the complexities of an AHP in order to be considered a bona fide group or association.

After consideration of the public comments, the Department agrees that some modification of this provision is appropriate. The intent of this final rule is to expand access to AHP coverage options, while protecting plan participants and beneficiaries from imprudent, abusive, or fraudulent arrangements. Removing undue restrictions for existing groups and associations as well as for newly-formed groups and associations of employers and working owners is critical to achieving the Department's goal of expanding choice in health coverage options. But the Department understands the concerns regarding operational risks such as fraud and insolvency that commenters believed might be more likely with respect to AHPs offered by newly-formed groups and associations that exist solely for the purpose of sponsoring an AHP.[15]

Accordingly, the Department is modifying this provision in the final rule to establish a general legal standard that requires that a group or association of employers have at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees, even if the primary purpose of the group or association is to offer such coverage to its members. Although the final rule does not define the term ''substantial business purpose,'' the rule contains an explicit safe harbor under which a substantial business purpose is considered to exist in cases where the group or association would be a viable entity even in the absence of sponsoring an employee benefit plan. The final rule also states that a business purposes is not required to be a for-profit purpose.[16] Thus, for example, a bona fide group or association could offer other services to its members, such as convening conferences or offering classes or educational materials on business issues of interest to the association members. Depending on facts and circumstances, a bona fide group or association might be tax-exempt under Code section 501(a) as an organization described in Code section 501(c), with a purpose unrelated to the sponsorship of the AHP, if it meets all the requirements for exempt status, including furthering an exempt purpose. A bona fide group or association could also act as a standard-setting organization that establishes business standards or practices. A bona fide group or association could also engage in public relations activities such as advertising, education, and publishing on business issues of interest to association members unrelated to sponsorship of an AHP. A bona fide group or association's purpose could simply be to advance the well-being of the industry in which its members operate, although in that case the group or association would need to advance that well-being through substantial other activity in addition to providing health coverage. In each instance, the other business purpose(s) or activity should be substantial enough that the association could be a viable entity even in the absence of acting as a sponsor of an AHP. If, for example, the group or association had operated with an active membership before sponsoring an AHP, that would be compelling evidence of such a substantial business purpose. Nor would it be inconsistent with this provision if such a pre-existing group or association created a wholly owned subsidiary to administer an AHP, even if the subsidiary exists solely to administer the group health plan. In this circumstance, the group or association's substantial business purpose unrelated to the provision of healthcare benefits is not eliminated by its decision to create a subsidiary under its control to administer the AHP.

These modifications emphasize that nothing in the final rule should be read as prohibiting a bona fide group or association—formed either before or after the issuance of this final rule—from sponsoring an AHP as its primary purpose, provided that it also has a substantial business purpose unrelated to sponsorship of the AHP. Thus, for instance, a group or association formed after this final rule is issued and that has a primary purpose of providing health coverage, but that also convenes conferences and provides educational materials and opportunities to its members, would satisfy this rule's requirements, if the convening and educational activities are sufficiently substantial. The Department believes these modifications assist substantially in drawing the line between traditional health insurance issuers (which typically exist only to underwrite and sell insurance) on the one hand, and those that qualify as an ''employer'' under section 3(5) of ERISA, on the other (because of their other substantial business purpose).

b. The Group or Association Must Have an Organizational Structure.

Paragraph (b)(3) of the Proposed Rule required that a group or association have ''a formal organizational structure with a governing body'' as well as ''by-laws or other similar indications of formality'' appropriate for the legal form in which the group or association operates in order to qualify as bona fide. Commenters generally supported these provisions on the basis that having such formalities will not only serve to clarify the rights and obligations of members of the association or group, but to promote accountability by enabling regulators and others to readily identify those parties who are responsible for operations, including the establishment and maintenance of the group health plan. These commenters suggested that the existence of formalized and robust organizational structures could be an important form of protection against fraud and insolvency. For these reasons, the final rule adopts these provisions without modification. There were requests for minor wording changes to paragraph (b)(3) to ensure that certain ongoing entities clearly fit within the

[15] In addition, the Department's revisions of the final rule are responsive to concerns that, in the absence of some purpose other than providing health benefits, there may be insufficient basis for treating the group or association as the sort of bona fide group or association of employers contemplated by ERISA section 3(5), as opposed to a commercial insurance operation or issuer that should be regulated in the same manner as other insurance companies or issuers.

[16] This responds to commenters concerns that engaging in substantial ''for profit'' activity could have unintended consequences with respect to an organization's status under section 501(c) of the Code. An association that is, or intends to be, tax-exempt under section 501(a) of the Code should keep in mind that engaging in a business ordinarily carried on for profit might affect its qualification for, or maintenance of, any recognition as a tax-exempt organization under federal law if the business activity is substantial.

final rule, and similarly, there were requests to clarify the meaning of certain words or phrases in paragraph (b)(3) as applied to specific fact patterns. The Department declines in this preamble to address the application of the final rule to specific fact patterns. The Department has procedures to answer inquiries of individuals or organizations affected, directly or indirectly, by ERISA as to their status under ERISA and as to the effect of certain acts and transactions.[17]

c. Participating Employer Control Over the Group or Association and the AHP

Paragraph (b)(4) of the Proposed Rule required that member employers control the functions and activities of the group or association, including its establishment and maintenance of the group health plan, in order for it to qualify as a bona fide group or association. Such control under the Proposed Rule could be direct or it could be indirect through the regular election of directors, officers, or other similar representatives that control the group or association and the establishment and maintenance of the plan. The Department noted in the preamble to the Proposed Rule that this ''control test'' was intended to largely duplicate the conditions in the Department's pre-rule guidance under ERISA section 3(5).

Some commenters who supported the Proposed Rule acknowledged that a control test is necessary to ensure that bona fide groups or associations act as an ''employer'' in relation to the group health plan and ''in the interest'' of participating employers, as required by ERISA section 3(5). Indeed, some of these commenters believe that this provision would assume heightened importance in light of other provisions in the Proposed Rule, notably the special rule on the dual treatment of working owners as employers and employees.

Some commenters who generally opposed the Proposed Rule were skeptical that the proposed control test could adequately protect against fraudulent MEWAs [18] and other entities that may not act in the best interest of the employer members. These commenters suggested that many small employers that join a group or association for the purpose of participating in a group health plan (and especially those employers that have little or no connection to each other beyond doing business in the same State or metropolitan area) are unlikely to have sufficient motivation or capacity to evaluate the integrity and expertise of those governing the group or association or administering the plan. For these reasons, these commenters consider the proposed control test to be a largely illusory safeguard, at least in the limited context they described. Some of these commenters urged the Department to bolster the proposed control test with additional or alternative requirements. In particular, commenters proposed that the Department clarify that employer members must not only control the group or association in form, but also in substance, in order for it to qualify as bona fide, because otherwise the protections contemplated by the control test could be evaded systematically. The commenters advancing this suggestion made reference to a strong historical correlation between fraudulent MEWAs and situations where participating employers had only nominal control of the entity sponsoring the MEWA.

A few commenters opposed the proposed control test entirely. These commenters generally expressed apprehension about the logistics of requiring participating employer members to control the functions and activities of a large group or association in order for it to qualify as bona fide. These commenters argued that at least for well-established groups or associations, which may have hundreds or even thousands of member employers and working owners and already act in the interest of their members, the requirement is impractical and unnecessary. One commenter argued that the control test set forth in the Proposed Rule should be recast as a safe harbor and that, if a group or association cannot meet the safe harbor's specific control criteria, it should be permitted to demonstrate in other ways that it is looking out for and acting in the interest of its members and their employees.

After careful consideration of these comments, the Department disagrees with the commenters who believe the proposed control test is unnecessary or that it will be ineffective, and the final rule adopts the proposed control test, with certain revisions as described below. The Department is of the view that the control test is necessary to satisfy the statutory requirement in ERISA section 3(5) that the group or association must act ''in the interest of'' the employer members in relation to the employee benefit plan. It will also help prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate as traditional health insurance issuers, in all but name.

The regulatory text in the final rule is slightly different than in the Proposed Rule. Although the Department's intent in the Proposed Rule was to replicate the control test as it exists in the Department's previously-issued sub-regulatory guidance under ERISA section 3(5), a number of commenters questioned whether the language in the Proposed Rule would effectively accomplish that objective. The regulatory text in the final rule is intended to better align the control test in paragraph (b)(4) with the Department's pre-rule guidance under ERISA section 3(5), including the requirement that control exist in form and substance. As revised, the control test provides that the functions and activities of the group or association must be controlled by its employer members, and the group or association's employer members that participate in the group health plan must control the plan. Control must be present both in form and in substance. Whether the requisite control exists is determined under a facts and circumstances test.

Several commenters requested guidance and clarification, including specific examples if possible, on what it would mean for participating employers (particularly very small employers and working owners) to control the functions and activities of the group or association or the establishment and maintenance of the plan, especially in cases where the group or association and plan are extremely large and the primary purpose of the group or association is to sponsor the plan. These commenters expressed concern that the control test, as proposed, could be construed as requiring that participating employers be responsible for management and day-to-day operations of the group or association and AHP in order for the group or association to qualify as bona fide. Thus, the commenters specifically asked that the final rule clarify the type and degree of control that employer members must exercise over the group or association in order for it to qualify as bona fide, and suggested that the Department identify specific activities or other criteria that would be sufficient to demonstrate the necessary degree of control. For instance, these commenters requested clarification on whether the Department intended that the proposed control test would require participating employers to actively manage administrative and operational functions of the AHP, such

[17] ERISA Advisory Opinion Procedure 76–1 (FR Doc. 76–25168).

[18] A ''MEWA'' is a ''multiple employer welfare arrangement'' as defined in ERISA section 3(40). A MEWA can be a single ERISA-covered plan, or an arrangement comprised of multiple ERISA-covered plans, each sponsored by unrelated employer members that participate in the arrangement. AHPs are one type of MEWA, and they are single ERISA-covered plans.

as network composition, benefit and funding levels, marketing, and distribution.

The final rule does not require group or association members to manage the day-to-day affairs of the group or association or the plan in order for the group or association to qualify as bona fide. As has long been the case, the Department will consider all relevant facts and circumstances in determining whether the functions and activities of the group or association are sufficiently controlled by its employer members, and whether the employer members who participate in the group or association's group health plan sufficiently control the group health plan. In the Department's view, the following factors, although not exclusive, are particularly relevant for this analysis: (1) Whether employer members regularly nominate and elect directors, officers, trustees, or other similar persons that constitute the governing body or authority of the employer group or association and plan; (2) whether employer members have authority to remove any such director, officer, trustees, or other similar person with or without cause; and (3) whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and premiums. The Department ordinarily will consider sufficient control to be established if these three conditions are met.[19]

A number of commenters raised issues regarding the interrelationship between the control test and the status of a group or association's board members under the definition of ''fiduciary'' under section 3(21) of ERISA. Whether, and the extent to which, any particular board members are fiduciaries under ERISA turns on whether they engage in activity described in section 3(21) of ERISA with respect to the AHP. Thus, although in many circumstances board members in fact will be fiduciaries under ERISA, the relevant facts and circumstances of the particular situation will dictate the outcome. Some commenters suggested that the final rule should require board members to acknowledge in writing their status as fiduciaries under ERISA. Section 402 of ERISA already provides that every employee benefit plan shall be established and maintained pursuant to a written instrument, and that such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. Some commenters suggested that the final rule could contain a deeming provision under which the control test would be considered satisfied if a group or association's board members (along with other officers) acknowledged in writing their fiduciary status. Whether group or association members in fact have sufficient control of the functions and activities of the group or association for it to be considered bona fide, however, is entirely independent of and unrelated to whether the group or association's key officials or board members are fiduciaries of the AHP. For these reasons, the Department declines to adopt the suggestions of these commenters.

Other commenters suggested revisions that the Department considers to be unnecessary, unduly burdensome, or beyond the scope of this rulemaking. For example, one suggestion was that the Department should require that a majority of the group or association's board members be participating employer members in order for it to be considered bona fide. Another suggestion was that the Department should dictate that groups or associations grant each employer member voting rights with respect to affairs of the group or association, health plan, or both, or require that groups or associations confer officer or director rights or status to some subset of participating employer members in order for the group or association to be considered bona fide. While these factors could be relevant to whether the members had the requisite degree of control, the Department is reluctant, and accordingly declines, to dictate specific governance structures (*e.g.,* by requiring a board structure and specifying the board's powers, selection process, and membership criteria). The test is whether the employer members exercise control in form and substance, not whether they adopted a specific organizational structure.

d. Definition of Eligible Participant

The Proposed Rule provides that only employees and former employees of employer members and their families or other beneficiaries (for example, spouses and dependent children) would be able to participate in a group health plan sponsored by the group or association. Commenters asked the Department to clarify or modify the definition of the individuals who are eligible to participate in an AHP. Some commenters said the rule should expressly state that retirees and COBRA-eligible persons[20] do not lose their status as eligible participants if their employer decides to no longer continue as a member of the bona fide group or association or ceases to be an employer member for other reasons (*e.g.,* the employer goes out of business). Others said that the term ''former employees'' is too broad to the extent individuals would be able to join an AHP merely because at some time in the past they worked for an employer that currently is a member of the bona fide group or association. The commenters expressed concern that such an expansive approach would introduce adverse selection issues. Another commenter stated that the term ''family member'' is too broad and that the term ''beneficiary'' alone would suffice. Some commenters suggested defining eligible participants under paragraph (b)(6) as including only employees, spouses, and dependent children. One commenter requested clarification regarding whether employees of the bona fide group or association (as opposed to employees of employer members) can participate in the AHP.

The Department agrees that some clarification of the definition of eligible participant is appropriate. Thus, the final rule provides that an eligible participant includes employees of a current employer member of the group or association, former employees of a current employer member of the group or association who became entitled to coverage under the group's or association's group health plan when the former employee was an employee of the employer, and beneficiaries of

[19] A number of commenters requested clarification or confirmation that the control test would be satisfied in an array of fact patterns involving different control structures, membership classifications, and participation privileges, including subgroup structures and associations of groups or associations. As stated elsewhere in this preamble, control must be present both in form and in substance, and whether control exists is determined under a facts and circumstances test. The Department declines in this preamble to address the application of the final rule to specific fact patterns. As noted above, the Department has procedures to answer inquiries of individuals or organizations affected, directly or indirectly, by ERISA as to their status under ERISA and as to the effect of certain acts and transactions. See ERISA Advisory Opinion Procedure 76–1 (FR Doc. 76–25168).

[20] COBRA means Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended. COBRA added ERISA sections 601–609, which require, among other things, group health plans to offer temporary continuation health coverage to covered employees, former employees, spouses, former spouses, and dependent children when group health coverage would otherwise be lost due to certain specific events.

such individuals (*e.g.,* spouses and dependent children). The Department's objective with this final rule provision is to provide participating employers and their employees with the same basic rule for defining participants as would apply if the employer member of the association established its own separate group health plan. To achieve this objective in the case of working owner coverage, the final rule includes a special provision that states that, except as may be required for purposes of COBRA continuation coverage, an individual eligible for coverage under the group health plan as a working owner (and the individual's beneficiaries) cannot continue to be eligible for coverage under the group health plan for any plan year after it is determined that the individual does not meet the conditions for being treated as a working owner under paragraph (e)(2). In the Department's view, these provisions make it clear that, when applicable, an AHP must provide COBRA continuation coverage and certain other post-employment coverage to persons who became eligible for coverage by virtue of an employment relationship to an employer member that has a connection to the bona fide group or association and the AHP. The Department also believes that the provision clarifies that employment with an employer unrelated to the employer's membership in the group or association sponsoring the AHP, in itself, is insufficient for an individual to be eligible for coverage under the AHP. For example, an employment relationship entered into with an employer only after the employer ceased being a member of the bona fide group or association would not be sufficient to allow the individual to be a covered participant in the AHP.

The Department also agrees with the commenters who suggested that it use the existing ERISA-defined term ''beneficiary'' rather than ''spouses,'' ''dependent children,'' or ''family member.'' Since an AHP may provide coverage to any ERISA beneficiaries (for example, dependents for federal tax purposes) and is not limited to spouses or dependent children, or other family members, the Department agrees that using the term ''beneficiary'' is more accurate.

The Department also agrees that it is not unusual for employer groups or associations to be established as separate legal entities that have their own employees, and for the group or association to choose to participate in the group or association's arrangement for the provision of health benefits as a way of providing benefits to its own employees. In the case of a geography-based AHP under the final rule, the group or association could be a participating employer by having its principal place of business within the relevant state or metropolitan area. In the case of an industry-based AHP under the final rule, the Department added a provision to the final rule to explicitly state that the group or association will be treated as being in the same trade or industry as the other employer members of the group or association.[21]

Some commenters asked the Department to hold harmless health insurance issuers and third party administrators who exercise diligence and good faith in relying on the bona fide group or association's representations of participant eligibility in cases where an ineligible individual is enrolled in an AHP. Another commenter asked that issuers and administrators be given access to the documentation necessary to verify employee eligibility. Issues of legal responsibility for operational errors in the establishment or implementation of an AHP would invariably depend on the particular facts and circumstances involved, including contractual provisions establishing the parties' respective rights and obligations. In the Department's view, this definitional rulemaking is not an appropriate vehicle for addressing such issues. Similarly, although the Department would expect a bona fide group or association to furnish its service providers (including issuers and third party administrators) access to documents and information necessary for those service providers to perform their obligations, the establishment of such information-sharing obligations is beyond the scope of this rulemaking under ERISA section 3(5).

Several commenters were concerned that if an AHP made coverage available to eligible participants on a continuous basis, as opposed to limiting enrollment to specified periods, the AHP could be subject to adverse selection as participants switched in and out of AHP coverage according to their current health needs. This could, in turn, make it difficult for AHPs to achieve stable risk pools and create challenges for issuers when setting rates for the policies they would offer to fully-insured AHPs. These commenters suggested that a final rule should require, or at least permit, AHPs to set temporal restrictions on enrollment such as only making coverage available to eligible participants during set open enrollment periods.

The Department declines to impose any specific requirements for AHPs with respect to the use of open enrollment periods. Although open enrollment periods are common for participant enrollment in group health plans, they are not required under any provision of Federal law and nothing in these final rules affects or restricts an AHP's ability to limit open enrollment periods.[22]

e. Health Insurance Issuer Cannot Sponsor an AHP

The final rule retains the requirement in the Proposed Rule that the group or association sponsoring the AHP cannot be a health insurance issuer or owned or controlled by a health insurance issuer in order for it to qualify as bona fide. Several commenters supported this requirement as important to differentiate bona fide employer groups from commercial entities selling insurance to employers. Others asked the Department to strengthen this prohibition further by including other entities with similar conflicts of interest, such as healthcare systems and network providers. Some commenters also sought clarification that this requirement would not prohibit insurance issuers from serving as third party administrators or providing certain services to bona fide groups or associations. Those commenters explained that health insurance issuers and insurance agents and brokers often provide significant assistance to groups or associations, such as plan design advice and development, marketing, and administrative services (including claims administration).

Other commenters opposed this requirement and argued that insurance issuers should be allowed to form and operate AHPs because, they argued, issuers are uniquely capable of guarding against fraud and are already subject to

[21] The Department notes that it would similarly conclude under its pre-rule guidance that employees of the sponsoring association could participate in the association's AHP.

[22] Of course, group health plans must provide special enrollment periods under certain circumstances. For example, current employees and their dependents who have experienced a loss of coverage must have an opportunity to enroll in the plan under a special enrollment period if they are otherwise eligible to enroll and the coverage was previously offered at a time when the employee had other health coverage. Additionally, special enrollment periods must be provided for certain dependent beneficiaries who experience a qualifying life event such as marriage, birth, or adoption. *See* ERISA section 701(f) and 29 CFR 2590.701–6. In addition, a group health plan, and a health insurance issuer offering group health insurance coverage, must not apply any waiting period that exceeds 90 days. *See* PHS Act section 2708 and ERISA section 715. *See also* 29 CFR 2590.715–2708.

measures designed to protect against insolvency. These commenters argued that insurance carriers can leverage their existing knowledge to reduce the risks of insolvency and fraud, run AHPs efficiently, and improve the affordability of coverage for AHPs. One commenter argued that the prohibition was inconsistent with the Proposed Rule's provision that allowed AHP sponsors to be created solely for the purpose of providing health benefits. The same commenter stated that the Department did not provide any rationale for prohibiting health insurance issuers from sponsoring or controlling an AHP.

Other commenters noted that it is not uncommon for an employee of an issuer to sit on the boards of employer groups or associations. Such commenters asked the Department to confirm that an insurance issuer, agent, or broker providing services to an AHP or having members on the governing body of the bona fide group or association or the AHP would not be considered to be ''controlling'' the bona fide group or association. One commenter also suggested that the final rule should allow AHPs to engage in joint ventures with insurance companies.

The Department believes that it is important to continue to preclude health insurance issuers in their capacity as health insurance issuers from constituting or controlling a bona fide group or association under the final rule. As the Department explained in the preamble to the Proposed Rule, this prohibition was designed to draw a line between the sorts of employer-sponsored arrangements that are regulated by ERISA and commercial insurance arrangements that lack the requisite connection to the employment relationship.[23] Being an insurance company or concern necessarily would require the group or association to serve and advance the exclusive business interests of the company or concern, including its shareholders or other owners, which might stand as an obstacle to acting in the interests of the employer members of the group or association, as is required by section 3(5) of ERISA in order for the group or association to qualify as bona fide. The prohibition also serves to prevent the various conflicts of interest that could arise in a situation where, for example, a health insurance issuer acts as both an AHP plan sponsor and also offers an insurance policy or administrative services in connection with the plan in exchange for compensation. Further, there may be limited circumstances where such a person could be on a governing board, *e.g.,* appointed as a part of a temporary board during an initial period of establishing the group or association or AHP, or serving as a non-voting member. But in general the Department does not believe it would be consistent with the final rule to have insurance issuer representatives on an AHP governing body due to concern that such structures suggest that the participating employers have effectively ceded control to an insurance issuer. However, this prohibition does not prevent a health insurance issuer from participating as an employer member of a bona fide association of insurers that sponsors an AHP. Nor does it prevent a group or association of health insurance issuers acting as employers from sponsoring an AHP for the benefit of their employees. In such cases, the health insurance issuers would be controlling the AHP in their capacity as employers of covered employees, and not in their capacity as health insurance companies, insurance services, or insurance organizations. The final regulation includes additional language to reflect this.

The Department agrees that, just as in the case of health insurance issuers, a group or association or plan that is controlled by a network provider, a healthcare organization, or some other business entity that is part of the U.S. healthcare delivery system would not be a bona fide group or association or AHP under this rule. The Department does not believe it is necessary or advisable to try to include an exhaustive list of all such entities in this provision of the rule. This is because such a control relationship would result in the employer group or association and plan failing the requirements in the final rule that the group or association must be controlled by its employer members and that the AHP be controlled by the employer members who participate in the plan. The Department acknowledges that the provision prohibiting control by a health insurance issuer could similarly be said to be redundant, however, in light of the fact that a key objective of various conditions in this final rule is to distinguish AHPs as employment-based benefit plans from commercial insurance arrangements, the Department believes that highlighting health insurance issuers in this provision helps reinforce that objective. The Department believes it would be consistent with the Department's purpose in including the health insurance issuer provision in the rule, and would also respond at least in part to the commenters, if the provision in the final rule was revised to expressly include subsidiaries of affiliates of health insurance issuers. The final rule includes such a revision. This provision of the final rule has been further revised to make clear that it does not preclude health issuers, their subsidiaries, or affiliates from being involved in the control of a bona fide group or association or AHP in such entity's capacity as a participating employer (*e.g.,* an issuer participating in an AHP as an employer member of an industry-based or geography-based bona fide employer group or association).

Moreover, nothing in this rule precludes a health insurance issuer or other business entity that is part of the U.S. healthcare delivery system from providing administrative services to an AHP. For example, a health insurance issuer could provide third party claims administration and payment services to an AHP. Similarly, a health insurance issuer could provide services to an AHP such as medical provider network design, pharmacy network design, formulary design, recordkeeping services, reporting and disclosure services, wellness program administration, 24-hour nurse helpline services, or audits services, as well as assistance in setting up the AHP.

f. Commonality of Interest

Paragraph (c) of the Proposed Rule addressed the ''commonality of interest'' required for a group or association of employers to sponsor an AHP. Under the Proposed Rule, commonality could be established by employers that (1) are in the same trade, industry, line of business, or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State). The final rule adopts the commonality of interest test from the Proposed Rule without substantive change.[24] Comments and clarifications

[23] *See* ERISA section 733(b)(2) and 29 CFR 2590.701–2, which provide that a health insurance issuer is an insurance company, insurance service, or insurance organization (including a health maintenance organization) that is required to be licensed to engage in the business of insurance and that is subject to state law that regulates insurance *but does not include a group health plan* (emphasis added).

[24] Paragraph (c) of the final rule contains a minor modification in wording. Paragraph (c) of the Proposed Rule contained introductory language stating that the commonalty test would be ''determined based on relevant facts and circumstances.'' That language was intended for those groups and associations that would prefer to rely on the Department's pre-rule guidance regarding when, and under what circumstances, a group or association of employers is able to act as an employer within the meaning of ERISA section

on the main provisions are addressed below.

(i) Trade, Industry, Line of Business, or Profession

Commenters generally supported the provision in the Proposed Rule establishing trade, industry, line of business, or profession, as a basis for finding commonality of interest, noting that groups or associations comprised of these classes of employer groups tend to be more stable, provide more predictable risk pools, allow formation of AHPs that are tailored to healthcare needs in the industry, and are more cost effective. Many commenters, however, requested that the Department clarify the terms ''trade,'' ''industry,'' ''line of business,'' and ''profession'' so that persons interested in forming AHPs would have more certainty regarding the permissible scope and membership classifications that would satisfy the rule. Some of these commenters suggested that the Department develop specific definitions for these terms, including one suggestion that these definitions dovetail with existing definitions of similar terms for VEBAs under Treasury Regulations.[25] Other commenters suggested a number of preexisting industry classification systems that the Department could sanction for this purpose. Among them were the North American Industry Classification System (NAICS) codes developed in part by the Office of Management and Budget (and which the Department incorporates in its Form 5500 series returns), the codes for the Standard Industrial Classification, which preceded the NAICS, and the OECD [26] International Standard Industrial Classification.

Determinations of what is a ''trade,'' ''industry,'' ''line of business,'' or ''profession,'' as well as whether an employer fits into one or more these categories, are based on all the relevant facts and circumstances. The Department is not persuaded that embracing proscriptive definitions or sanctioning a specific industry classification list is appropriate because doing so might interfere with the ability of groups or associations to determine the scope of their own membership. In general, the Department intends for these terms to be construed broadly to expand employer and employee access to AHP coverage.[27] The Department will consider the use of any generally-accepted classification system of the sort identified by the commenters above, as sufficient to meet the commonality condition in paragraph (c)(1)(i) of the final rule.[28] That is because each of these definitions adequately articulates a concept of nexus or commonality that serves to distinguish a bona fide association from a commercial health insurance issuer. Similarly, if an association or group can establish that it would satisfy the ''line of business'' definition for VEBAs, as applicable in Treasury Regulations, the association or group is considered to meet the commonality test under the requirements of the final rule.[29] Finally, in the case of a bona fide group or association that is sponsoring an AHP and that is itself an employer member of the group or association, the Department will consider any trade, industry, line of business, or professional group or association to be in that same trade, industry, line of business, or profession, as applicable, as the other employer members of the bona fide group or association.

Several commenters requested clarification on whether subsets of businesses clearly within trades, industries, or professions could further organize themselves around shared principles, values, or beliefs that, alone, would not be sufficient to establish commonality under paragraph (c) of the final rule. According to the commenters, these situations tend to focus on the characteristics of the owners, such as owners who are women, minorities, or veterans, or the structure of the businesses, such as franchises or companies owned by an employee stock ownership plan (ESOP). Commenters suggested that subset-associations organized in this manner may share more in common than those linked by line of business alone, including a shared culture or regulatory scheme. As mentioned above, the commonality test is based on all the relevant facts and circumstances. In the Department's view, therefore, a subset of otherwise eligible employers does not cease to have the requisite level of commonality under the final rule merely because it chooses to further segment itself inside its trade, industry, or profession into smaller groups based on other, reasonable similarities among employers, and thus such segmentation is permitted, provided that it is not a subterfuge for discriminating based on a health factor as prohibited under paragraph (d) of this final rule.[30] Therefore, for example, a subset of information technology firms, such as cloud storage companies, could meet this test, without having to cover the entire information technology industry. Restaurant owners that are military veterans could also meet this test, without having to include all restaurant owners.[31]

(ii) Geography

The Proposed Rule's definition also permits a bona fide employer group or association to base its membership on a common geographic location, even if the membership is comprised of unrelated employers in multiple unrelated trades, industries, lines of business or professions. To meet the terms of the geographic test, the group or association's employer members each must have a principal place of business within a region that does not exceed the boundaries of the same State or metropolitan area (even if the metropolitan area includes more than one State). The preamble to the

3(5). Paragraph (a) of this final rule now contains language to more clearly make this point.

[25] A VEBA is a ''voluntary employees' beneficiary association'' described in Code section 501(c)(9).

[26] Organization for Economic Cooperation and Development.

[27] A few commenters requested clarification whether the ''line of business'' test is limited to ''for profit'' businesses or other organizations and excludes non-profit organizations. Paragraph (c)(1)(i) of the final rule is not limited in this manner. Thus, a non-profit employer does not fail to have commonality with for-profit employers in the same trade, industry, line of business, or profession in which it operates merely because of its non-profit status. Accordingly, paragraph (c)(1)(i) of the final rule would permit groups of for-profit employers, non-profit employers, or both.

[28] The business code subcategories in the NAICS may be more restrictive than what would constitute an industry, trade, line of business or profession under the final rule. For instance, although each of the twenty subcategories of manufacturing listed by the NAICS, *e.g.,* ''Food Manufacturing,'' ''Beverage and Tobacco Product Manufacturing,'' ''Paper Manufacturing,'' etc. could be a ''trade, industry, line of business or profession'' within the meaning of paragraph (c)(1)(i) of the final rule, combinations of the listed manufacturing subcategories could also satisfy this provision in the final rule. However, a categorization that is defined or applied so broadly so as to potentially include practically any type of business would not satisfy the final rule.

[29] 26 CFR 1.501(c)(9)-2(a)(1) says that membership in a VEBA must consist of individuals who become entitled to participate by reason of their being employees and whose eligibility for membership is defined by reference to objective standards that constitute an employment-related common bond among such individuals. That regulation further states that employees of one or more employers engaged in the same line of business in the same geographic locale will be considered to share an employment related bond for purposes of an organization through which their employers provide benefits.

[30] As discussed elsewhere in this preamble, other Federal and State nondiscrimination rules may also apply.

[31] This flexibility is also consistent with the final rule's nondiscrimination rules, described below, which permit employment-based distinctions to be used within an AHP, provided that such distinctions are not directed at individual participants or beneficiaries based on any health factor.

Proposed Rule cited examples of such metropolitan areas as the Greater New York City Area/Tri-State Region covering portions of New York, New Jersey and Connecticut; the Washington Metropolitan Area of the District of Columbia and portions of Maryland and Virginia; and the Kansas City Metropolitan Area covering portions of Missouri and Kansas. The preamble also made it clear that AHPs could satisfy the commonality requirement by limiting themselves to a smaller geographic region, such as a city or county.

The Department invited comments specifically on whether more clarification would be helpful regarding the definition of a metropolitan area. The Department asked in particular whether a federal designation by the U.S. Census or the Office of Management and Budget (OMB), which delineates and defines Metropolitan and Micropolitan Statistical Areas according to published standards (see *www.census.gov/programs-surveys/metro-micro.html*), or another definition, should be used and, if so, how, for purposes of establishing eligibility for continued or new employer membership (*e.g.,* at the beginning of each plan year). The Department also asked whether there is any reason for concern that groups or associations could manipulate geographic classifications to avoid offering coverage to employers expected to incur more costly health claims. The Department also sought comments on whether there are other examples that would be helpful to clarify the provision and on whether there should be a special process established to obtain a determination from the Department that all of a group or association's members have a principal place of business in the same metropolitan area.

Many commenters supported this provision and said a geography-based ability to satisfy the commonality requirement would provide employer groups and associations with important flexibility and allow more employers to join together to secure lower cost healthcare coverage for themselves and their employees through AHPs. Many commenters supporting an expansion of the commonality of interest test to allow employers with a principal place of business in a single State said that such a provision in the final rule would allow well-established organizations like a State chamber of commerce to take advantage of the new health coverage choice that AHPs represent. Many commenters also sought clarification of what would constitute a metropolitan area for purposes of the final rule. Some commenters suggested that the final rule define a metropolitan area consistent with definitions developed by OMB and used by the Census Bureau and other federal agencies, such as the Bureau of Labor Statistics (BLS). Some of those commenters noted that although they would prefer the OMB Metropolitan Statistical Areas definition, other federal sources would be acceptable. The commenters noted that OMB, in identifying Metropolitan Statistical Areas, requires that the regions demonstrate high degrees of economic and social ties, and that Metropolitan Statistical Areas could, therefore, serve as appropriate geographic markers for bona fide associations and AHPs. Some of those commenters noted that one of the benefits of using the OMB definition of Metropolitan Statistical Areas is that it is an objective and standard benchmark that would create a level of certainty for groups and associations to use in structuring the scope of their bona fide group and association and their AHP. Others suggested that the rule expressly allow associations and groups sponsoring AHPs to rely on OMB's definitions of Metropolitan and Micropolitan Statistical areas. One commenter urged the Department not to limit the geographic commonality standard to one State or a single Metropolitan Standard Area, claiming it was arbitrary because employers that satisfy the commonality of interest requirement on the basis of trade, industry, line of business, or profession are not subject to geographic constraints and any employer group or association that sponsors an AHP will demonstrate that it acts in the interest of its members by meeting the control requirements. The commenter suggested that if any geographic limitation were to be included in the final rule it should allow employers in three contiguous States to meet the test.

Other commenters generally opposed the geography-based expansion of the commonality of interest test, saying it is so broad that employers with no genuine common interest other than being in the same State will be allowed to join together to offer AHPs, opening the door to fraudulent entities to offer coverage. These commenters expressed concern that the proposed test was so permissive as to promote the formation of AHPs across State lines with the result that some sponsors of AHPs might attempt to manipulate geographic boundaries with the goal of choosing particular State regulators. They argued that the ability of State insurance regulators to assist consumers would also decrease because State regulatory jurisdiction typically does not extend across State lines. One commenter said that the final rule should allow multi-State metropolitan areas only if, after consultation with the NAIC, the Department finds that such a provision would not diminish the ability of States to have proper oversight. One commenter said that if the final rule envisions AHPs operating in multiple States, then the Department should establish an independent task force to resolve issues of interstate regulation and oversight among impacted States. One commenter suggested that the Department create a process to review and issue a determination that all of the employer members of a bona fide group or association sponsoring an AHP have a principal place of business in the same metropolitan area. The commenter reasoned that verification that the plan service areas align with the employers' principal places of business is essential to determining an accurate quote for the cost of coverage.

Some commenters said the ''principal place of business'' standard was confusing. They said that health insurance issuers typically declare a ''situs'' State for large employer plans that is typically the location of the company's headquarters and/or the State where most of the employees reside. The commenter was concerned that, without more conditions, the principal-place-of-business provision could be used by sponsors of AHPs to pick as a situs one State with perceived regulatory advantages. The commenter suggested that the final rule also require that the situs State be where the principal place of business of most of the employer members of the AHP are or are anticipated to be. Another suggested that if an AHP is formed for members in a certain region, the AHP should be required to cover a minimum number of members to assure that the group or association is not formed to provide a special benefit for a limited number of individuals. Another suggestion was that the final rule require the situs of the AHP to be a physical location and not merely a post office box.

Other commenters said that if the geography provision was included in the final rule, the group or association and AHP should be required to cover the whole State or metropolitan area or, if sub-areas were permitted, the sub-areas should be required to be contiguous in order for the group or association to qualify as bona fide. The commenters said that, without such requirements, an AHP could ''redline'' to achieve favorable risk pools by defining a region or a metropolitan area

to avoid areas that are less affluent and, therefore, more likely to have chronic health problems. Other commenters similarly argued that the Proposed Rule should be revised to prohibit redlining in geographic or commonality definitions. The commenters expressed concern that geographically-based AHPs, in particular, could cater to upper income, more highly educated zip codes and avoid lower-income, inner-city areas with lower levels of college-educated residents, and effectively exclude individuals in poorer health. The commenters also expressed concern about the ability of AHPs to use geographic restrictions to exclude certain high-cost areas or high-risk profession employees (*e.g.,* defining their region to cover only a high density area while excluding a rural area) and to favor participation of lower risk industries, professions, and geographic areas. One commenter suggested that the Department rely on rating areas that already exist in every State. The commenter said each State already has a set of geographic rating areas that issuers must use to set rates, and that these areas are generally the size of Metropolitan Statistical Areas, or larger to include adjacent rural areas, and are designed to be reasonably economically diverse.

This final rule retains the geography standard as a basis for meeting the commonality test as proposed without substantive revision. The Department acknowledges stakeholders' interest in clear guidelines so that employer groups interested in establishing and maintaining AHPs pursuant to the final rule can have an acceptable level of certainty regarding the group or association's status as an employer under ERISA section 3(5) and the plan's status as an employee welfare benefit plan under ERISA section 3(1). The Department did not intend the commonality of interest provisions to be overly restrictive or to be applied in an overly rigid way. In the Department's view, an area that matches a Metropolitan Statistical Area or a Combined Statistical Area, as defined by OMB (and as used by U.S. government agencies for statistical purposes), would constitute a metropolitan area for purposes of the rule.[32] The Department does not intend, however, that the OMB standard be the exclusive definition of metropolitan area for purposes of the final rule. Rather, by adopting the proposed geography provision as the final rule the Department intends to leave open the possibility that other geographic areas may also qualify as metropolitan areas based on the particular facts and circumstances involved. For instance, the area from which a city regularly draws its commuters may qualify as a metropolitan area, regardless of whether it would qualify under OMB's definition.

Further, as noted in the Proposed Rule, the Department did not intend, and nothing in the final rule requires, that a group or association or their AHP cover the entire State or an entire metropolitan area in order for the group or association to qualify as bona fide. Rather, as explained elsewhere in this preamble, in the Department's view, the final rule provides substantial flexibility for groups and associations to cover segments of a geographic area that otherwise meets the commonality of interest definition, provided such segmentation is not gerrymandered or manipulated in such a way as to be a subterfuge for discriminating based on a health factor.[33]

The Department does not agree that it would be appropriate to expand the single-State provision to include, as one commenter suggested, three contiguous States. The Department believes that the final rule's provisions allowing nationwide AHPs based on a common trade, industry, line of business or profession and multi-state AHPs based on a common metropolitan area provide sufficient flexibility to groups or associations interested in sponsoring multi-State AHPs. At the same time, the final rule appropriately balances the need for flexibility with the concerns expressed by State regulators and other stakeholders about potential confusion related to compliance with insurance laws and regulations when AHPs, especially self-insured AHPs, operate in multiple States.

With respect to the comments suggesting that more clarity is needed in defining the ''principal place of business'' provision, the Department does not agree that further clarification is necessary or would be helpful. First, several commenters raising this issue seemed to believe that the principal place of business provision applied to the group or association and their AHP. However, the requirement in the Proposed Rule, which is adopted in the final rule, applies to the principal place of business of the *employers* that are participating in the group or association, not the principal place of business of the group or association or AHP. To the extent the commenters were intending to raise issues about situs states and state insurance regulation, those issues are not germane here. The application and coordination of state insurance law remains the province of the States and is discussed by the Department elsewhere in this document in connection with other provisions of the final rule.

The Department believes that the inclusion of the subterfuge provision in the final rule, as well as other provisions of federal and State law, sufficiently address the concern about groups or associations and their AHPs being structured to define eligibility for membership in a way that will avoid high cost areas and/or high risk professions.[34] The Department agrees with those commenters who suggested that these issues are more appropriately addressed under State authorities. Additionally, the Department explains elsewhere in this preamble that the final rule does not change existing ERISA preemption rules that authorize broad State insurance regulation of AHPs, either through the health insurance issuers through which they purchase coverage or directly in the case of self-insured AHPs. State insurance regulators have a long history of preventing redlining in insurance; the Department is confident that States will continue to use their authority to play that important role successfully in this

[32] The Office of Management and Budget is responsible for maintaining and updating statistical area delineations, a task it has performed every decade since the 1950 Census. OMB establishes and maintains these areas solely for statistical purposes. The delineations are intended to provide a nationally consistent set of geographic areas for collecting, tabulating, and publishing federal statistics. More information, including current and historical federal statistical area delineation files, is available on the Census Bureau website at *www.census.gov/programs-surveys/metro-micro.html.* In periodically reviewing and revising the definitions of these areas, OMB does not take into account or attempt to anticipate any nonstatistical uses that may be made of the definitions, nor will OMB modify the definitions to meet the requirements of any nonstatistical program. Thus, OMB has advised agencies that in cases where there is no statutory requirement and an agency elects to use the Metropolitan, Micropolitan, or Combined Statistical Area definitions in nonstatistical programs, it is the sponsoring agency's responsibility to ensure that the definitions are appropriate for such use.

[33] *See* ERISA sections 510 and 702. *See also* 29 CFR 2590.702. Other federal and State nondiscrimination laws may also apply.

[34] As discussed elsewhere in this preamble, if a group or association organizes or offers health coverage to a segment of an industry or geography as a subterfuge for discriminating against an individual based on a health factor, the association will not meet the commonality of interest requirement. Moreover, the HIPAA health nondiscrimination rules and paragraph (d) of the final rule prohibit AHPs from making distinctions between groups of participants for purposes of eligibility, benefits, or premiums, if such distinctions are directed at individual participants or beneficiaries based on any health factor.

context.[35] Moreover, the Department does not believe that imposing contiguity requirements or similar constraints would effectively address the rating and redlining concerns described above because even with such restrictions an AHP could rate coverage within the AHP based on sub-areas.

(iii) Other Factors for Commonality of Interest

The Proposed Rule also requested comments on whether the final rule, if adopted, should also recognize other bases for finding a commonality of interest. In response, stakeholders suggested other bases for finding commonality such as ownership characteristics (*e.g.,* an association of owners who are women, minorities or veterans), business models or structures (such as businesses owned by ESOPs, franchises, or not-for-profits), size of business (*e.g.,* small businesses), shared religious and moral convictions, and those without any commonality at all. According to the commenters, employers within these relationships often share unique bonds, interests, needs, and regulatory schemes, and may have significantly more commonality of interest than those in the same industry or region due to these shared traits. Commenters argued that permitting such employers to work together through their groups and associations to establish market power and economies of scale is consistent with the Department's stated goals, and, therefore, should be permitted to benefit from the final rule.

The Department does not agree that these characteristics should be included as additional commonality of interest criteria in the final rule. To the extent these classes of unrelated businesses are not part of a single trade, industry, line of business, or profession, the geography standard for establishing a commonality of interest at paragraph (c)(1)(ii) already provides them with the ability to form State-wide and metropolitan area groups and associations that qualify as an employer for purposes of sponsoring an AHP. Thus, for example, groups or associations of employers with no commonality of interest other than shared moral convictions may sponsor AHPs, provided they satisfy the geography standard and other requirements of the final rule. Similarly, the ''same business'' standard in paragraph (c)(1)(i) also is available to all of these scenarios to the extent the employers are in the same trade, industry, line of business, or profession. For example, a national affinity group or association of military veteran business owners or franchise operators may, through its constitution and bylaws, establish subgroups of its members along relevant industry or business lines, such as entertainment, construction, security, agriculture, gaming, information technology and so forth. Each subgroup, in turn, could serve as the ''employer'' for purposes of section 3(5) of ERISA and could establish an AHP without geographic limitations covering the employer members within the subgroup. In these circumstances, the provisions of the rule would apply at the subgroup level, including the control requirement in section (b), and the subgroups could rely on their membership in the national affinity group or association to satisfy the requirement that the subgroup have a substantial business purpose other than providing benefits. However, a test that would treat all nationwide franchises, all nationwide small businesses, or all nationwide minority-owned businesses, as having a common employment-based nexus—no matter the differences in their products, services, regions, or lines of work—would not be sufficient to establish commonality of interest for a national group or association and AHP because it would be impossible to define or limit (*e.g.,* business owners who support democracy) and, in the Department's view, would effectively eviscerate the genuine commonality of interest required under ERISA.

g. Nondiscrimination

The Proposed Rule included certain nondiscrimination requirements that built on the existing health nondiscrimination provisions applicable to group health plans under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[36] As explained in the preamble to the Proposed Rule, the HIPAA health nondiscrimination rules generally prohibit health discrimination in eligibility for benefits and premiums[37] *within* groups of similarly-situated individuals, but they do not prohibit discrimination *across* different groups of similarly-situated individuals. In determining what counts as a group of similarly-situated individuals, for these purposes, paragraph (d) of the HIPAA health nondiscrimination rules at 29 CFR 2590.702, generally provides that plans may, subject to an anti-abuse provision for discrimination directed at individuals, treat groups of participants as distinct groups if the groups are defined by reference to a bona fide employment-based classification consistent with the employer's usual business practice.

As stated in the HIPAA health nondiscrimination rules, whether an employment-based classification is bona fide is determined based on all the relevant facts and circumstances, including whether the employer uses the classification for purposes independent of qualification for health coverage (*e.g.,* determining eligibility for other employee benefits or determining other terms of employment). Examples in the HIPAA health nondiscrimination rules of classifications that may be bona fide, based on all the relevant facts and circumstances, include full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations. Under an anti-abuse provision contained in the HIPAA health nondiscrimination rules at 29 CFR 2590.702(d)(3), however, a distinction between groups of individuals is not permitted if the creation or modification of an employment or coverage classification is directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries.[38]

In addition, under the HIPAA health nondiscrimination rules, a plan may, generally, subject to certain anti-abuse provisions for discrimination directed at

[35] *See, e.g., https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8328.pdf.*

[36] *See* ERISA section 702 and 29 CFR 2590.702–1. This final rule generally refers to the HIPAA health nondiscrimination provisions in ERISA. Parallel provisions are included in the Code and PHS Act at Code section 9802, PHS Act section 2705, 26 CFR 54.9802–1 and 45 CFR 146.121. The Department notes that HIPAA was amended by the ACA in certain respects not relevant to this final rule.

[37] 29 CFR 2590.702(c)(3) provides that, notwithstanding the general nondiscrimination rule, a plan or issuer may vary premium or contribution amounts that it requires similarly situated individuals to pay based on whether an individual has met the standards of a wellness program that satisfies 29 CFR 2590.702(f).

[38] The term health factor means, in relation to an individual, any of the following health status-related factors: Health status, medical condition (including both physical and mental illnesses), claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability, or disability. Evidence of insurability includes conditions arising out of acts of domestic violence and participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing, and other similar activities. ERISA section 702(a)(1); 29 CFR 2590.702(a). In the Department's view, ''[t]hese terms are largely overlapping and, in combination, include any factor related to an individual's health.'' Nondiscrimination in Health Coverage in the Group Market; Interim Final Rules and Proposed Rules, 66 FR 1378, 1379 (Jan. 8, 2001).

individuals, treat beneficiaries as distinct groups based on the bona fide employment-based classification of the participant through whom the beneficiary is receiving coverage, the relationship to the participant, marital status, with respect to children of a participant, age or student status (subject to PHS Act section 2714, as incorporated in ERISA section 715, as well as ERISA section 714) and other factors if the factor is not a health factor. Finally, the HIPAA health nondiscrimination rules generally allow group health plans to treat participants and beneficiaries as distinct groups.

The HIPAA nondiscrimination rules apply to group health plans, including AHPs. Therefore, AHPs, like any other group health plan, cannot discriminate in eligibility, benefits, or premiums against an individual within a group of similarly situated individuals based on a health factor. AHPs, like other group health plans, generally may make distinctions between groups of individuals based on bona fide employment-based classifications consistent with the employer's usual business practice, provided such distinction is not directed at individual participants or beneficiaries based on a health factor. Accordingly, as illustrated in examples in the final rule, an agricultural AHP may offer a different coverage package to dairy farmers than to corn growers, and a metropolitan AHP may offer different pricing to retailers than to restauranteurs, provided such distinctions are not directed at individual participants or beneficiaries based on a health factor.

The Proposed Rule proposed that, in applying the HIPAA health nondiscrimination rules for defining similarly-situated individuals, the group or association may not treat member employers as distinct groups of similarly-situated individuals if it wishes to qualify as a bona fide group or association for purposes of sponsoring an AHP. As noted above, the HIPAA health nondiscrimination rules apply within groups of similarly-situated individuals. If a bona fide group or association could treat different employer-members as different bona fide employment classifications, the preamble to the Proposed Rule said that the nondiscrimination protections in paragraphs (d)(1) through (d)(3) could be ineffective, as AHPs could offer membership to all employers meeting the group or association's membership criteria, but then charge specific employer members higher premiums, based on the health status of those employers' employees and dependents. Accordingly, the preamble to the Proposed Rule stated that a group or association that seeks treatment as an ''employer'' under ERISA section 3(5) for purposes of sponsoring a single group health plan under ERISA section 3(1) cannot simultaneously undermine that status by treating different employers as different groups based on a health factor of an individual or individuals within an employer member. The Department sought comment on whether this structure, which could potentially represent an expansion of current regulations, would create involuntary cross-subsidization across firms that would discourage formation and use of AHPs.

Many commenters strongly supported the proposed nondiscrimination provisions and urged that such provisions be retained in any final rule. Some commenters believed that the nondiscrimination provisions would provide important protection for AHP participants and beneficiaries and that they would reduce, if not eliminate, opportunities for AHPs to engage in risk selection. One commenter felt that prohibiting discrimination based on health factors alone is appropriate for AHPs because AHPs differ from single-employer plans which typically have steady enrollment based on the employer's workforce and do not see variability in the underlying demographics of the eligible versus enrolled population. The commenter speculated that allowing AHPs to make distinctions based on non-health factors would ensure that premiums and contributions will be sufficient to pay incurred claims and attract a mix of risk.

Numerous commenters also expressed support for the proposed restriction on AHPs treating different employers as distinct groups based on a health factor of an individual or individuals within an employer member. These commenters argued that this provision is essential for preventing AHPs from discriminating against at-risk populations and individuals with preexisting conditions. In their view, without this requirement, AHPs would also have an excessively unfair advantage over commercial insurance issuers offering coverage in the community rated small group and individual markets, which would lead to adverse selection and increased premiums for non-AHP employer sponsored coverage. Many commenters urged DOL to go even further in a final rule because non-health factors such as age, gender, industry, occupation, and geography are closely related to health status and, in their view, rating on these criteria would actually be a pretext for discrimination based on health factors. These commenters stated that AHPs should be limited to the rating factors currently allowed in the small group market.

Other commenters argued that additional requirements are necessary and pointed to the fact that age, gender, occupation, and other characteristics are likely to affect an individual's claims experience but do not meet the definition of a health factor. Thus, the commenters stated, groups and associations that wish to be treated as a bona fide group or association and offer a group health plan may still be able to set criteria for membership and set rates in ways that favor healthier populations, because, for example, younger age correlates with lower healthcare expenditures. Commenters also asserted that the Proposed Rule could create an uneven playing field where AHPs were exempt from rating rules and nondiscrimination requirements applicable to health insurance issuers (especially those in the individual and small group markets) and could therefore exercise competitive advantages by charging more actuarially fair premiums. Such practices could encourage healthy groups to obtain AHP coverage while discouraging less healthy groups from doing so. As a result, premiums would likely rise for individuals and small employers with non-AHP coverage. Many of these commenters further suggested that these effects could be avoided if AHPs were made subject to some or all of the rating rules that apply to issuers in the individual and small group markets.

Other commenters argued that the proposed nondiscrimination provisions were too restrictive. With respect to paragraph (d)(4) of the Proposed Rule, which provides that different employer members of a group or association offering an AHP may not be treated as distinct groups of similarly-situated individuals if the group or association wishes to qualify as bona fide, many commenters claimed that this provision presented a new regulatory restraint for existing AHPs and would discourage the formation and use of new AHPs. They argued that the provision would effectively prohibit AHPs from setting rates for each employer member based on prior or expected claims experience (''experience-rate''). Such rate-setting, they argued, is critical to AHPs' ability to offer affordable coverage because a key component of balancing risk and creating a stable and sustainable plan is directly related to the ability to assign appropriate premiums through medical underwriting of each employer-member. The commenters asserted that if AHPs cannot separately experience-rate each

employer member based on the health status of its employees, employers with healthier employees will leave the AHP to obtain better rates elsewhere, leaving the AHP with a less stable risk pool. Several commenters noted that it is common for existing AHPs to treat employer members as distinct groups of similarly-situated individuals and experience-rate each employer-member. Some commenters believed that requiring existing AHPs to comply with the proposed nondiscrimination rules could be so burdensome and disruptive that it would cause many AHPs to cease operations.

One commenter stated that omitting a risk adjustment mechanism to address differences in enrollees' aggregate health conditions would make AHPs unstable and would lead to their failure. Another commenter argued that this would disincentivize large employers, whose plans can be experience-rated, from participating in an AHP unless their risk pool was significantly sicker than that of the AHP. Some commenters also stated that experience rating was necessary due to the fact that AHPs have a smaller risk pool as compared to a commercial insurer and without the ability to manage risk by experience rating, they will be unable to compete with commercial issuers. Another commenter claimed that without the ability to experience-rate each member employer, AHPs would be left to compete with other coverage options on the basis of benefits, such as by offering less generous benefit packages to achieve lower prices. A few commenters were also concerned that the Proposed Rule could interfere with AHPs' ability to establish wellness programs by preventing AHPs from rewarding those groups that do participate, or by reducing the incentive to offer wellness programs.[39]

Commenters also claimed that a prohibition against experience-rating was not necessary to distinguish AHPs from commercial insurance arrangements because the Proposed Rule retained the requirements of commonality and control. Also, several commenters pointed out that some States, including Washington and Kentucky, appear to allow such practices pursuant to laws and regulations applicable to MEWAs. Many commenters suggested that the Department should include a type of grandfather rule to accommodate AHPs that already use experience-rating for each employer-member, to prevent market disruption and burdens associated with coming into compliance with new rules that are inconsistent with long-standing business practices.

After considering the comments and feedback received from stakeholders, the Department is finalizing the proposed nondiscrimination provisions in paragraph (d) with one clarification and adding four new examples to illustrate the nondiscrimination provisions.[40] The final rules include an adaptation of the HIPAA health nondiscrimination rules for AHPs, but the Department declines to adopt additional rating requirements in this final rule. Federal rating rules that some commenters suggested should apply to AHPs are grounded in the PHS Act and apply to health insurance issuers in the individual and small group markets, but not to issuers in the large group market or to group health plans. Thus, these rules do not apply those Federal rating rules to self-insured AHPs, or to insured AHPs that have employer members with a total of more than 50 employees, as insurance coverage sold to the latter would generally be regulated as large group coverage.

Additionally, AHPs' ability to discriminate based on non-health factors is subject to State regulation. As discussed in more detail in section B.7., below (entitled ''ERISA Preemption and State Regulation of AHPs''), under ERISA section 514, States maintain significant authority to impose additional rating rules on insured AHPs through regulation of the underlying insurance policies obtained by AHPs to fund the benefits they provide, and may also impose similar requirements for self-insured AHPs.

The Department understands the concerns raised by commenters regarding the importance of allowing AHPs to experience-rate each employer member but has decided to keep paragraph (d)(4), with one clarification and several new examples to illustrate the circumstances under which an AHP could charge different premiums to different member employers under paragraph (d)(4). As explained in the preamble to the Proposed Rule, paragraph (d)(4) was intended to distinguish bona fide AHPs from commercial arrangements that more closely resemble State-regulated private insurance offered to the market at large, a distinction the Department viewed as especially important with the broadening of the employment nexus requirement. *See, e.g.,* Advisory Opinion 94–07A; Advisory Opinion 2001–04A.[41] As discussed earlier in this document, Congress did not intend to treat commercial insurance products marketed by private entrepreneurs, who lack the close economic or representational ties to participating employers and employees, as ERISA-covered welfare benefit plans.[42]

Accordingly, as noted above, the touchstone of the Department's analysis has long been whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the plan. Only groups or associations that have such a nexus can be appropriately treated as sponsors of ERISA-covered plans, as opposed to commercial insurance providers. Moreover, when plans are sponsored by employers, or by groups or associations that have the requisite connection or commonality, there is less cause for concern about fraud, because an employer or group or association with the requisite commonality pursues objectives—*e.g.,* maintaining a satisfied workforce or advancing the well-being of a particular industry or economic community—that could be imperiled by fraud. Because the final rule relaxes the Department's pre-rule guidance on the groups or associations that may sponsor a single ERISA-covered group health plan, it is especially important to maintain paragraph (d)(4) as proposed. In the context of these new, broader arrangements, paragraph (d)(4) ensures

[39] The Department is not persuaded that AHPs will fail to offer wellness programs due to paragraph (d)(4). Paragraph (d)(4) does not preclude an AHP established under this final rule from offering a wellness program. Employers will retain many incentives to offer incentives to offer wellness programs, even though an AHP cannot rate the employer based on a health factor (*e.g.,* reduced absenteeism and increased productivity).

[40] As explained elsewhere in the preamble, bona fide employer groups or associations and AHPs that meet the Department's pre-rule sub-regulatory guidance are not required to satisfy the standards of this final rule, including paragraph (d)(4) of this final rule, in order to be considered an employer under ERISA section 3(5) that can sponsor a single group health plan. The pre-rule sub-regulatory guidance had a stronger employer nexus requirement in that geography, alone, was not sufficient to establish commonality, and working owners without common law employees were not permitted to participate in the plan. Accordingly, whether a single plan MEWA that meets the Department's pre-rule sub-regulatory guidance can treat employer members as distinct groups of similarly-situated individuals depends on whether the creation or modification of the classification is directed at individual participants or beneficiaries based on a health factor. For example, if the classification was implemented to single out individual participants and beneficiaries based on a health factor and deny them health coverage, the classification would not be permitted under the HIPAA health nondiscrimination rules. 29 CFR 2590.702(d)(3). *See also* 29 CFR 2590.702(d)(4) *Example 5.*

[41] *See* AO 94–07A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1994-07a* and AO 2001–04A at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2001-04a.*

[42] *See* supra footnote 4.

that the group or association is distinguishable from commercial-insurance-type arrangements, which lack the requisite connection to the employment relationship and whose purpose is, instead, principally to identify and manage risk on a commercial basis. Such an AHP that provides benefits for employer members (including working owners without employees), but classifies each of them as distinct groups of similarly-situated individuals that can be experience-rated or otherwise discriminated against based on a health factor, may be more comparable to a commercial insurance issuer.

An important purpose of the commonality of interest test is to ensure that the members of the group or association are bound by a common interest as employers, as reflected in the uniform treatment of members based on their common nexus. Generally, one of the primary benefits of participation in a group health plan is that required premiums and contributions, as well as benefits, are determined for *groups* of similarly-situated individuals and individual employees cannot be singled out. Absent paragraph (d)(4), the rating practices of AHPs forming under the broader nexus test could too closely resemble medically-underwritten individual or small employer market commercial-type insurance coverage.

At the same time, the final rule clarifies that AHPs are not precluded from making distinctions between employer members in all circumstances. Several commenters asked the Department to confirm that paragraph (d)(4) of the Proposed Rule would not have prevented an AHP from charging employer members different premiums or contributions based on non-health factors, such as age, case size, industry, and gender. According to these commenters, many AHPs may fail without the ability to make these distinctions. Distinctions based on a factor other than a health factor (such as industry, occupation, or geography) are permitted, provided they are not directed at individual participants or beneficiaries based on a health factor of one or more of those individuals. This clarification is consistent with the HIPAA health nondiscrimination rules. AHPs could draw distinctions based on non-health attributes of a particular member employer (*e.g.,* the industry or region in which it operates) or based on non-health factors of a member employer's workforce (*e.g.,* adjusting the member employer's rate based on the employees' occupations within the member).[43]

New examples seven through nine in the final rule illustrate some circumstances under which an AHP could charge different premiums to different member employers while complying with paragraph (d)(4) of the final rules. These examples draw on the bona fide business classification principles set forth in the HIPAA health nondiscrimination rules.[44] For this reason, AHPs will be permitted to charge different premiums to different member employers in much the same way that a single large employer could charge different premiums to employees in different operating divisions, locations, or occupations within the company, but may not make distinctions in premiums that a single large employer could not make. The final rule thus continues to maintain the important distinction between rating approaches that are appropriate for AHPs and those that are used by commercial insurers.

New example 10 was also added to make clear that the wellness program provisions of the HIPAA health nondiscrimination rules at 29 CFR 2590.702(f) apply. The wellness program provisions permit plans to vary benefits (including cost-sharing mechanisms, such as a deductible, copayment, or coinsurance), and the amount of premium or contribution they require similarly situated individuals to pay, based on whether an individual has met the standards of a wellness program that satisfies the HIPAA health nondiscrimination rules. The HIPAA health nondiscrimination rules generally permit rewards of up to the 30 percent of the total cost of coverage under the plan, except that the percentage is increased by an additional 20 percentage points (to 50 percent) to the extent that the additional percentage is in connection with a program designed to prevent or reduce tobacco use. Moreover, the total cost of coverage for such purpose is generally determined based on the total cost of employee-only coverage under the plan. However, if, in addition to employees, any class of dependents (such as spouses, or spouses and dependent children) may participate in the wellness program, the plan may use the total cost of the coverage in which an employee and any dependents are enrolled. In either case, the cost of coverage is determined based on the total amount of employer and employee contributions towards the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage.

3. Working Owner Provision

a. Treatment of Working Owners as Employers and Employees

A number of commenters, including many associations and working owners (such as farm owners, realtors and court reporters) strongly supported the ''working owner'' provision of the Proposed Rule. These small business owners noted that while most Americans get their health coverage through an employer, self-employed professionals without common law employees are forced to purchase insurance in the more volatile individual insurance market, which tends to offer fewer choices at much higher costs. These commenters said that the working owner provision will offer sole proprietors and other self-employed individuals without employees more flexibility in insurance plan design, improved negotiating power, and lower cost health coverage. The Department agrees that allowing working owners such as sole proprietors to participate in AHPs covered by ERISA will give additional coverage options to certain individuals who may not currently have access to affordable health coverage. In the time since the Department first issued sub-regulatory guidance on bona fide groups or associations, increasing numbers of workers fall into these categories.[45] The

[43] Under HIPAA, employer members could then pass through the different premium charges to their employees based on these same non-health factors.

[44] As discussed earlier in this preamble, examples in the HIPAA health nondiscrimination rules of classifications that may be bona fide, based on all the relevant facts and circumstances, include full-time versus part-time status, different geographic locations, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations. Under an anti-abuse provision contained in the HIPAA health nondiscrimination rules at 29 CFR 2590.702(d)(3), however, a distinction between groups of individuals is not permitted if the creation or modification of an employment or coverage classification is directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries.

[45] The number and proportion of U.S. workers with at least some degree of self-employment or working-ownership has been increasing for some time. See for example: Emilie Jackson, Adam Looney, and Shanthi Ramnath, ''The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,'' U.S. Department of the Treasury, Office of Tax Analysis Working Paper 114 January 2017, *https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf;* Steven F. Hipple and Laurel A. Hammond, ''Self-employment In The United States,'' U.S. Bureau of Labor Statistics Spotlight on Statistics, March 2016, *https://*

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final rule is responsive to these changes in the composition of the workforce and to the needs of that workforce.

Other commenters opposed the working owner provision and argued that allowing working owners without employees to participate in AHPs, and even permitting an AHP to consist entirely of such individuals, would harm the small group and individual markets. These commenters expressed concern that such AHPs would be able to design and market plans with the result that a disproportionate number of healthy individuals might shift out of ACA-compliant individual markets and small group markets, resulting in increased rates and decreased choice in those markets. These commenters also argued that allowing working owners without employees to be considered ''employers'' under ERISA section 3(5) would upset existing DOL guidance and court decisions. Specifically, these commenters asserted that the Department has consistently taken the position in sub-regulatory guidance that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status (such as working owners and self-employed individuals without common law employees), and where control of the group or association is not vested solely in employer members, the group or association is not a group or association of employers within the meaning of ERISA section 3(5).

Some commenters also noted that the Proposed Rule would have permitted an AHP to consist entirely of working owners. They complained that it was an impermissible reading of ERISA for the Department to conclude that a plan with no common law employees was an employment-based plan that Congress intended to be regulated under ERISA. They cited the U.S. Supreme Court decision in *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992), as supporting that argument. They asserted that even where a working owner participates in an AHP with unrelated persons who are common law employees, there still is no employment-based nexus sufficient for that working owner to be treated as a plan participant.

Additionally, some commenters argued that the inclusion of ''working owners'' in the definition of ''employer'' is in conflict with the ACA. Specifically, they argued that Congress, in adopting the ACA, was aware of the existing case law and the Department's sub-regulatory guidance, and intended to retain that legal structure, as reflected in the ACA's inclusion of various protections for individual market participants. In particular, they point to ACA definitions of the individual, small group, and large group markets (42 U.S.C. 18024) that continue to provide that owners of businesses who have no employees cannot qualify for group coverage (although the ACA permitted small group coverage for groups that included only one employee other than the owner). They claim that adopting the working owner provision as part of the final rule would violate the ACA.

The Department disagrees. As described in the preamble to the Proposed Rule, the working owner provision is consistent with the Department's longtime recognition that working owners should be able to participate in ERISA-covered plans. *See* Advisory Opinion 99–04A (various ERISA and Code provisions ''reveal a clear Congressional design to include 'working owners' within the definition of 'participant' for purposes of Title I of ERISA.''). The Department also explained in the preamble to the Proposed Rule that the policy underlying its regulation at 29 CFR 2510.3–3, which excludes ''plans without employees'' from the definition of employee benefit plans covered by Title I of ERISA, was not to prevent working owners from participating in ERISA covered plans, but to confirm that ERISA does not mandate that a working owner incur costs to comply with reporting and disclosure, fiduciary, and enforcement provisions that serve no practical purpose in the context of a plan run by and covering only the working owner and spouse. In the case of an AHP, however, many or most of the affected employers and employees will not be directly involved in the administration of the AHP or the provision of benefits, and would benefit from ERISA's prudence and loyalty requirements for those administering the AHP, as well as such other protections as reporting and disclosure obligations and claims procedure requirements, and enforcement, in the same manner and to the same extent as participants in other ERISA plan arrangements.

The working owner provision in the rule also is consistent with longstanding conclusions the Department has reached that address the operational impracticalities of having a plan alternate between being ERISA and non-ERISA coverage as a result, for example, of a sole proprietor sometimes having common law employees and sometimes not based on business cycles, or a person who was a common law employee participating in the plan becoming an independent contractor of the member employer. *See, e.g.,* DOL Advisory Opinion 99–04A (acknowledging that nothing in the definition of Title I of ERISA precluded a working owner who had initially participated in a plan as an employee of a contributing employer from continuing to participate in the plan).

The Department also does not believe that the U.S. Supreme Court decision in *Darden* precludes it from including the working owner provision in this rule. The *Darden* Court did not address the validity of an agency rule promulgated after notice and comment defining ''employer'' or ''employee'' under ERISA. It also must be read in the context of the specific issue the Court was addressing (an attempt to disqualify an individual from receiving benefits) and the fact that the ''expectations'' test advocated by the plaintiff would have severely undermined ERISA purposes insofar as it would have ''severely compromise[d] the capacity of companies to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be.'' *Id.* at 327. In the subsequent case *Yates* v. *Hendon,* 541 U.S. 1 (2004), the Court clarified that ''[u]nder ERISA, a working owner may have dual status, *i.e.,* he can be an employee entitled to participate in a plan and, at the same time, the employer (or owner or member of the employer) who established the plan.'' *Id.* at 14.

Also, unlike the issue in *Darden,* there are other provisions of ERISA and related federal laws governing employee benefit plans that address the ability of working owners to act both as employer members of groups or associations and to participate as employee participants in AHPs. The varying treatment of working owners in Title I, Title II, and Title IV of ERISA establishes that the statute allows the Department, where appropriate, to treat a working owner as having dual status as an ''employer'' and ''employee.''[46]

www.bls.gov/spotlight/2016/self-employment-in-the-united-states/pdf/self-employment-in-the-united-states.pdf; and Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky, and James R. Spletzer, ''Measuring the Gig Economy: Current Knowledge and Open Issues,'' March 2, 2017, *https://aysps.gsu.edu/files/2016/09/Measuring-the-Gig-Economy-Current-Knowledge-and-Open-Issues.pdf.*

[46] Congress in HIPAA itself expressly provided for dual status treatment of partners and other working owners in defining group health plans covered by Part 7 of Title I of ERISA, which encompasses plans that cover only sole proprietors and spouses. *See* ERISA section 732(d) and PHS Act 2721.

Moreover, the Department's treatment of working owners as such does not violate the ACA. The PHS Act definitions (which were added to the PHS Act by HIPAA and later amended by the ACA and the Protecting Affordable Coverage for Employees Act [47] (PACE Act)) all specifically incorporate the ERISA definitions of employer, employee, and employee welfare benefit plan under ERISA sections 3(5), (3)(6), and 3(1), respectively, by reference. Under all of the ACA provisions, related to whether coverage is in the individual or group market, who is an employer (and who is an employee) is determined under ERISA section 3(5).

Accordingly, although a working owner without common law employees generally would not meet the PHS Act definition of a small employer (and, thus, would generally have to purchase insurance in the individual market, to the extent he desired coverage), such a working owner participating in a group or association that meets the ERISA section 3(5) definition of an employer would be counted as an employee of the single group or association employer, which allows him to obtain group health coverage through the AHP. The final rule makes explicit that working owners without common law employees may qualify as both an employer and as an employee for purposes of participating in an AHP. HHS has reviewed this final rule and has advised the Department that nothing in the PHS Act precludes the Department from amending its interpretation of the definition of an employer under ERISA section 3(5), and that it concurs with this interpretation of PHS Act section 2791(d)(6) in light of this final rule.[48]

b. Working Owner Definition and Verification of Working Owner Status

As in the Proposed Rule, the working owner criteria in the final rule are designed to ensure that a legitimate trade or business exists, because ERISA governs benefits provided in the context of a work relationship, as opposed to the mere marketing of insurance to individuals unrelated to their status as employees in a trade or business and any benefits they obtain through that status. Thus, a group or association would fall outside the purview of the final rule if it offered coverage to persons who are not genuinely engaged in a trade or business (*e.g.,* a group or association offering AHP coverage could not make eligibility for ''working owners'' turn on such de minimis ''commercial activities'' as merely registering with a ride sharing service or giving a ''customer'' a single on-demand ride for a fee, or knitting a single scarf to be offered for sale on the internet, with no requirement that the individual engage in the supposed ''trade or business'' ever again). The rule is intended to cover genuine work relationships, including self-employment relationships, not to permit individual coverage masquerading as employment-based coverage.

The Department also solicited comments on whether the criteria in the proposed standard were workable, whether any additional clarifications would be helpful to address issues relating to how working owners could reasonably predict whether they will meet the earned income and hours worked requirements, and whether AHPs should be required to obtain any evidence in support of such a prediction beyond a representation from the working owner.

The Proposed Rule's definition of ''working owner'' required that the individual either work at least 30 hours per week or 120 hours per month providing services to the trade or business, or have earned income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiary in the group health plan. The Proposed Rule also expressly would have allowed the group or association sponsoring the group health plan to rely on written representations from the individual seeking to participate as a working owner as a basis for concluding that these conditions are satisfied.

The Department received comments stating that the final rule should (1) retain requirements for minimum hours worked or income; (2) include a verification or audit process to confirm that participating working owners meet eligibility requirements and confirm that issuers may separately verify that working owners meet eligibility requirements as a condition of providing insurance coverage; and (3) clarify that issuers will be held harmless in the event of fraudulent enrollments of working owners.[49]

With respect to the verification process, some commenters said that the Proposed Rule would allow working owner enrollment in an AHP based on the mere attestation that the individual is actually a ''working owner,'' without a requirement that the AHP take steps to confirm this basic element of eligibility. Some commenters argued that such an attestation approach invites abuse and does not ensure an adequate employment nexus as required by ERISA. Those commenters suggested that, if the Department decided to retain the working-owners provision in the final rule, the Department should strengthen the verification requirements to ensure that these individuals are genuinely engaged in a trade or business and are performing services for the trade or business in a manner that is in the nature of an employment relationship. Other commenters suggested that the Department should include a requirement in the final rule that the working owners have been in business for a certain number of years before joining the AHP.

The Department notes as a preliminary matter, that the attestation provision was included in the Proposed Rule to reduce compliance burdens and potential liability exposure in the case of errors or failures. Plan fiduciaries have an obligation under ERISA to take steps to ensure that only eligible individuals participate and receive benefits under the plan. In carrying out that responsibility, ERISA section 404(a)(1)(B) requires fiduciaries to make eligibility determinations ''with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . .'' The Department agrees with commenters that a written representation from an individual that he or she meets the working owner conditions, without more, may be insufficient in some cases and even could lead to abuses. The Department revised the final rule to eliminate that provision. In its place, the final rule

[47] Public Law 114–60 (2015).

[48] One commenter stated that the PHS Act definitions supersede ERISA in that ERISA section 715(a)(2) provides that, to the extent any provision of ''this part'' conflicts with a provision of part A of title XVII of the PHS Act with respect to group health plans or health insurance issuers, then the provisions of the PHS Act shall apply. First, the reference to ''this part'' is to the provisions of Part 7 of ERISA, which does not include section 3(5) of ERISA. Moreover, the Department does not agree there is a conflict between the PHS Act definitions that cross-reference ERISA in any case.

[49] Some commenters urged that the final rule make clear that the AHPs are not required to include working owners in their plans and, therefore, are permitted to exclude working owners from their AHPs. The Department believes the final rule leaves groups or associations with substantial flexibility to determine their own membership requirements, including whether to include working owners. If groups or associations decide to include working owners they can also set criteria for working owner participants that are more stringent than the minimum criteria in the final rule, provided such criteria are consistent with the applicable nondiscrimination provisions under paragraph (d) of this final rule.

offers flexibility, but clarifies that plan fiduciaries have a duty to reasonably determine that the conditions of paragraph (e)(2) are satisfied and monitor continued eligibility for coverage under the AHP. The Department recognizes that there are various ways that fiduciaries could establish prudent processes for making working owner (and other eligibility) determinations, and it would not be appropriate for the Department to establish a one-size-fits-all process under this final rule. For instance, in the Department's view, a reasonable determination could involve the fiduciary relying on the accuracy of the information in written documentation or a sworn statement submitted by a working owner, without independent verification, unless something in the written document or sworn statement, or other knowledge of the fiduciary, would cause a reasonable fiduciary to question the accuracy or completeness of the documentation. Nothing in the final rule precludes groups or associations sponsoring AHPs from establishing their own, separate verification processes and requirements for working owners, or any employer or employee, as a condition of membership in the group or association. Similarly, health insurance issuers doing business with AHPs could establish a verification and monitoring requirement as part of the insurance policy or an administrative service arrangement with the AHP.

Commenters stated that the Proposed Rule's ''hours worked'' provision should be modified to take into account that many industries include workers that do not have a defined work schedule that results in a steady and predictable 30-hour work week or 120-hour month. One commenter noted that in its industry, over 15% of working owners work fewer than 30 hours per week and make less than $10,000. The commenter also suggested that the provision should also provide for workers who are reducing their hours, as they make a transition out of their former job. Another commenter suggested that the final rule include a ''variable'' worker provision allowing flexibility in making an hours-worked determination to address situations in which a working owner's time performing services for his business can often vary due to various industry, seasonal, and other business and market factors, and said it would be particularly useful to owners of start-up businesses and other newly formed entities. The Department agrees that the ''hours-worked'' criterion could be made more flexible without impairing the objective of limiting the provision to self-employed individuals who are genuinely engaged in a trade or business. Accordingly the final rule reduces the hours-worked provision to an average of 20 hours per week or 80 hours per month. A working owner could demonstrate this by evidence of a work history or a reasonable projection of expected self-employment hours worked in a trade or business. For this purpose, consistent with the principles of the gig economy, hours worked in a trade or business can be aggregated across individual jobs or contracts. Therefore, for example, an on-demand driver could aggregate hours driven using different ride assignment technology platforms. (Similarly, wages earned could be aggregated so that, for example, a pianist could aggregate money earned teaching piano lessons and money earned while giving performances.)

The Proposed Rule stated that the earned income standard and other group health eligibility provisions are informed by Federal tax standards, including section 162(l) of the Code, that describe conditions for self-employed individuals to deduct the cost of health insurance. (In the final rule, the term ''self-employment income'' replaces the term ''earned income'' that was used by the Proposed Rule.) [50] Accordingly, in applying the working owner provisions of paragraph (e) of the final rule, AHPs may rely on the definitions of ''wages'' and ''self-employment income'' in Code sections 3121(a) and 1402(b) (but without regard to the exclusion in section 1402(b)(2)), respectively.

Concerns about the potential liability of issuers with respect to ineligible individuals wrongly treated as working owners would invariably depend on the particular facts and circumstances involved, including contractual provisions establishing the parties' respective rights and obligations. Accordingly, the final rule does not include any provision on that subject.[51]

Section 2510.3–5(e)(2)(iii) of the Proposed Rule would have provided that an individual would not be treated as a ''working owner'' if the individual was eligible to participate in any subsidized group health plan maintained by any other employer of the individual or the individual's spouse. Many commenters opposed this provision. Some argued that coverage available through a separate employer or through a spouse's employer may not be the most affordable option for a family, the AHP coverage may in fact provide more comprehensive coverage than that made available by a separate employer, and that the provision in the Proposed Rule would result in a ''marriage penalty'' that is not applied to other employers or their employees. These commenters also noted that this requirement would be very hard to enforce and would require the fiduciary of the AHP to establish a verification process that would add unnecessary complexity and burden to the working-owner provision. For example, commenters said that they did not believe the Department intended that eligibility for ''excepted benefits'' would be disqualifying. Excepted benefits generally provide only limited health coverage (*e.g.,* dental-only coverage, vision-only coverage, certain employee assistance plans, or fixed indemnity coverage) or are generally not primarily health insurance coverage (*e.g.,* accidental death and dismemberment or automobile coverage).[52] Those commenters said that if ''excepted benefits'' coverage was not disqualifying, administrators of AHPs would not only have to monitor for group health coverage but would also have to make determinations on whether the coverage was limited to excepted benefits. Other commenters pointed out that the Proposed Rule did

[50] In paragraph (e)(2)(iii)(B) of the final rule, the words ''wages or self-employment income'' replace ''earned income'' to conform this paragraph to language in paragraph (e)(2)(ii) of the final rule. This change is to eliminate the use of inconsistent terminology in these two paragraphs and to avoid confusion.

[51] Some commenters asked the Department more generally to address the liability of the respective parties to the AHP for violations of the nondiscrimination provisions in the rule, general ERISA reporting and disclosure requirements and fiduciary rules, Code section 4980H and the related Code sections 6055 and 6056 reporting requirements, Form W–2 reporting, COBRA compliance, and ''all of the other responsibilities that come with the maintenance of a single large employer plan.'' With regard to the provisions under the Department's jurisdiction, the Department does not believe this document is the appropriate place to address these questions because they also will invariably depend on the application of the particular law involved and the particular facts and circumstances of each case. The Code provisions listed are under the jurisdiction of Treasury and the IRS and are outside the scope of this rulemaking; stakeholders should refer to the relevant Code sections and guidance thereunder.

[52] *See* ERISA section 733. *See also* Preamble to Health Insurance Portability for Group Health Plans; Interim Rules, explaining that there are four types of excepted benefits and that ''category 1'' benefits, for example, automobile insurance, liability insurance, workers compensation and accidental death and dismemberment coverage, are generally not ''health insurance coverage'' and are excepted in all circumstances. The other three categories are considered health insurance (for example, limited scope dental and vision benefits, employee assistance programs) and are excepted only if certain conditions are met. 62 FR 16894, 16903 (April 8, 1997).

not include any guidance on how administrators would address situations when a working owner or a working owner's spouse is offered or loses subsidized coverage during the middle of the year.

After consideration of the public comments, the Department agrees that the condition is not a good indicator of whether a working owner is involved in a legitimate trade or business, as opposed to engaged in de minimis ''commercial activities'' that cannot fairly be classified as meaningful self-employment. Accordingly, the subsidized health coverage provision in the Proposed Rule is not adopted as part of the final rule.

4. Essential Health Benefits and Comprehensive Coverage Requirements

Many commenters opposed the Proposed Rule on the grounds that because AHPs will generally be insured in the large group market or be self-insured, AHPs would not be subject to the requirement to provide EHBs, which only applies to non-grandfathered individual market and small group market insurance coverage. Commenters raised the possibility that AHPs would seek to deliver low premiums by providing benefits that are not as comprehensive as other coverage options available to working owners and small employers. They asserted that the Proposed Rule could lead to adverse selection in the individual and small group markets because healthier groups and working owners could be attracted to AHPs providing minimal benefits because of the lower costs, while less healthy groups and working owners would seek out more robust coverage in the individual and small group markets. This could lead to less stable risk pools in the individual and small group markets, rising premiums, and cascading effects that could leave certain markets without any active health insurance issuers. Further, they stated that AHPs offering comprehensive benefits may also be disadvantaged, as healthy members could leave to join lower-cost AHPs (and return when their medical needs increase). Commenters noted that certain populations with specific needs, such as those with disabilities, could be disproportionately affected if their coverage does not include a robust level of benefits. Some of these commenters suggested that in order to mitigate these effects, the Department should require AHPs to provide EHBs or some other minimum level of benefits, or require them to provide ''minimum value'' within the meaning of Code section 36B(c)(2)(C)(ii) and 26 CFR 1.36B–6.[53]

Other commenters acknowledged concerns that AHPs may provide inadequate benefits but did not believe that legitimate membership organizations would risk their goodwill and reputation by offering such health plans. Instead, they argued that economies of scale would enable AHPs to offer more comprehensive coverage to their members than they would be able to purchase on their own. Another commenter noted that even though self-insured plans and large group market policies are not required to provide EHBs, most do, in fact, provide comprehensive coverage.

The Department declines to adopt commenters' recommendations to make the provision of EHBs in an AHP a condition for a group or association to qualify as bona fide. Such a mandate would run contrary to the goal of leveling the playing field between small employers in AHPs, on the one hand, and large employers, on the other, who generally are not subject to the EHB requirements. Furthermore, such a mandate could reduce AHPs' flexibility to tailor coverage to the particular needs of the members of the group or association offering the benefits, and thereby reduce access to AHPs by making them less attractive options for providing affordable coverage. For this reason, the Department also declines to require the provision of minimum value coverage as a condition for a group or association to qualify as bona fide. The ability to design AHP benefit packages and set cost-sharing requirements without the burden of certain Federal restrictions is critical to enabling AHPs to provide an additional, more affordable coverage option to small businesses and working owners who may otherwise have been unable or unwilling to obtain higher-priced coverage. Moreover, the Department believes that concerns regarding adverse selection as result of AHPs not providing comprehensive coverage are overstated because we agree with those commenters who asserted that AHPs are not likely to offer relatively low levels and scope of benefits, which could jeopardize their relationship with their members and because other federal and State coverage requirements may apply.

The Department notes that for those AHPs that choose to offer coverage to employers that are applicable large employers subject to the employer shared responsibility provisions of Code section 4980H, the participating applicable large employers face the possibility of having to make an employer shared responsibility payment if the AHP does not provide minimum value coverage.[54] AHPs also remain subject to Federal and State laws other than EHB requirements that require the provision of certain benefits. For example, AHPs must provide coverage for certain recommended preventive services without the imposition of cost-sharing.[55] These services include:

(1) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force (Task Force) with respect to the individual involved;

(2) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention (Advisory Committee) with respect to the individual involved. A recommendation of the Advisory Committee is considered to be ''in effect'' after it has been adopted by the Director of the Centers for Disease Control and Prevention. A recommendation is considered to be for routine use if it appears on the Immunization Schedules of the Centers for Disease Control and Prevention;

(3) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA); and

(4) With respect to women, evidence-informed preventive care and screening provided for in comprehensive guidelines supported by HRSA (not otherwise addressed by the recommendations of the Task Force).

In addition, Title VII of the Civil Rights Act (as amended by the Pregnancy Discrimination Act and administered by the Equal Employment Opportunity Commission (EEOC)) generally provides that pregnancy-related expenses for employees and their spouses must be reimbursed in the same manner as those incurred for other medical conditions.[56]

[53] Unless otherwise specified, the Department interpreted commenters' use of ''minimum value'' to refer to the term as used in Code section 36B(c)(2)(C)(ii) and 26 CFR 1.36B–6, which generally means that the percentage of the total allowed costs of benefits provided under the plan is greater than or equal to 60 percent, and that the plan also provides substantial coverage for inpatient hospitalization and physician services. *See also* 45 CFR 156.145.

[54] *See* Code sections 36B and 4980H.

[55] See PHS Act section 2713, which is incorporated in ERISA section 715 and Code section 9815.

[56] 29 CFR 1604.110(b); EEOC Enforcement Guidance: Pregnancy and Related Issues, No. 915.003 (June 25, 2015), available at *https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm*. Moreover, the protections of the Newborns' and Mothers' Health Protection Act contained in section 9811 of the Code, 711 of ERISA, and section 2725 of the Public Health Services Act generally provides, if plans cover

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Many AHPs, or the insurance coverage that insures them, will also be subject to State benefit mandates. The State of Pennsylvania, for example, requires policies issued in the large group market to cover in-patient and out-patient services for severe mental illness, inpatient and outpatient services for substance use disorders, autism services, childhood immunizations, and mammography.[57] These types of State mandates may apply to fully-insured AHPs through the health insurance policies they purchase. In addition, under ERISA's provisions saving State regulation of MEWAs from preemption, States may also extend benefit mandates to self-insured AHPs.

Some commenters also expressed concern that the maximum out of pocket limit (MOOP) under PHS Act section 2707(b) (incorporated into ERISA section 715) and the prohibition of lifetime and annual dollar limits under PHS Act section 2711 (also incorporated into ERISA section 715) only apply with respect to EHBs. These commenters were generally concerned that in the absence of these protections, AHPs would impose burdensome cost-sharing requirements or annual and lifetime limits for critical benefits, such as mental health care, substance-use disorder services, prescription drugs, and maternity services, in an effort to drive down costs, as had happened in the pre-ACA insurance market.

While group health plans that are offered in the large group market or are self-insured are exempt from the requirement to offer EHBs, all non-grandfathered group health plans are subject to the MOOP and the prohibition on annual and lifetime dollar limits on EHBs. Accordingly, to the extent a plan covers EHBs, the MOOP and annual and lifetime dollar limits provisions apply.[58] As such, if an AHP covers a benefit that would be considered an EHB, the AHP must count an individual's out-of-pocket spending for in-network provision of that benefit toward the MOOP; any EHBs in excess of the MOOP must be covered without cost-sharing.[59] Similarly, if an AHP covers any benefits that would be considered an EHB, all such benefits must be covered without any annual or lifetime dollar limit.

5. Application of ERISA Group Health Plan Requirements to AHPs

An AHP sponsored by a bona fide group or association under this final rule is a group health plan and an employee welfare benefit plan under ERISA. Accordingly, the AHP is subject to all ERISA provisions applicable to group health plans and employee welfare benefit plans, including Title I of ERISA.

Some commenters expressed concerns about the Proposed Rule on the broad assumption that AHPs would be exempt from various consumer protections included in ERISA and other Federal laws, including changes made by the ACA, and that the rule would lead to a diminution in rights and protections for AHP participants. As the Department explained in the Proposed Rule, the primary purpose of allowing more flexibility for groups or associations to sponsor AHPs is to expand access to affordable health coverage, especially among small employers and working owners—many of whom currently do not provide health benefits to their workers—by removing undue restrictions on the establishment and maintenance of AHPs. However, as noted above, an AHP offered by a bona fide group or association under this final rule remains a group health plan under ERISA and participants in AHPs are entitled to the same protections under ERISA that are available to participants in single employer group health plans.

Some commenters requested that the Department provide clarification with respect to the application of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) and the COBRA continuation coverage requirements. Specifically, because these requirements include an exemption for employers with a certain number of employees, commenters inquired whether it was the total number of employees of the separate participating member-employers or the number of employees of employers, collectively, participating in the bona fide group or association that matters for purposes of determining whether the requirements apply to an AHP.

Generally, MHPAEA requires that financial requirements and treatment limitations for mental health and substance use disorder benefits must be no more restrictive than those placed on medical and surgical benefits. MHPAEA provides an exemption for group health plans for ''any plan year of a small employer.'' [60] Under ERISA section 712(c)(1)(B), a small employer is defined as an employer who employed between 2 (or 1 in the case of an employer residing in a State that permits small groups to include a single individual) and 50 employees on business days during the preceding calendar year. As one commenter observed, because the ERISA provisions of MHPAEA provides a definition of a ''small employer'' that makes no reference to the separate definition of an ''employer'' under ERISA section 3(5), some AHP operators may try to argue that the definition refers to the common law definition of employer, rather than the definition in ERISA section 3(5), and that an AHP is, therefore, exempt if all the participating employer-members meet the definition of ''small employers.''

MHPAEA amended ERISA, the Code, and the PHS Act and is subject to joint interpretive jurisdiction by the Departments of Labor, the Treasury, and HHS (collectively, the Departments).[61] For purposes of ERISA, the Department interprets the term ''small employer,'' as specified in ERISA section 712(c)(1)(B) to mean an ''employer'' of a certain size, using the ERISA definition of ''employer'' in section 3(5). The Department has consulted with HHS, which has advised the Department that it uses the same interpretation for purposes of applying the MHPAEA small employer exemption in the PHS Act.[62] Accordingly, for a bona fide group or association, the determination of whether MHPAEA applies under ERISA and the PHS Act depends on the size of the AHP, which generally would

hospital stays in connection with childbirth, that plans must provide hospital stays of at least 48 hours (or 96 hours in the case of a caesarian section) following delivery.

[57] *See* 40 P.S. sections 764g, 908–2, 764h, 3502, 764c. (For a list of state benefit mandates, *see generally* the Center for Consumer Information & Insurance Oversight Information on Essential Health Benefits (EHB) Benchmark Plans available at *https://www.cms.gov/cciio/resources/data-resources/ehb.html;* or see *http://www.ncsl.org/research/health/state-ins-mandates-and-aca-essential-benefits.aspx#State_EHB_2016*).

[58] For more information regarding the application of the MOOP and prohibition of lifetime and annual limits for plans not subject to the requirement to provide EHBs, *see* 29 CFR 2590.715–2711(c); *See also* Q10 of Frequently Asked Questions on Essential Health Benefits Bulletin, available at *https://www.cms.gov/CCIIO/Resources/Files/Downloads/ehb-faq-508.pdf.*

[59] *See* Frequently Asked Questions about Affordable Care Act Implementation, Part XII, Q2 (February 22, 2014), available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xii.pdf* and *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs12.html* and Frequently Asked Questions about Affordable Care Act Implementation, Part XVIII Q2, (January 9, 2014), available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xviii.pdf* and *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs18.html.*

[60] ERISA section 712(c)(1).

[61] *See* HIPAA section 104. *See also* Memorandum of Understanding 64 FR 70164 (Dec. 15, 1999).

[62] The Code does not reference the ERISA definition of employer. For purposes of determining applicability of, and potential for excise taxes under, the Code, interested parties should contact the Internal Revenue Service.

be based on the number of employees employed in the aggregate during the preceding calendar year by the employer members of the bona fide group or association. This interpretation is consistent with the approach described earlier in this preamble of treating AHPs like large employers.

COBRA provides for a temporary continuation of group health coverage that would otherwise be lost due to certain life events, but does not apply to a group health plan for any calendar year if ''all employers maintaining such plan normally employed fewer than 20 employees'' on a typical business day during the preceding calendar year.'' [63] Commenters asked for clarification on how the law would apply to those employers with fewer than 20 employees that joined a bona fide group or association whose member employers, collectively, employ 20 or more employees. The coverage provisions of the COBRA continuation coverage requirements are within the interpretive jurisdiction of Treasury and the IRS. The Department will consult with Treasury and the IRS and anticipates future guidance on the application of COBRA to such plans.

6. Application of Federal Laws Other Than ERISA to AHPs

a. Application of Federal Healthcare Laws

Numerous commenters requested that the Department provide clarifications with respect to the application of a wide variety of Federal laws and regulations that are not grounded in ERISA but may implicate or apply to AHPs. Examples include the employer shared responsibility provisions, premium tax credit eligibility rules, network adequacy standards, the Pregnancy Discrimination Act of 1978, other federal nondiscrimination laws, and Medicare secondary payer rules.

The Department considers these comments to be beyond the scope of this rulemaking. In setting out additional criteria for determining whether an employer group or association can act as an employer within the meaning of ERISA section 3(5) for purposes of sponsoring a single group health plan for its employer-members, the intent of this final rule is to expand the number of organizations that are eligible to sponsor an AHP. However, many AHPs currently exist and therefore the interaction between AHPs and the various laws and regulations discussed by these commenters are not a consequence of this rule. Further, these laws and regulations are not within the Department's interpretive jurisdiction and therefore any guidance provided would be outside the scope of its regulatory authority.

b. Use of Voluntary Employees' Beneficiary Associations (VEBAs)

A VEBA is a type of tax-exempt organization that could be used by employee welfare benefit plans, including multiple employer welfare benefit plans, to hold plan assets.[64] The VEBA rules are administered by the IRS and are outside the interpretive jurisdiction of the Department. Some commenters argued that conditions in the Proposed Rule conflict in several ways with IRS guidance regarding the use of VEBAs, and expressed concern that the differences could limit the expansion of AHPs. The commenters noted in particular that VEBA regulations may require that membership consist of individuals who are employees and who have an employment-related common bond, and the way for a fund covering employees who work for multiple employers to meet this requirement is for the employees participating in a VEBA to work for employers in the same line of business in the same geographic locale. This differs from the Proposed Rule, which allowed employer groups to be in the same industry or the same geographic locale. They also noted that an organization including working owners who did not have common law employees may not meet VEBA requirements under which no more than 10% of the VEBA members can be sole proprietors and other working owners. The commenters requested that the Department work with the IRS on harmonizing the VEBA requirements with those of AHPs. Commenters also suggested that IRS issue guidance treating membership in a group or association sponsoring an AHP pursuant to the Department's rule as similar to membership in a labor union by employees, and to regard employer participation in the group or association as having a sufficient employment-related common bond to use a VEBA trust in connection with the AHP.

The Department acknowledges that applicable IRS guidance regarding the use of VEBAs sets out different criteria for employer groups and associations that seek to establish and use those arrangements than this final rule sets out for sponsorship of a group health plan under ERISA. Although VEBAs are often a convenient way for multiple employers to fund certain employee welfare benefits in a tax-advantaged environment, VEBAs are not the sole vehicle for funding of multiple employer plans. To the extent that an employer group or association that offers an AHP chooses to use a VEBA in connection with the AHP, the arrangement must comply with applicable VEBA requirements. For more information on the use of VEBAs and the process for obtaining an IRS determination on VEBA status under Code section 501(c)(9), *see* 26 CFR 1.501(c)(9)–1 through –8, and Revenue Procedure 2018–5 (or latest update).

c. AHPs and Joint Employer Status Under Federal Laws

Commenters requested that the Department should include language to ensure that employers, including franchisors whose franchisees participate in an AHP, are not considered joint employers under ERISA or the Fair Labor Standards Act (FLSA). Similarly, commenters requested clarification that a person or entity who contracts with individuals as independent contractors does not, by participating in an AHP with independent contractors, facilitating formation or operation of an AHP by independent contractors, or promoting an AHP for those independent contractors, become the employer of the independent contractors. The commenters argued that the question of who is an ''employer'' or ''joint employer'' carries significant legal consequences because of the increasing prevalence of independent contractor and other third-party relationships in today's workplace, such as those between a business and a contractor's employees, or between a corporate parent and its franchisees' workers. The commenters said that the legal test for employment or joint employment under the FLSA has become less clear, with many tests for employer or joint employer liability looking to a variety of factors. There may also be increased risk of joint liability under ERISA section 510 for a franchisor. Commenters claimed that the potential increased risk for expanded employer or joint-employer liability could limit the expansion of AHPs. Some commenters requested, on similar grounds, that we clarify that franchisors assisting in the start-up and ongoing administration of an AHP involving their franchisees and entities providing similar assistance in connection with AHPs for independent contractors would not be grounds for finding joint employer status.

[63] ERISA section 601.

[64] *See* Code section 501(c)(9). An organization described in Code section 501(c)(9) is exempt from tax under Code section 501(a).

The employer group or association provision in ERISA section 3(5) merely authorizes separate employers to maintain a single plan to provide benefits to their separate employees. It does not impose any independent employer obligation upon businesses with respect to the employees of other employers that obtain benefits under the plan. Participation in an AHP does not involve any agreement between employers to share employee services, or any sharing of direct or indirect control of an employee or independent contractor or his or her employment. By participating in an AHP, the individual participating employers also are not acting directly or indirectly in the interest of the other individual employers in relation to an employee, or in the interest of any independent contractor who may participate in the AHP as a working owner. Although the group itself may be acting in the interest of the participating employers in sponsoring the AHP, that is not analogous to one individual employer acting in the interest of another individual employer with respect to an employee or in the interest of an independent contractor. The individual employers are not, by reason of participating in the AHP, involved in hiring, firing, disciplining, setting rates or methods of pay, maintaining records, controlling, or directing and supervising the work of the other participating employers' employees or of independent contractors. Therefore, nothing in the final rule is intended to indicate that participating in an AHP sponsored by a bona fide group or association of employers gives rise to joint employer status under any federal or State law, rule, or regulation. The final rule also should not be read to indicate that a business that contracts with individuals as independent contractors becomes the employer of the independent contractors merely by participating in an AHP with those independent contractors, who would participate as working owners, if applicable, or promoting participation in an AHP to those independent contractors, as working owners.

7. ERISA Preemption and State Regulation of AHPs

The Department received many comments, including from State insurance regulators, expressing the view that it is very important that the final rule not undermine or impair the current ERISA preemption provisions that broadly permit States to regulate AHPs under State insurance laws and regulation. The commenters expressed concern about a history of abuses involving unlicensed entities that compete with State-licensed health insurance issuers, but are exempt from many of the solvency standards and consumer protections that apply to traditional issuers in the State-regulated individual and small-group markets. These commenters argued that AHPs operating in multiple States should be required to abide by the regulations of each of the States in which the plan is providing health care coverage, and not just the State in which the group or association or their AHP is deemed to be domiciled.

Commenters expressed concerns about potential abuses that could arise if AHPs were exempt from consumer protections that apply to entities marketing and selling insurance in their States. The commenters cited cases of healthcare arrangements purporting to be AHPs that left State residents with unpaid claims for their healthcare when the purported AHP failed, or the operators of the arrangement left the State. Some commenters stated that the States have a relatively strong oversight record and existing mechanisms to protect against fraud. These commenters noted that State officials and the insurance agents they regulate serve as ''eyes on the ground'' to detect and report fraudulent schemes in their local markets. Another commenter suggested that the final rule should distinguish self-insured AHPs, which have historically presented problems in the market, from fully-insured AHPs, which are backed by licensed health insurance issuers and subject to oversight by State insurance commissioners and HHS. A few commenters asked that the Department promulgate a rule under ERISA section 520 which authorizes the Department to make persons operating AHPs subject to otherwise preempted State insurance laws to prevent fraud and abuse, before we finalize the AHP regulation, in order to give the Department an additional oversight and enforcement tool.

The main point of these commenters was that the Department should make it clear that the final rule in no way limits the ability of States under State insurance laws to regulate AHPs, health insurance issuers offering coverage through AHPs, and insurance producers marketing that coverage to employees. In particular, they requested that the Department make a clear and unequivocal statement that States retain full authority to set and enforce solvency standards for all AHPs, and comprehensive licensure requirements and oversight for non-fully-insured AHPs including benefit, rating and consumer protection standards, and laws specifying who is eligible to apply for licensure.

The Department agrees that the final rule does not modify or otherwise limit existing State authority as established under section 514 of ERISA. If an AHP is fully insured, ERISA section 514(b)(6)(A)(i) provides that State laws that regulate the maintenance of specified contribution and reserve levels (and that enforce those standards) may apply, and State insurance laws are generally saved from preemption when applied to health insurance issuers that sell policies to AHPs and when applied to insurance policies that AHPs purchase to provide benefits. In addition, in the case of fully-insured AHPs, it is the view of the Department that ERISA section 514(b)(6) clearly enables States to subject AHPs to licensing, registration, certification, financial reporting, examination, audit and any other requirement of State insurance law necessary to ensure compliance with the State insurance reserves, contributions and funding obligations. Furthermore, under this framework, if an AHP established pursuant to this final rule is not fully insured, then, under section 514(b)(6)(A)(ii) of ERISA, any State law that regulates insurance may apply to the AHP to the extent that such State law is ''not inconsistent'' with ERISA.

Some commenters oppose continued application of State insurance laws, stating that navigating the varying or contradictory standards of multiple States has made it difficult for AHPs to actually operate across State lines. For example, some expressed concern about State MEWA statutes that prohibit participation across different industries, prohibit self-employed individuals from being covered by MEWAs, and prohibit MEWAs from operating in the State if established solely for the purpose of obtaining or providing insurance. Some commenters noted that several States currently prohibit AHPs from self-insuring. These commenters say that the varying State laws prevent AHPs from providing uniform insurance and healthcare coverage across State lines. Some of these commenters support broader Federal oversight and regulation of self-insured AHPs rather than joint Federal-State regulation.[65] Others

[65] One commenter recommended that the Department establish a federal oversight board to, among other things, review and approve benefit designs for AHPs and to establish caps on annual premium rate increases. According to this commenter, such a federal board also could provide notice to participants if there are material changes in benefit levels or coverage under the AHP. A different commenter recommended that the Department establish a high-risk pool or other reinsurance mechanism to provide support to the

support applying only the laws of one State, such as the State in which the AHP is domiciled.

Several commenters asserted that the Proposed Rule was unclear or in direct conflict with State law, such as group size calculations used to determine the applicability of pooling, loss ratio, community rating, and essential health benefit requirements. These commenters requested that the Department render an opinion, or opinions, as to whether such laws (such as benefit mandates, rating rules, and licensing and registration requirements, among others) would be superseded by or because of the final rule.

The Department declines the invitation of the commenters to opine on specific State laws. The provisions in ERISA section 514 are clear and well established, and both the Department's interpretations and federal court rulings generally have upheld such State laws when they have been challenged as preempted by ERISA. The final rule is not the appropriate vehicle to issue opinions on whether any specific State law or laws would be superseded because of the final rule.

Several commenters recommended that the final rule establish competency standards for persons offering or operating AHPs, and minimum funding requirements for self-insured AHPs. A few commenters encouraged the Department to require a criminal background check of each fiduciary of any self-insured AHP, and a cap on broker compensation for self-insured AHPs. Other commenters suggested that the final rule require self-insured AHPs to meet risk-based capital requirements to ensure the group or association has the capital necessary to support overall business operations, and to engage an insurance underwriter.

As noted above, some commenters called for an increased federal role in regulating AHPs as an alternative to state insurance regulation. One commenter stated that while the states should be responsible for enforcement of standards provided in the final rule, the Department should have the authority to intervene. Other commenters emphasized the need for increased coordination between the states and DOL to evaluate the financial resources of AHPs and protect consumers against fraud and abusive practices. Other commenters noted that DOL should take enforcement action against AHPs that fail to file timely and complete M–1 forms with the Department, and one commenter suggested that all self-insured AHPs should be required to register with the federal government.

Among the commenters arguing for an increased federal role, some urged the Department to use its authority under section 514(b)(6)(B) of ERISA to exempt AHPs from aspects of State insurance law. Most of these commenters focused on the potential benefits of uniform standards, and the need for interstate AHPs to be free of potentially overlapping, cumbersome, different, or contradictory patchworks of regulations that, they asserted, could be so detrimental to the operation of multi-state AHPs as to prevent them. Some commenters suggested that the Department could replace state protections by crafting an exemption with additional federal consumer protections that AHPs must comply with as a condition of the exemption.

ERISA section 514(b)(6)(B) provides that the Department may prescribe regulations under which non-fully-insured MEWAs that are employee benefit plans may be granted exemptions, individually or by class, from certain State insurance regulations. ERISA section 514(b)(6)(B) does not, however, give the Department unlimited exemption authority. Significantly, ERISA section 514(b)(6)(B) does not give the Department any authority to exempt any fully-insured AHP from any state insurance laws that can apply to a fully-insured MEWA plan under ERISA section 514(b)(6)(A). Furthermore, section 514(b)(6)(B) does not allow the Department to exempt self-insured AHPs from state insurance laws that can be applied to fully-insured AHPs, *i.e.,* laws related to reserve and contribution requirements that must be met in order for the fully-insured MEWA plan to be considered able to pay benefits in full when due, and provisions to enforce such standards. Notwithstanding these limitations, ERISA section 514(b)(6) provides a potential future mechanism for preempting state insurance laws that go too far in regulating non-fully-insured AHPs in ways that interfere with the important policy goals advanced by this final rule. But, as noted in the Proposed Rule, doing so at this time lies outside the scope of this proceeding.

While no state is required by Federal law to take legislative action in order to regulate AHPs, many states regulate AHPs and other MEWAs under their general insurance statutes while others have chosen to adopt MEWA-specific insurance laws. For example, under some state insurance laws, a self-insured MEWA is subject to the state's general insurance laws and regulations applicable to licensed health insurance issuers unless the state has adopted a specific MEWA licensing law. To guard against fraud and abuse, a number of States provide that self-insured MEWAs must be licensed, registered, have a minimum number of participating employers, obtain an actuarial opinion that the MEWA can meet promised benefits and require that the MEWA keep a minimum level of reserves.[66] DOL anticipates close cooperation with State regulators to guard against fraud and abuse.

8. ERISA Fiduciary Status and Responsibilities of AHP Sponsors

Several commenters asked the Department to provide guidance on fiduciary liabilities and responsibilities of a bona fide group or association that sponsors an AHP and clarify that any individual charged with the operation or management of an AHP is considered a fiduciary under ERISA. They stressed that it is important for groups and associations that sponsor an AHP to understand that they are obligated to protect the interests of the participants of the plan, and may be held individually liable if they fail to do so. Some of the commenters also requested the Department to clarify who will be responsible for ensuring compliance with ERISA and other federal requirements, such as COBRA compliance, ERISA reporting and disclosure requirements, compliance with certain requirements under the Code, compliance with the nondiscrimination requirements under paragraph (d) of this final rule and all of the other responsibilities that come with the maintenance of a single large employer plan.

An AHP offered by a bona fide group or association under the final rule is subject to all of the ERISA provisions applicable to group health plans, including the fiduciary responsibility and prohibited transaction provisions in Title I of ERISA. The Department notes that the bona fide group or association that sponsors the AHP assumes and retains responsibility for operating and administering the AHP, including

individual and small group markets that would be affected by the final rule. The Department lacks the statutory authority to establish an oversight board of the type described by the commenters. It also lacks the statutory authority to establish a high-risk pool or other reinsurance mechanism. Further, even if such steps were within the Department's authority, the suggested actions are beyond the scope of this rulemaking, and at least some of the concerns underlying the comments may be better addressed through application of existing State insurance laws or amendments of State insurance laws.

[66] *See e.g.,* CA Ins. Code, Art. 4.7; TX Ins. Code sec. 3.95–2; Rev. Code of WA sec 48.125.020.

ensuring compliance with these requirements.[67]

Several commenters requested that the Department clarify that all notice requirements applicable to ERISA group health plans apply to AHPs, including the Summary of Benefits and Coverage (SBCs) and Summary Plan Description (SPDs), as well as notices under FLSA section 18B, which is imposed on the employer, rather than the plan. Commenters also requested that the Department require AHPs to disclose to employer groups and potential beneficiaries if they do not provide specific consumer protections or benefits the covered customers would have otherwise received in the traditional insurance market, including a comparison to EHBs, whether dollar limits apply to any benefit, whether the plan provides minimum value, and the right to receive coverage on the health insurance Exchanges. Other commenters requested that the Department coordinate with State regulators regarding the content of any notices to avoid confusion and excessive administrative costs.

As group health plans, AHPs are subject to the disclosure requirements of Title I of ERISA. This includes the requirement to provide an SPD, Summary of Material Modifications (SMMs) and Summaries of Material Reductions in Covered Services or Benefits (SMRs).[68] The AHP's SPD must disclose, in a manner calculated to be understood by the average plan participant, the participants' rights and obligations under the plan. The SPD must include, among other requirements, a description of the cost-sharing provisions, limits on benefits, and the extent to which preventive services, prescription drugs, and medical tests, devices and procedures must be covered under the plan.[69] The AHP must also furnish a Summary of Benefits and Coverage and Uniform Glossary under PHS Act section 2715, as incorporated into ERISA by section 715. PHS Act section 2715 requires plans and issuers to provide to applicants, enrollees and policyholder or certificate holders a Summary of Benefits and Coverage (SBC) that describes the benefits and coverage under the plan. The current SBC template requires a plan to disclose whether it meets minimum value standards, how it covers benefits, including prescription drugs, maternity care, mental health and substance abuse services, and any limitations, exceptions and other important information (such as dollar limits).

The AHP also must describe services that it does not cover or excludes. The SBC must be provided to participants and beneficiaries as part of any written application materials distributed to participants and beneficiaries, or (if no written application materials are distributed) no later than the first date a participant is eligible to enroll in coverage. This ensures that participants and beneficiaries have the opportunity to familiarize themselves with the terms of their coverage before they enroll. The SBC must also be provided by the first day of coverage if there are changes; upon special enrollment; upon renewal, reissuance or reenrollment (either when application materials are provided or no later than 30 days prior) and within seven business days upon request.[70] The AHP is subject to a fine if it fails to provide the SBC as required by law. 26 CFR 54.9815–2715(e); 29 CFR 2590.715–2715(e); and 45 CFR 147.200(e). Similarly, those employers who participate in an AHP and are subject to the FLSA must provide a notice at the time of hiring notifying an employee of the existence of an Exchange, the availability of premium tax credits if the employer plan fails to cover 60% of the total allowed costs and that if the employee purchases a qualified health plan through the Exchange, he or she may lose the employer contribution to any health benefit plan, which may be excludable from income. FLSA section 18B. As ERISA-covered group health plans, AHPs are subject to numerous other disclosure requirements.[71]

In addition, AHPs are MEWAs and, as such, are subject to existing federal regulatory standards governing MEWAs. Sponsors of AHPs will need to exercise care to ensure compliance with those standards, including those established in the ACA.

The ACA also expanded reporting and required registration for MEWAs with the Department. MEWA registration requirements require plan and non-plan MEWAs to file Form M–1s under ERISA section 101(g) and 29 CFR 2520.101–2. All AHPs under the final rule will be MEWAs and, as MEWAs, required to file the Form M–1 regardless of the plan size or type of funding. Further, all employee welfare benefit plans that are MEWAs subject to the Form M–1 requirements, including AHPs under the final rule, will be required to file the Form 5500, regardless of the plan size or type of funding. In addition, the ACA added new criminal penalties under ERISA section 519 for any person who knowingly submits false statements or makes false representations of fact about the MEWA's financial condition, the benefits it provides, or its regulatory status as a MEWA in the marketing of a MEWA. The ACA also amended ERISA section 501(b) to impose criminal penalties on any person who is convicted of violating the prohibition in ERISA section 519.

Thus, as ERISA-covered plans and MEWAs, AHPs will be subject to comprehensive disclosure requirements. In light of these existing requirements, the Department does not believe adding new, and potentially redundant, disclosure requirements on AHPs of the sort suggested by some commentators is necessary or advisable at this time based on the record before the Department. Thus, the final rule does not include any special disclosure requirements on bona fide groups or associations of employers that sponsor AHPs or on AHPs established pursuant to the final rule. As noted elsewhere in this document, the Department intends to work with state insurance regulators on overall implementation of the final rule, including the interaction of any applicable state insurance law disclosure requirements with the disclosure requirements applicable to group health plans, such as AHPs, under Title I of ERISA.[72]

C. Economic Impact and Paperwork Burden

1. Summary

This final rule is intended to facilitate the creation and maintenance of AHPs

[67] Some commenters suggested that the final rule should set limits on compensation that may be received by plan fiduciaries and brokers. The Department declines this suggestion, and notes that the fiduciary responsibility provisions in Part 4 of ERISA already establish rules and requirements for service provider compensation and other expenses of administering a plan, including a requirement that service providers receive no more than reasonable compensation for their services. *See* ERISA section 408(b)(2) and 29 CFR 2550.408b–2.

[68] *See* 29 CFR 2520.104b–2, 2520.104b–3(a), (d)(3).

[69] 29 CFR 2520.102–3(j)(3).

[70] Special rules for duplication apply. See 26 CFR 54.9815–2715(a)(1)(iii); 29 CFR 2590.715–2715(a)(1)(iii), and 45 CFR 147.200(a)(1)(iii).

[71] *See, e.g.,* ERISA sections 104(b), 502(c), 503, 712(a)(4) and 715; PHS Act sections; 2719; 2719A; 29 CFR 2520.104b–1, 2560.503–1, 2590.712(d)(3) and 2590.715–2719. To assist with compliance, a summary of EBSA's reporting and disclosure requirements for employee benefits plans may be found at *www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf.*

[72] The Department intends to reexamine existing reporting requirements for AHPs/MEWAs, including the Form M–1 and possibly the Form 5500, and may be asked to propose class or individual prohibited transaction exemptions for AHPs that want to use affiliates to serve as their administrative service providers or act as issuers providing benefits under the AHP.

to offer more affordable health insurance to small businesses, including working owners. Millions of Americans are working owners of small businesses, employees of small businesses, or are family members of such working owners or employees. Too many have unaffordable options for health insurance or lack health insurance altogether. By revising the Department's rules and promoting formation of AHPs for small businesses and working owners, this final rule will make affordable health insurance available to many of these people, including a substantial number who would otherwise be uninsured.

Many employer groups or associations have a thorough knowledge of the economic challenges that their members face. Using this knowledge and the regulatory flexibility provided by this final rule, AHPs may tailor health coverage to better meet the needs of their members at lower and more actuarially fair prices [73] than plans currently available in the small group and individual health insurance markets under the ACA and state laws applicable to those markets. Thus, this final rule will increase the choice of affordable health coverage available to many small businesses, including working owners. Small businesses may use some of the economic gains that they will reap from affordable AHP health coverage to raise pay, hire more employees, and invest in new equipment, structures, and intellectual property, all of which contributes to economic growth.

AHPs will pursue economies of scale by encouraging more small businesses and working owners to band together to (1) make health coverage design and purchasing decisions; and (2) provide administrative functions. Like large health insurance issuers, AHPs with large shares in local healthcare markets may exercise bargaining power with local healthcare providers and achieve economies of scale in purchasing healthcare services. AHPs sponsored by geographically-based, multi-industry organizations, which the final rule authorizes, are more likely than AHPs sponsored by industry-based organizations with widely scattered memberships, which the Department's current pre-rule guidance allows (and this new regulation will continue to permit), to garner sufficient numbers of insured in local healthcare markets to achieve such economies of scale.

There are many well-established, geographically-based organizations, such as local chambers of commerce, that lend themselves to sponsoring AHPs, but generally cannot under the Department's pre-rule guidance. Such organizations can, and sometimes do, help their members purchase health insurance policies in the individual and small group markets. However, the ACA and state laws and regulations governing individual and small group markets limit both the propensities of such organizations to undertake group purchasing of health insurance and the economies of scale that such organizations can achieve from group purchasing. This final rule will enable such geographically-based organizations to sponsor AHPs that will provide or purchase health insurance for their small business members through the more lightly regulated large group market. Moreover, the final rule will also encourage newly formed employer organizations to sponsor AHPs, and will enable AHPs to extend membership to working owners.

Fully-insured and self-insured AHPs established under this final rule generally will be subject to federal benefit mandates that apply to the large group insurance and self-insured ERISA-covered markets, respectively.[74] AHPs established under this rule will also be subject to substantial nondiscrimination rules. State laws and regulations may, to a varying degree, impose additional benefit mandates and pricing restrictions. At the same time, however, AHPs formed under this rule will not be subject to federal mandates (*e.g.,* the ACA's ten categories of EHBs) and federal pricing rules (*e.g.,* modified community rating rules) that apply exclusively to the individual and small group insurance markets. Placing AHPs in the same regulatory environment as large employers will help small employers to tailor their benefits packages resulting in plan designs that more accurately reflect the coverage and pricing that some small businesses and their employees may value.

Relative to health insurance issuers in the individual and small group markets under ACA and state laws applicable to those markets, AHPs established under this final rule can use their regulatory flexibility to design more tailored, less comprehensive health coverage and set more actuarially fair prices that generally are lower for lower risk groups and higher for higher risk ones, provided the prices comply with applicable nondiscrimination standards. This regulatory flexibility in design and pricing will necessarily lead to some favorable risk selection toward AHPs and adverse selection against individual and small group markets.

To the extent that small businesses that use AHPs avoid paying forced cross subsidies to the ACA-compliant individual and small group markets (and thereby reap economic gains), premiums in those ACA-compliant markets will increase. Individual policy holders with household incomes at or below 400 percent of the federal poverty level generally will be protected from these premium increases (*i.e.,* by premium tax credits), but higher-income individuals and small businesses that lack attractive, affordable AHP options will not. Facing premium increases, small businesses and working owners that remain in the ACA-compliant individual and small group markets may drop insurance or be less able to invest, hire, and grow.

In the past, some AHPs and other MEWAs suffered from mismanagement and abuse, leading to unpaid claims and loss of coverage. Congress, the Department, and states have made progress combatting MEWA abuse and will continue their efforts as AHPs become more prevalent in response to this rule. AHPs with tighter ties to, and that are more controlled by, employer members are likely to be more insulated from mismanagement and abuse. The final rule requires certain minimum such ties and control in order to reduce operational risks. Nonetheless, risks remain.

The final rule in effect broadens the flexibility of states to tailor their laws and regulations to their local market conditions and policy preferences. The ACA has constrained this flexibility with respect to health insurance in the individual and small group markets. AHPs present an opportunity for states to make affordable health coverage options that the ACA has otherwise foreclosed available to small businesses, including working owners. States' long experience regulating individual and small group markets and close-in knowledge of local market conditions position states to optimize AHPs' role.

Overall, and as discussed more fully below, the Department has concluded that this rule delivers social benefits that justify any attendant social costs.

[73] For purposes of this document, ''actuarially fair'' generally means that coverage is priced so that the premium paid by an individual or business reflects the risks associated with insuring the particular individual or business covered by that policy.

[74] This discussion of ''economic impact and paperwork burden'' addresses AHPs that enjoy sufficient participation to constitute large groups. Such large AHPs are expected to account for the overwhelming majority of AHP enrollment. Smaller AHPs' impacts would be different and are not considered here.

2. Relevant Executive Orders

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.

Under Executive Order 12866 (58 FR 51735), ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this final rule is economically significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, OMB has reviewed the rule pursuant to the Executive Order.

The background to the rule is discussed earlier in the preamble. This discussion assesses the rule's expected impacts.

3. Introduction and Need for Regulation

Presently, U.S. households obtain health benefits from a number of different private and public sources. Essentially all individuals age 65 or older are covered by Medicare; many poor individuals under age 65 are covered by Medicaid; and 60 percent of individuals under age 65 have employer-sponsored coverage. Nearly all large employers offer health coverage to their employees, but only about one-third of employers with fewer than 50 employees do. Thirty-seven percent of individuals under age 65 obtain coverage from private employers with 50 or more employees, nine percent from smaller private employers and 13 percent from governmental employers. Another nine percent purchase individual policies.[75]

Today, businesses generally purchase health insurance in one of three market segments, depending on their size. These segments are: (1) The individual market, which includes working owners if they are not covering employees and therefore cannot establish a group health plan, other individuals, and their families; (2) the small group market, for small employers; and (3) the large group market, which generally includes employers with more than 50 employees. Many large employers self-insure rather than purchase group insurance in the large group market.

Relative to large employers, small businesses purchasing health insurance in the individual and small group markets generally face at least two inherent economic disadvantages. First, owing to their small size, working owners and other small businesses lack very large employers' potential for administrative efficiencies and negotiating power. Second, unlike large businesses, individual small businesses do not constitute large, naturally cohesive risk pools. Any single small business's claims can spike abruptly due to one serious illness. Relative to large employers, small businesses also face more rigorous regulatory requirements. The ACA imposes requirements in the individual and small group health insurance markets that do not apply in the large group market or to self-insured plans. For example, the ACA imposes adjusted community rating rules and mandates coverage of ten categories of EHBs.[76] These requirements, which aimed to make comprehensive coverage affordable for individuals and small businesses with high expected or actual claims, generally have caused adverse selection by limiting choice and raising premiums for those who do not expect to have high medical needs.

While some AHPs exist today, before the issuance of this final rule, their reach was limited by the Department's prior interpretation of the conditions when an AHP constitutes an employer-sponsored plan under ERISA. Under the prior interpretation, eligible group or association members had to share a common interest (usually, in practice, operate in the same industry) and genuine organizational relationship, join together for purposes other than providing health coverage, exercise control over the AHP, and have one or more employees in addition to the business owner in order for the group or association to qualify as bona fide. Absent any one of these criteria, AHPs were treated not as single, large-group plans, but as issuers or distributers of separate individual, small-group, and/or large-group policies to participating members, based on the status or size of the member. The prior interpretation precluded an AHP's potential advantage of allowing small businesses and working owners to tailor benefit packages under largely the same rules available to large employer plans. Instead, the prior interpretation forced AHPs not meeting the requirements of the prior interpretation to subject their members to different rules, depending on the members' status as an individual working owner, or small or large employer, diminishing any potential for administrative cost savings. Accordingly, after consideration of public comments on the Proposed Rule, the Department is publishing this final rule, which broadens the conditions under which an AHP will be treated as a single large group plan. As a result, the number of small businesses eligible to participate in such AHPs will increase, and many Americans will have new, affordable employment-based health coverage options.

The final rule generally does this in four important ways. First, it relaxes the requirement that group or association members share a common interest, as long as they operate in a common geographic area, in order for the group or association to qualify as bona fide. Second, it confirms that groups or associations whose members operate in the same trade, industry, line of business or profession can sponsor AHPs under the final rule, regardless of geographic distribution. Third, it clarifies the existing requirement that bona fide groups or associations sponsoring AHPs must have at least one substantial business purpose unrelated to the provision of benefits. Fourth, it permits AHPs that meet the final rule's new requirements to enroll working owners without employees. Consequently, for example, the final rule would newly allow a local chamber of commerce that meets the other conditions in the rule to offer AHP

[75] Population statistics are from DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor. Employer statistics are from the Medical Expenditure Panel Survey, Insurance Component, available at *https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_1/2016/tia2.pdf*.

[76] *See* PHS Act sections 2701, 2702, and 2707(a).

coverage to all of its members, including self-employed working owners, based on having their principal places of business within a single state or metropolitan area. This rule does not supplant the Department's previously issued sub-regulatory guidance, which in effect generally permits an AHP to condition each employer member's premiums on its employees' collective health status factors, as long as such rating complies with the HIPAA nondiscrimination requirements, including the requirement that it does not single out one or more individuals based on their health. On the other hand, an AHP providing health coverage under this final rule must not treat the employees of an employer member as a distinct group of similarly-situated individuals based on the employees' health factors. (Such an AHP may, however, treat employees of subsets of employer members as distinct groups of similarly situated individuals based on bona fide employment-based classification based on other, non-health factors, such as its industry or location, or its employees' ages or genders, or occupations.)

4. Increased Choice

Under this final rule, AHPs will be able to offer many small businesses more attractive and affordable health coverage options than are currently available to them in the ACA-compliant individual and small group markets. These options will include tailored plans that omit certain benefits that some small businesses and their employees may prefer to forgo in return for reduced cost. Small businesses taking advantage of these tailored options may accrue economic advantages for themselves and their employees.

Absent this final rule, many small businesses' health coverage choices would be more limited. Under existing ACA federal and state rules, non-grandfathered individual and small group insurance policies generally must provide coverage for ten categories of EHB, and meet certain other benefit standards, for example with respect to actuarial value, and network adequacy. These limits, which are not applicable to large employer plans, hamper the ability of many small employers to offer benefits packages tailored to their needs. Under this final rule, AHPs generally will be subject to the same, more flexible rules to which large employer plans are subject, consistent with leveling the federal regulatory playing field between small and large employers. The Department notes, however, that AHPs and large employers differ with respect to their economic incentives, and the Department does not expect that their behavior will be the same. For instance, AHPs generally will have incentives to tailor benefits to appeal to lower-risk groups—an incentive that large employers generally do not share, as discussed below.

AHPs established under this final rule will be able to match more closely the preferences of many small businesses and often of their employees for the design and price of health coverage than health insurance issuers can in ACA-compliant individual and small group markets. Such closer matches generally will improve the welfare of AHP members. For example, a working owner opting for less comprehensive coverage can devote the attendant savings to uses he or she values more, and will be less apt to overuse medical care (although possibly at more risk of forgoing beneficial care). The same can be said of small business employees whose employer switches from an ACA-compliant small group policy to more affordable AHP coverage that better matches employer and employee preferences on the optimal mix of wages and health benefits and the composition of health benefits.

Some comments expressed concern that AHPs, by offering more tailored, less comprehensive coverage that appeals mostly to less costly groups, will raise the price of comprehensive policies for some small businesses that prefer them, and generally erode choice and affordability for consumers limited to the ACA-compliant individual and small group markets.[77] Some comments additionally expressed concern that AHPs, by offering less comprehensive coverage and increasing the cost of more comprehensive coverage offered by others, will erode access to needed healthcare services. Some comments recommended that the Department address these concerns by requiring AHPs to cover EHB and satisfy other ACA and state benefit standards. Some comments expressed concern that AHPs would reduce choice for some small businesses by increasing premiums in individual and small group markets and possibly prompting some insurers to withdraw offers in those markets. Even some businesses joining AHPs may in fact have preferred offers that are no longer available because of AHPs. The Department believes that these concerns are justified by the economic advantages that will accrue to the small businesses to which AHPs will offer more attractive choices.[78]

The Department notes that AHPs operating under this final rule, like other large group plans, though not subject to the requirement to cover EHB and other requirements applicable only to issuers in the small group and individual markets, are in fact subject to some other significant benefit mandates. These include, for example, a ban on charging participants and beneficiaries higher premiums because they have a pre-existing health condition; a ban on denying coverage of an otherwise covered but pre-existing health condition; a requirement that if the plan

[77] The American Academy of Actuaries commented that ''flexible benefit rules could allow AHPs to create plans more attractive to lower-cost groups, resulting in positive selection (and lower premiums) for AHPs and adverse election (and higher premiums) for ACA plans.'' The comment pointed to potentially less comprehensive coverage of rehabilitative and habilitative services (including chiropractic, physical therapy, and other therapies) and behavioral health services, and to narrower drug formularies. (See comment letter from the American Academy of Actuaries, February 9, 2018, (Comment # 106 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00106.pdf*).) According to another public comment, AHPs can be expected to behave like unregulated individual and small group issuers, in that they will ''offer more limited coverage packages that appeal distinctively to particular demographics or health profiles.'' (See comment letter from Mark A. Hall, Professor of Law and Public Health, Wake Forest University School of Law, Feb 16, 2018, (Comment # 146 on EBSA web page last accessed at *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85*).) Another commenter notes that ''AHPs stand to gain from using [benefit design] to avoid very high-cost enrollees and attract people who cost less to cover.'' (See comment letter from the Center on Budget and Policy Priorities, March 6, 2018 (Comment # 537 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00537.pdf*).) According to another commenter, before the ACA required coverage of EHB, individual policies covered little or no maternity services, often excluded or limited mental health coverage, and often lacked pharmacy coverage. See comment letter from the Consumers Union, March 1, 2018 (Comment # 294 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00294.pdf*). One existing AHP publicly markets its ability ''to design plan and deductible options, and keep costs low since MEWAs are not subject to some of the Affordable Care Act's (ACA) mandated benefits.'' See MEWA FAQs question three from the Council of Smaller Enterprises available at: *http://www.cosemewa.com/~/media/Files/PDF/COSE/MEWA/2017/112116%20COSE%20Helath%20and%20Wellness%20Trust%20FAQ%20V3%20Dec%2014%20pdf.pdf?la=en.*

[78] For some discussions of the potential benefits of increased choice of health plans, see Bundorf, M. Kate, Jonathan Levin, and Neale Mahoney. 2012. ''Pricing and Welfare in Health Plan Choice.'' *American Economic Review,* 102 (7): 3214–48. *https://www.aeaweb.org/articles?id=10.1257/aer.102.7.3214;* and Dafny, Leemore, Kate Ho, and Mauricio Varela. 2013. ''Let Them Have Choice: Gains from Shifting Away from Employer-Sponsored Health Insurance and toward an Individual Exchange.'' *American Economic Journal: Economic Policy,* 5 (1): 32–58.

offers dependent coverage it must do so for dependent children up to age 26; a ban on annual or lifetime dollar limits on EHB that the plan covers; for non-grandfathered plans, a requirement to cover certain preventive health services without cost-sharing; special enrollment rights (for example, upon marriage or birth of a child); for non-grandfathered plans, caps on out-of-pocket expenses for covered EHB; prohibitions on waiting periods for coverage that exceed 90 days; for non-grandfathered plans, additional protections for selection of in-network primary care providers, pediatricians, and OB/GYNs without referral and without prior authorization; non-grandfathered plan protections for coverage of emergency room services; protections for coverage of post-breast-cancer-surgery benefits; protections for the length of a hospital stay in connection with childbirth (if such stay is a covered benefit under the plan),[79] and procedural protections governing appeals of denied health claims (for non-grandfathered health plans, this also includes external review). These mandates place significant constraints on AHP benefit designs, but leave ample room for AHPs to offer more tailored, less comprehensive, and more affordable health coverage than is available in ACA-compliant individual and small group markets.[80]

This final rule in effect broadens states' flexibility to tailor their local market rules to their local market conditions and policy preferences. The ACA, in particular, had constrained that flexibility with respect to individual and small group insurance. Expanded AHPs under this rule present an opportunity for states to make available to their local small businesses affordable health coverage options that the ACA had otherwise foreclosed. States' long experience regulating individual and small group markets and close-in knowledge of local market conditions position them to optimize AHPs' role.

Many AHPs will be subject to State benefit mandates. Pennsylvania, for example, requires policies issued in the large group market to cover in-patient and out-patient services for severe mental illness, inpatient and outpatient services for substance use disorders, autism services, childhood immunizations, and mammography.[81] Where present and applicable, these types of State mandates will apply to fully insured AHPs through State regulation of the health insurance policies they purchase, or directly to self-insured AHPs as permitted under ERISA's MEWA preemption provisions. Moreover, under this final rule, States retain the authority to adopt minimum benefit standards, including standards similar to those applicable to individual and small group insurance policies under the ACA, for all AHPs. To the extent that States adopt such standards, AHPs generally will have less opportunity to expand choices of more affordable coverage options for many small businesses.

5. Economies of Scale

Many AHPs will pursue advantages of economies of scale that small businesses do not currently enjoy. AHPs sponsored by pre-existing groups or associations that perform multiple functions for their members other than offering health coverage (such as chambers of commerce or trade associations) might have more potential to deliver administrative savings than those established for the principal purpose of offering health coverage. These existing organizations may already have extensive memberships and thus may have fewer setup, recruitment, and enrollment costs than organizations newly formed to offer insurance. These existing organizations that have been limited in their ability to offer AHPs to some or all of their existing members (for example, to working owners or workers outside of a common industry) by the Department's prior interpretations could newly extend AHP eligibility to such members.

As with traditional insurers of individuals and small groups, AHPs' most promising potential for economies of scale may be an ability to negotiate discounts with healthcare providers. Such discounts may reflect a combination of (1) administrative efficiencies from economies of scale; (2) influence over providers' utilization decisions and practices; (3) reduction of any excess provider profits; and (4) sometimes modest cost-shifting to other payers who have less negotiating leverage.

Only large AHPs are likely to secure provider discounts similar to those that large health insurance issuers often can deliver to their individual and small group customers. Large issuers have the benefit of aggregating their purchasing power across all market segments in which they participate, potentially including private individual, small and large group insurance, large self-insured employer customers, Medicare Advantage, and Medicaid. These latter segments often account for a disproportionately large fraction of provider utilization volume. AHPs generally will have more potential to negotiate provider discounts if they opt to keep their provider networks narrow, so as to concentrate use and scale among available providers. Geographically-based AHPs, which this final rule allows for the first time, may be most likely to be able to secure provider discounts. On the other hand, AHPs' entry sometimes could dilute other payers' abilities to obtain discounts,[82] thereby increasing costs for such payers' enrollees.

Accordingly, AHPs with large shares in local health markets will be best positioned to negotiate discounts with providers. Without the benefit of this final rule, AHP participation has been constricted to date—especially as common geography has not constituted an allowable basis to form an AHP—and as a result, prior AHPs generally have been unable to achieve large local participation. Among MEWAs operating as single large group health plans (hereafter, ''plan MEWAs''), total enrollment averaged just 3,437 in 2016. Twenty-eight had more than 10,000 enrollees, and four had more than 50,000, but many of these were dispersed across multiple States.

This final rule, by enabling AHPs to be comprised of otherwise unrelated small employers and working owners who share a common geographic area, will open the door for more AHPs to claim large fractions of local markets and thereby pursue advantages of scale. There are many well established,

[79] ERISA does not mandate coverage of maternity benefits. However, Title VII of the Civil Rights Act (as amended by the Pregnancy Discrimination Act and administered by the EEOC) generally applies to employers with 15 or more employees and provides that pregnancy-related expenses for employees and their spouses must be reimbursed in the same manner as those incurred for other medical conditions. Historically many individual insurance policies and some policies for very small plans limited or excluded coverage for maternity care, in order to limit adverse selection. AHPs covering employers with 15 or more employers would need to ensure compliance with Title VII in connection with such coverage, and, though not required to do so, may, for administrative simplicity and other reasons, offer maternity benefits to all participants and beneficiaries regardless of a member employer's size. Some AHPs covering only working owners and very small plans may exclude coverage of such services. For more information regarding Title VII, contact the EEOC. In addition, other State law provisions may apply.

[80] One commenter acknowledged concerns that AHPs may offer less comprehensive benefits, but stated that legitimate membership organizations would not risk their goodwill and reputation with their members by offering substandard health plans.

[81] *See* 40 P.S. sections 764g, 908–2, 764h, 3502, 764c. (For a list of state benefit mandates, *see generally http://www.ncsl.org/research/health/state-ins-mandates-and-aca-essential-benefits.aspx#State_EHB_2016*).

[82] For a discussion of market concentration and issuers' market power *see* Sheffler, Richard M. and Daniel Arnold. ''Insurer Market Power Lowers Prices in Numerous Concentrated Provider Markets.'' Health Affairs 36, no. 9 (2017).

geographically based organizations, such as local chambers of commerce, that lend themselves to sponsoring AHPs, but cannot under the Department's pre-rule guidance. Under that guidance, such organizations could, and sometimes did, help their members purchase health insurance in the individual and small group markets. However, ACA and State laws and regulations governing individual and small group markets limit both the propensities of such organizations to undertake group purchasing of health insurance and the economies of scale that such organizations can achieve from group purchasing. This final rule will enable such geographically-based organizations to sponsor AHPs (plan MEWAs).

The large group market's regulatory flexibility is likely to encourage and enable more existing organizations to pursue more potential scale advantages for small business members. These might include some MEWAs that currently do not constitute single large group plans but instead encompass multiple plans, each sponsored separately by a participating employer (hereafter ''non-plan MEWAs''). In 2016, one non-plan MEWA covered more than 50,000 enrollees in Connecticut. A second covered more than 100,000 across 22 States and more than 20,000 in Tennessee alone.[83] These and other heretofore non-plan MEWAs might qualify to become AHPs with large local market shares under this final rule. The final rule will also encourage the establishment of new organizations to sponsor AHPs, and will enable both existing and new AHPs to extend membership to working owners.

Under favorable conditions, AHPs may achieve other economies of scale. For example, small group and individual insurance sometimes can be beset by high distribution costs, reflecting for example commissions paid to agent and brokers who sell policies, possibly amplified by churning of small businesses into or out of the market or between issuers. AHPs, unlike large employer plans, must themselves incur some cost to distribute insurance to large numbers of small businesses. However, relative to traditional health insurance issuers and agents, some AHPs might reduce these costs, for example if they are able to take economic advantage of members' existing ties to the sponsoring group or association and/or if they are more able or inclined than traditional issuers and agents to minimize churn. Little hard data exists on the degree to which such scale advantages might flow to future AHPs, due to a rapidly changing marketplace and the restrictive requirements imposed on AHPs before this rule. Several commenters argued that these advantages have been elusive in the past, and under this rule are likely to be small and available only under certain favorable conditions. One such public comment stated that where available, ''administrative savings of more than 2–3 percent appear to be highly unlikely . . . .'' [84] Administrative savings of 2–3 percent of total insurance premiums is nonetheless significant.

A 2011 report [85] found that in Washington State, issuers' [86] average loss ratio was a bit higher (and administrative costs therefore likely lower) for AHP-affiliated small groups than for community-rated small groups. However, the report notes that this difference is ''consistent'' with the larger average size of AHP-affiliated small groups. For similarly sized small groups, issuers' loss ratios were similar for the AHP and community-rated segments. It is difficult to infer from this data point whether Washington State AHPs enjoy true administrative efficiencies relative to traditional individual and small group issuers. On one hand, the same report indicates that AHP premiums were substantially lower than the premiums that issuers charged small businesses outside of AHPs. If AHPs' premiums are lower and loss ratios are the same, then all else equal, AHPs' administrative costs are likely to be lower, if measured in dollars per member. Lower administrative costs might be evidence of greater administrative efficiency, but alternatively might be explained by the lighter regulatory load on AHPs, or by a difference in the administrative demands associated with insuring the AHPs' population (which might use less healthcare) or providing AHP benefits (which might be less comprehensive). In addition, it is unclear whether these loss ratios take into account administrative costs that may reside with the group or association rather than with the issuer.

Large AHPs sometimes may achieve savings by offering self-insured coverage. Because large group plans in and of themselves constitute large and potentially stable risk pools, it often is feasible for them to self-insure rather than to purchase fully-insured large group insurance policies from licensed health insurance issuers. Large risk pools' claims experience generally varies only modestly from year to year, so well-run large group plans can set premiums and operate with little risk of financial shortfalls. By self-insuring, AHPs sometimes may avoid the transaction cost associated with buying large group insurance from an issuer and the cost associated with the issuer's profit margin. They sometimes may avoid the potentially significant cost to comply with State rules that apply to large group issuers, including for example premium taxes, benefit mandates, market conduct rules, and solvency standards. Under this final rule, however, States retain authority to extend such rules to self-insured AHPs, and AHPs will be subject to ERISA requirements that demand sound financial management.[87]

While some AHPs may achieve significant administrative efficiencies for their small business members from economies of scale, the magnitude of such savings is likely to be smaller than the savings AHPs can deliver by offering more tailored, less comprehensive benefits, offering actuarially fair price discounts to low-risk groups, and assembling favorable risk pools. Some AHPs will successfully deliver economic value to their members even if these AHPs have relatively high administrative costs. Consequently, while some AHPs may deliver significant savings for their members from economies of scale, other AHPs may not deliver such savings or may even increase administrative costs.

6. Risk Segmentation

As noted above, AHPs established under this final rule will enjoy regulatory flexibility to design more tailored, less comprehensive health

[83] DOL calculations based on Form M1 Filings.

[84] See comment letter from Mark A. Hall, Professor of Law and Public Health, Wake Forest University School of Law, Feb 16, 2018 (Comment # 146 on EBSA web page last accessed at *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85*).

[85] Chollet, D., Mathematica Policy Research, ''Association Health Plans and Community-Rated Small Group Health Insurance in Washington State-Final Report,'' (September 30, 2011), *http://www.statecoverage.org/files/Mathematica_assoc_healthplans_WA.pdf.*

[86] Washington State generally requires AHPs to be insured, rather than self-insured.

[87] Self-insurance entails operational risk. Self-insured AHPs sometimes may face more operational risk than self-insured large employers, for two reasons. First, for a given size, an AHP's claims may be more volatile than a large employers' insofar as the AHP is more exposed to unanticipated favorable or adverse selection. Second, while premiums generally represent the totality of an AHP's available revenue, a large employer may be able to tap other revenue sources to cover claims volatility, as it would any other unexpected business expense. AHPs' efforts to manage these operational risks will limit the savings available from self-insurance.

coverage and price it in a more actuarially fair manner than health insurance issuers can in the ACA-compliant individual and small group markets. Thus, AHPs will be able to offer lower premiums to many small businesses by offering actuarially fair price discounts to lower risk groups, consistent with applicable nondiscrimination provisions.

AHPs' exercise of their relative flexibility will lead to some degree of favorable risk selection toward AHPs and adverse selection against individual and small group markets. This risk segmentation will increase premiums somewhat in ACA-compliant individual and small group markets. The Department's Proposed Rule identified these considerations, reviewed mixed evidence on the likelihood and extent of risk segmentation, and predicted that the proposal's nondiscrimination rules together with AHPs' potential to deliver savings from scale advantages would substantially limit, but not entirely eliminate, such risk segmentation. Some commenters, however, asserted that even with the benefit mandates that apply in the large group market and the nondiscrimination rules included in this final rule, many AHPs, by design and/or in response to market forces, unless prevented by State regulation, will assemble disproportionately favorable risk pools and thereby subject local individual and small group markets to adverse selection and premium increases. After evaluating these comments, the Department believes that AHPs' scale advantages generally will be insufficient to limit risk segmentation. This final rule's nondiscrimination provisions will reduce, but not eliminate, AHPs' risk-segmentation effects.

Under this final rule, AHPs' ability to segment risks will be limited by a number of forces. An AHP that forms under this final rule, and that may enroll otherwise unrelated small businesses and working owners, cannot adjust employer members' premiums based on their respective employees' health status. States may take additional steps to limit AHPs' risk segmentation effects, which would limit the ability to set actuarially fair prices and might limit AHP formation. AHPs are controlled by their members and, therefore, in some cases, AHPs' belief that their members are better off and their reputation is enhanced by offering broader benefit packages with more community-rated prices, may weigh against the competitive pressure to calibrate benefits and prices to avoid bad risks. Likewise, very large AHPs' size sometimes may itself blunt this pressure. Finally, risk selection efforts are subject to increasing costs and diminishing returns.

Nevertheless, AHPs established under the final rule will, within the general rules applying to large group plans and the specific nondiscrimination provisions in this final rule, by escaping some ACA pricing restrictions and forced cross-subsidies, will tend to segment risks. Relative to ACA-compliant issuers in the individual and small group markets, AHPs can offer more actuarially fair (and potentially much lower) prices to lower risk groups based, for example, on age, gender, or industry. Moreover, AHPs additionally can design health coverage to attract lower risk groups. At the same time, the Department finds that risk segmentation will be limited for reasons discussed above and further in this section. While under this final rule AHPs and large employer plans will have a similar federal regulatory environment, their economic incentives will be different. Large employers design and price health benefit offers to recruit and retain productive workers and to maximize those workers' productivity. Consequently, large employers typically offer heavily subsidized comprehensive health coverage for employees and their families. In contrast, AHPs will design and price offers for their members in competition with more heavily regulated individual and small group issuers, and possibly with one another. This favors actuarial pricing that accurately reflects risk differences between, for example, genders, age groups, and industries, and more tailored, often less comprehensive benefits, insofar as such pricing and benefits will attract favorable risk pools and facilitate lower premiums.

Some groups or associations may prefer to provide comprehensive benefits at community rates that do not discriminate among members by age or gender. Such groups or associations might be motivated by a sense of obligation toward or solidarity among members, such as workers with a common trade. Trade unions historically have negotiated comprehensive multiemployer benefit arrangements with large numbers of small and medium sized companies, with costs allocated based on hours worked rather than on actuarial factors. On the other hand, AHPs may be more vulnerable than union-negotiated arrangements to competition from other groups or associations more willing to use actuarial pricing and/or benefit limitations to provide potential savings for many of the same members. Such competitive pressure may force groups or associations to adopt actuarial pricing reflecting risk and limited benefits as defenses against adverse selection. Groups or associations that naturally comprise relatively favorable and homogenous risk pools may be best able to sustain nondiscrimination in rate setting, because they will enjoy savings that can be shared widely, and can spread thinly across young and healthy members the costs attributable to the few needing expensive care. Such AHPs, however, while refraining from discrimination internally, could increase adverse selection against local individual and small group markets.

AHPs historically have utilized actuarial pricing. According to comments, existing AHPs often rate employer members based on health factors such as claims, and need flexibility to do so to ensure their success. Nearly all AHPs in Washington State experience rate.[88] AHPs operating under this new rule may not adjust prices actuarially for health status, but only for non-health factors such as age, gender, and industry. AHPs that under this rule extend eligibility to working owners may face even greater competitive pressure to limit benefits, because individual markets generally are more susceptible than small group markets to adverse selection.

One comment[89] provided a conceptual framework for assessing the implications of AHPs' relative pricing flexibility and predicted that AHPs would segment risks under the Proposed Rule. The comment calls attention to certain factors related to

[88] Chollet, D., Mathematica Policy Research, ''Association Health Plans and Community-Rated Small Group Health Insurance in Washington State-Final Report,'' (September 30, 2011), *http://www.statecoverage.org/files/Mathematica_assoc_healthplans_WA.pdf.*

[89] See comment letter from the American Academy of Actuaries, February 9, 2018, (Comment #106 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00106.pdf*).

rating,[90] plan design,[91] and other considerations.[92] One comment points out that the flexibility AHPs will have to, for example, cover certain trade groups, will result in the ability to offer more affordable care to those groups than individual and small group issuers. AHPs also may offer substantially lower premiums to younger men and substantially higher premiums for younger women.[93] One comment points to market experience as evidence that AHPs could threaten risk pools. The comment argues that AHPs' scale advantages will be insufficient to offset their large incentives to avoid worse health risks. The comment cites a market collapse in Kentucky in the 1990s to illustrate concerns about market dynamics and regulation.[94]

A publicly available report estimated that under the Department's proposal, nationwide by 2022 AHPs would increase overall premiums in individual markets by between 2.7 percent and 4.0 percent, and in small group markets by between 0.1 percent and 1.9 percent.[95] (A more recent report estimated that AHPs, together with the separate proposal to expand short-term, limited duration insurance policies, would increase premiums in individual and small group markets by from 2 percent to 3 percent.[96]) A separate estimate predicted that AHPs available to all Washington, DC employers would increase premiums in the local individual market by 5 percent and small group market by 10 percent, or possibly by more if high cost employers do not consider joining AHPs.[97] Yet another predicts that premiums in Massachusetts' combined individual and small group markets could increase by more than 10 percent in the first year.[98] If the first of these sets of estimates is correct, individuals remaining in the individual and small group markets could see a combined premium increase of between $7.7 billion and $14.1 billion, due to the reduction in cross subsidization. This would also be the amount of the cross-subsidization those leaving to join an AHP were providing in those markets and they will now be able to retain.[99]

Some analysts examining federal AHP legislation considered in the early 2000s likewise pointed to the potential for risk segmentation, but disagreed over the likely magnitude. One report concluded that premiums for firms in State-regulated markets would increase by 23 percent.[100] A different study of separate but largely similar legislation predicted that these premiums would increase by just 2 percent.[101] It is unclear whether the disagreement is attributable to differences in AHPs' expected size or expected degree of favorable selection, or other factors. However, the relevance of the reports is diminished by the fact that they were written well before the passage of legislation such as the ACA and the substantial changes to the health markets that have occurred in the interim.

A more recent report[102] discussing the impact of AHPs on the individual

[90] With respect to rating, the comment identifies six factors: (1) Age, (2) industry/occupation, (3) geography, (4) gender, (5) group size, and (6) separateness of the risk pool. The comment indicates that relative to individual and small group issuers, AHPs ''could offer lower premiums to younger adults and higher, less attractive premiums to older people,'' but also might set premiums for newborns substantially higher than for older children (the ACA requires all children under 14 to be rated together). The comment continues that AHPs' unique ability to vary rates by industry or occupation will advantage them over issuers. Geographically, health insurance issuers must all rate evenly within the same state-specified zones, but AHPs could use different zones and might, for example, split a state zone into smaller segments to reflect cost differences. AHPs might additionally set higher rates for smaller groups (of say, fewer than 10), and for women of child-bearing age.

[91] With respect to plan design, the comment notes that AHPs might limit covered services, network size or composition, or impose higher cost sharing (which, if the plan is not grandfathered, would still be subject to the limitations on out-of-pocket costs imposed by PHS Act 2707), all of which could contribute to favorable risk selection.

[92] The comment emphasizes that AHPs' success and effects could vary widely depending on the local regulatory environment, and on the AHP's ability to compete with local issuers on dimensions including reputation, provider networks (and associated provider discounts), care management, and administration.

[93] See comment letter from BlueCross BlueShield, March 6, 2018 (Comment #549 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00549.pdf*). According to the comment, all else equal, AHPs may rate the engineering services industry 9 percent lower than issuers operating under individual and small group market rules, and may rate the taxicab industry 15 percent higher. AHPs may rate men in their 20s more than 40 percent lower than would be consistent with individual and small group market rules, and may rate women in their late 20s and 30s more than 30 percent higher. This suggests, for example, that AHPs are likely to enroll more male than female working owners, disproportionately leaving women (and their maternity-related costs) in local individual markets.

[94] See comment letter from Mark A. Hall, Professor of Law and Public Health, Wake Forest University School of Law, Feb 16, 2018, (Comment #146 on EBSA web page last accessed at *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85*). According to the comment, Kentucky implemented market reforms but exempted AHPs from these reforms, including rating reforms. This resulted in healthy people seeking coverage through associations, which were not community rated. This left unhealthy people to seek coverage in the regulated markets. Carriers began canceling health insurance policies and fleeing the state, leaving a decimated market. The same commenter expressed concerns that AHPs cannot duplicate large employers' advantages with respect to the composition and stability of risk pools, because each small business will select insurance options based on its own anticipated medical needs and premium offers.

[95] Avalere Health, Association Health Plans: Projecting the Impact of the Proposed Rule at 3, 5–7 (Feb. 28, 2018), available at *http://go.avalere.com/acton/attachment/12909/f-052f/1/-/-/-/-/Association%20Health%20Plans%20White%20Paper.pdf*.

[96] U.S. Congressional Budget Office, ''Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028.'' *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53826-healthinsurancecoverage.pdf.* The Department did not rely on the information contained in the CBO report, which was released after the comment period had closed, to reach its conclusions regarding the effects of the final rule on premiums, but notes that the CBO's findings are consistent with other evidence available to the Department.

[97] See letter from Oliver Wyman to Mila Kofman, February 21, 2018 regarding ''the potential impact of association health plans in the District of Columbia.'' The Department notes that the DC market is unusual and might not be an appropriate reference to understand national implications. The DC Exchange covers approximately 17,000 people of whom 80 percent of are unsubsidized (almost the opposite of the rest of the country). Consequently AHPs' effects may be less acute on a national level than in DC.

[98] See comment letter from the Massachusetts Division of Insurance and Massachusetts's State-Based Marketplace, March 6, 2018 (Comment #600 on EBSA web page last accessed at: *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00600.pdf*.

[99] These estimates use the Avalere Health report for estimates of the 2022 changes in premiums, and the number of individuals leaving the individual and small group markets to join an AHP. The Department estimates that there are about 25 million individuals with coverage in the individual market and 25 million individuals in the small group markets. The CBO estimates that by 2022 there will be 5 million fewer individuals in the individual market and 2 million few individuals in the employer-based market due to the repeal of the individual mandate. As not all individuals leaving the employer market place are in the small group market an estimate of one million is used for the number of individuals no longer being covered in the small group market due to the repeal of the individual mandate. The following calculations where used to obtain the estimates. For the individual market: Low estimate, (25,000,000 − 5,000,000 − 710,000) * ($14,900 * (1 − (1/1.027))); high estimate, (25,000,000 − 5,000,000 − 1,110,000)* ($15,000 * (1 − (1/1.04))). For the small group market: low estimate, (25,000,000 − 1,000,000 − 1,650,000,000) * ($8,100 * (1 − (1/1.001))); high estimate, (25,000,000 − 1,000,000 − 3,200,000) * ($8,300 * (1 − (1/1.019))).

[100] Karen Bender and Beth Fritchen, ''Impact of Association Health Plan Legislation on Premiums and Coverage for Small Employers,'' Mercer Risk, Finance and Insurance report prepared for the National Small Business Association, 2003.

[101] James R. Baumgardner and Stuart A Hagen, ''Predicting Response to Regulatory Change in the Small Group Health Insurance Market: The Case of Association Health Plans and Healthmarts,'' *Inquiry* 2001/2002, 38(4), 351–364.

[102] Georgetown University Health Policy Institute, Center on Health Insurance Reforms,'' State Options to Protect Consumers and Stabilize the Market: Responding to President Trump's Executive Order on Association Health Plans,'' December 2017.

and small group market notes that States may require AHPs to comply with ''key insurance market standards and practices'' that limit risk segmentation, such as State individual and small group market rules. The report notes that such steps could protect local markets from adverse selection, but would also diminish AHPs' ability to deliver choice and savings for their local members.

While some comments and other evidence support the conclusion that AHPs' flexibility under this rule will lead to risk segmentation, the comments do not allow the Department to predict its extent. Furthermore, many comments also affirm that this rule's application of nondiscrimination rules to AHPs established under this final rule will reduce its degree. Experience in Oregon under the ACA suggests that AHPs operating under the Department's pre-rule guidance have taken advantage of available flexibility to vary individual small businesses' premiums to reflect their respective expected costs more widely and based on more factors than permitted in individual and small group markets.[103] However, AHPs that gain large group status only under this final rule will not retain flexibility to adjust individual member employers' rates based on health status.

AHPs' potential to attract a favorable risk pool is limited by a number of factors, and AHPs themselves sometimes may suffer some degree of adverse selection. The nondiscrimination provisions of this final rule limit AHPs' ability to set actuarially appropriate prices. In addition, AHPs' efforts to select favorable risks generally would yield diminishing returns; that is, there is a point beyond which additional selection efforts would themselves cost more than could be justified by any savings from attendant selection results. AHPs under this final rule generally may not condition employer members' eligibility, benefits, or premiums on their employees' health factors. AHPs generally can condition these things on many other factors, including for example age, gender, industry, occupation, and geographic location. These factors do not fully correlate with health status, however, and there may be declining returns and/or increasing administrative costs associated with more aggressive and granular use of these factors to select risk. A similar argument may apply with respect to AHPs' use of benefit design or tailored marketing to select risks.

AHPs that are barred from adjusting employer members' rates based on health status (namely, those that qualify as large group plans under this final rule but not under the Department's pre-rule guidance) are likely to face some potential for adverse selection, particularly where competing with other AHPs and/or other non ACA-compliant plans for some of the same enrollees. At least one comment notes that AHPs, while vulnerable to adverse selection, would be without applicable ''offsetting stabilization mechanisms'' such as the ''subsidies, risk adjustment, reinsurance, open enrollment provisions, and coverage mandate'' that the ACA provided in individual and small group markets.[104] To limit AHPs' vulnerability to adverse selection, this final rule allows them to exclude working owners and to limit annual open enrollment opportunities [105] as suggested by some commenters. AHPs also may pursue a strategy of limiting benefits in order to protect against adverse selection.

Comments also demonstrate that successful AHPs can coexist with stable and viable individual and small group markets, even if those AHPs operate under looser rules, are able to set more actuarially fair prices, and realize some degree of favorable selection relative to local small group markets. Comments and other public evidence suggest that such conditions now prevail in some form in Oregon and Washington State, for example.[106]

A 2014 report examines Oregon's AHP market.[107] Before the ACA, Oregon exempted AHP coverage from individual and small group market rules. Oregon later eliminated this exemption, but AHPs that qualify as single, large group plans under ERISA remained outside the relevant rules, and many Oregon AHPs claimed this status, the report says. These AHPs tended to rate employer members on health status or claims experience, and other factors not allowed in individual or small group markets, and such pricing flexibility gave AHPs ''a competitive edge . . . particularly with healthy small groups.'' The report predicted that AHPs would grow.

A 2011 report [108] documented AHPs' ''robust'' role in Washington's markets in the years leading up to the passage of the federal ACA. Washington, unlike many other States (and notwithstanding the Department's contrary past guidance with respect to MEWA's status under ERISA [109]), historically had recognized AHPs sponsored by associations formed for the purpose of providing insurance. It required AHPs to be insured (rather than self-insured), but exempted issuer sales through AHPs from small group rating rules, allowing them to rate on claims experience, health status, gender, non-standard age factors, and other

[103] Kevin Lucia, Sandy Ahn, and Sabrina Corlette, ''Federal and State Policy Toward Association Health Plans in Oregon,'' Robert Wood Johnson Foundation and Urban Institute, October 2014.

[104] See comment letter from Aetna, March 6, 2018 (Comment # 472 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00472.pdf*).

[105] The Department notes that, of course, AHPs must provide special enrollment periods under certain circumstances. For example, current employees and their dependents that have experienced a loss of coverage must have an opportunity to enroll in the plan under a special enrollment period if they are otherwise eligible to enroll and the coverage was previously offered at a time when the employee had other health coverage. Additionally, special enrollment periods must be provided for certain dependent beneficiaries who experience a qualifying life event such as marriage, birth, or adoption. See ERISA section 701(f) and 29 CFR 2590.701–6. In addition, a group health plan, and health insurance issuer offering group health insurance coverage, must not apply any waiting period that exceeds 90 days. See PHS Act section 2708 and ERISA section 715. See also 29 CFR 2590.715–2708.

[106] See comment letter from State of Washington, Office of Insurance Commissioner, March 6, 2018 (Comment # 531 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00531.pdf*; See also comment letter from Forterra Inc., on behalf of its parent company, the Association of Washington Business, March 6, 2018 (Comment #577 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00577.pdf*; See also Chollet, D,. Mathematica Policy Research, ''Association Health Plans and Community-Rated Small Group Health Insurance in Washington State-Final Report,'' at p. 20 (September 30, 2011), *http://www.statecoverage.org/files/Mathematica_assoc_healthplans_WA.pdf;* See also comment letter from the Robert Wood Johnson Foundation, March 3, 2018 (Comment #334 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00334.pdf*; See also Kevin Lucia, Sandy Ahn, and Sabrina Corlette, ''Federal and State Policy Toward Association Health Plans in Oregon,'' Robert Wood Johnson Foundation and Urban Institute, October 2014.

[107] Kevin Lucia, Sandy Ahn, and Sabrina Corlette, ''Federal and State Policy Toward Association Health Plans in Oregon,'' Robert Wood Johnson Foundation and Urban Institute, October 2014.

[108] Chollet, D., Mathematica Policy Research, ''Association Health Plans and Community-Rated Small Group Health Insurance in Washington State-Final Report,'' (September 30, 2011), *http://www.statecoverage.org/files/Mathematica_assoc_healthplans_WA.pdf.*

[109] Under that guidance, AHPs sponsored by associations formed for the purpose of providing health coverage generally did not constitute single, large group plans under ERISA. Instead under ERISA such arrangements generally constituted MEWA encompassing multiple separate plans sponsored by the MEWAs participating employers. Prior to the implementation of the ACA, this status under ERISA did not prevent states from recognizing such AHPs as large groups under state law or otherwise excepting them from state rules that governed small group insurers.

variables that were prohibited in the community-rated small group market. AHPs operated both within and across industries, and covered both large and small employers. In 2008 AHPs claimed approximately one-half of Washington's small group market and more than one-third of its combined small and large group market. For small groups, the report found that AHP premiums ($246 per member per month) were lower than community rated premiums ($316 per member per month). This difference ''likely'' is attributable mostly to risk segmentation favoring AHPs over community-rated small group markets and ''the larger size of AHP small groups relative to community rated small groups,'' [110] and partly to less comprehensive benefits, the report says. The medical loss ratio was a bit higher (and administrative costs therefore likely lower) for AHP small groups than for community rated small groups, but the report notes that this difference is ''consistent'' with (and so might be attributable to) the larger average size of AHP small groups. This suggests that AHPs enjoyed either no or little administrative cost advantage over unaffiliated small groups. AHPs tended to rate based on health status (60 percent of enrollees) and/or claims experience (87 percent of enrollees). AHP growth in Washington was more than offset by contraction of other group coverage.[111] AHPs' historically substantial market share in Washington State stands as evidence that they delivered economic advantage to many small businesses there relative to choices available in community rated small group markets. However, it is likely that some or much of this advantage came at the expense of other small businesses that paid higher prices in community-rated markets, or went without insurance.

Washington AHPs' experience may differ from new AHPs' experience under this final rule, for many reasons. For example, Washington's experience generally is limited to the small group market, while new AHPs can offer coverage to working owners who may now be purchasing in individual markets, where the potential both for savings for AHP enrollees and adverse selection against other risk pools will be different and possibly greater. In addition, while Washington AHPs have rated members based on health status, AHPs operating under this final rule cannot, so such AHPs' potential to offer targeted savings and select risk relative to small group markets are more limited.

The impact of this final rule on State individual and small group risk pools is highly dependent on State regulatory practices. States under this final rule retain broad authority to pursue steps to optimize AHPs' role in their local markets.

In response to requests in comments on the Proposed Rule, this final rule makes clear that AHPs can attach rewards and penalties to individual enrollees' participation in wellness programs. These rewards and penalties are separate from (and may add to or offset) pricing differences based on risk factors such as age, gender or industry. Under federal rules, financial rewards or penalties can be as much as 30 percent of an enrollee's total premium, or 50 percent where the additional 20 percentage points are associated with tobacco use. Wellness programs must be designed to promote health, and not to penalize or screen out individuals in poor health. Their rewards must be reasonably available to all. In practice, however, some permissible program designs and practices nonetheless may tend to deliver fewer rewards or more penalties to less healthy individuals, who, relative to healthier individuals, may on average find participation to be more costly or less appealing. Consequently, while AHPs operating under this new rule may not condition premiums on health status, some AHPs' wellness programs in practice may have a disparate negative impact on those in poorer health. Such wellness programs sometimes could yield additional favorable selection toward AHPs.

The Department believes that the provisions of this rule and States' broad authority to adjust local rules, combined with the attendant benefits of extending insurance to small businesses and working owners, strike the right balance to both limit and justify consequent adverse selection against local markets.

7. Individual and Small Group Markets

The Department separately considered AHPs' potential impacts on both the individual and small group markets. With respect to individual markets, many of those insured there now might become eligible for AHPs.[112] AHPs operating under this final rule could enroll both working owners and the employees of small businesses that do not currently offer insurance but elect to join AHPs and begin offering insurance. The latter group has grown as small firms' propensity to offer health coverage for employees has declined substantially from 47 percent of establishments in 2000 to 29 percent in 2016.[113] Of the 25 million U.S. individuals under age 65 who were insured in individual markets in 2015, approximately 3 million were working owners or dependents thereof, and an additional 12 million were employees of small businesses or dependents thereof. With respect to small group markets, essentially all insured businesses might become eligible for AHPs. In 2015, firms with fewer than 50 employees insured 25 million workers and dependents.[114]

[110] This may affect premiums in two ways. First, per-member administrative costs may decrease with (small) group size. Second, very small groups generally subject insurers to more adverse selection than somewhat larger groups.

[111] From 2005 to 2008, enrollment in AHPs increased 11 percent, while enrollment in the large group and community rated small group market decreased nearly 12 percent resulting in an overall decline in group coverage during this period. As a result, 87,000 fewer workers and dependents (-5.2 percent) were enrolled in any insured group coverage in 2008 than in 2005. Source: Chollet, D., Mathematica Policy Research, ''Association Health Plans and Community-Rated Small Group Health Insurance in Washington State-Final Report,'' (September 30, 2011), *http://www.statecoverage.org/files/Mathematica_assoc_healthplans_WA.pdf*. For reference, at the same time nationally, the number of private employees enrolled in their employers' insurance plans grew from 61 million to 63 million. See *Medical Expenditure Panel Survey, Insurance Component, 2016 Chartbook,* U.S. Agency for Healthcare Quality and Research, September 2017, *https://meps.ahrq.gov/data_files/publications/cb21/cb21.pdf*.

[112] Under the rule, working owners must earn wages or self-employment income from the trade or business for providing personal services to the trade or business and either (1) work at least 20 hours per week or at least 80 hours per month providing personal services to the trade or business, or (2) earn income from the trade or business that at least equals the working owner's cost of coverage for the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.

[113] Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends. Medical Expenditure Panel Survey-Insurance Component, 2012–2016. Medical Expenditure Panel Survey Private Sector Insurance Component, Table II.A.2. In 2016, among employees of firms with fewer than 50 employees, just one in four were enrolled in insurance on the job. Nearly one-half worked at firms that did not offer insurance. Agency for Healthcare Research and Quality (AHRQ), 2016 Medical Expenditure Panel Survey Insurance Component (MEPS–IC) Tables. Nonetheless, just 18 percent of small firm employees were uninsured. Many obtained insurance from a spouse's or parent's employer. The Department's calculations are based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[114] These estimates were derived from the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor. The Department revised its methodology in estimating the universe of potential individuals affected by the regulation between the proposed and final rule. The initial estimates did not restrict the definition of working owners to those working at least 20 hours per week, and so this restriction was added, which reduced the number of working owners and their dependents from 20 million in the proposal to 15 million in the final. Additionally, in the Proposed Rule, current source of insurance for dependents of working owners and employees at small firms not offered insurance were only

Continued

While all of these individuals could become eligible for AHPs under this final rule, some are more likely than others to become eligible, and among those who do become eligible, some are more likely than others to enroll.

The Proposed Rule described some relevant features of individual and small group markets under the ACA and existing State rules. Here the Department presents considerations raised by subsequent developments, comments on the Proposed Rule, and other newly identified information. Importantly, it considers the role of individual market subsidies, the reduction of the individual shared responsibility payment to $0 for those who do not have minimum essential coverage and do not have an exemption beginning in 2019, and the role of other (non-AHP) non ACA-compliant plans in individual and small group markets.

AHPs' impact on local individual markets is likely to differ based on market sub-segments and the effect of State regulation. To the extent not prevented by State rules, AHPs are likely to result in some adverse selection and associated premium increases in the individual and small group markets. States' approaches are likely to vary widely and to range from steps that maximize AHPs' flexibility [115] and impacts to those that minimize them.[116]

With respect to individual markets, as discussed earlier, consequent to this final rule premiums are likely to increase modestly on average. The increases might vary widely across local markets. As noted above, in 2015, approximately 3 million individual market enrollees were working owners or their dependents. It is likely that under this final rule AHPs will offer insurance to many of these individuals. AHP coverage offers generally are likely to be most affordable and attractive to categories of individuals with lower expected claims, such as young single men, and for the 1 million of the 3 million working owners with incomes too high to qualify for subsidies on the Exchanges (more than four times the poverty threshold).

Also as noted above, about 12 million people insured in individual markets were employees of small private businesses or dependents thereof. Among those, some strong candidates for AHP enrollment are those with incomes too high to qualify for premium tax credit subsidies whose small employers already offer them insurance, who number 800,000. Another 1.4 million have offers from small employers but lower incomes. To the extent that their offers are affordable and provide minimum value, such individuals are ineligible for ACA subsidies on Exchanges and therefore likely to be strong candidates for AHP enrollment. The remaining 9 million are currently without offers from their small employers, and consequently would gain AHP eligibility if their small employers join an AHP to begin offering health coverage to these employees. However, a majority of these 9 million are eligible for subsidies on exchanges.[117] Small employers generally are less likely to begin offering coverage to employees whose demand for such an offer is weak because they currently have access to subsidized comprehensive coverage. Because of this, AHPs will likely enroll only a portion of all current individual market enrollees with connections to small businesses. Notwithstanding these limitations, in light of the very large numbers of Americans who work for small employers, who are working owners, or who are dependents of employees of small employers or working owners, the Department expects AHPs to deliver health insurance to millions of people.

Recent economic research shows that small businesses with 49 or fewer employees have a high after-tax price elasticity for offering employer-sponsored health insurance to their employees. For small businesses, a one percent reduction in the after-tax price would cause a 0.82 percent increase in the likelihood of offering employer-sponsored health insurance, the research found. For medium-sized business with 50 to 499 employees, a one percent reduction in the after-tax price would cause a 0.35 percent increase in the likelihood of offering employer-sponsored health insurance. For large businesses with 500 or more employees, however, the after-tax price elasticity for offering employer-sponsored health coverage is not statistically different from zero. The high after-tax price elasticity for small businesses cannot be directly applied to project a potential net increase in offers under the final rule, for two reasons. First, AHP coverage is likely to differ from ACA-compliant small group coverage not only with respect to price but also with respect to benefit design and comprehensiveness. Second, AHPs will set different premiums for different members conditional on cost related factors such as age, gender, and industry, so it is unclear whether the employers most inclined to respond to price decreases will see large or small decreases, or no decreases. Nonetheless, this research does corroborate the proposition that lower premiums from the expansion of AHP plans under the final rule will cause some small businesses that do not currently offer employer-sponsored health coverage through the ACA-compliant small-group market to begin offering employer-sponsored health coverage to their employees through AHPs. The Department did not rely on this research to reach any conclusions regarding the effects of the final rule on the likelihood that small businesses would begin offering health coverage through AHPs. Instead, the Department includes this information as a supplement to corroborate its findings.

A publicly available report estimated that between 2.4 million and 4.3 million individuals would move from the individual and small group markets combined, and enroll in AHPs by 2022 under a moderate enrollment scenario, between 710,000 and 1.1 million of which would move from the individual market.[118] This estimate also projected significant premium decreases by moving to AHPs (between $1,900 to $4,100 lower than the yearly premiums in the small group market and $8,700 to $10,800 lower than the yearly premiums in the individual market by 2022,

counted if they were the same as family member identified as having potential AHP access. For the final rule, dependents' source of insurance is counted whether or not their insurance matches.

[115] For example, Iowa recently enacted legislation lowering barriers for certain AHPs. See Iowa SF2349—An Act Relating to Health Plans Established by Associations of Employers or Sponsored by Certain Agricultural Organizations, enacted on April 2, 2018.

[116] For example, Massachusetts historically has limited AHPs flexibility. See comment letter from the Massachusetts Division of Insurance and Massachusetts's State-Based Marketplace, March 6, 2018 (Comment # 600 on EBSA web page last accessed at: *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00600.pdf.*

[117] DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[118] The report estimates that the Proposed Rule will result in a projected to shift of between 710,000 and 1.1 million individuals out of the individual market, and 1.7 million to 3.2 million out of the small group market by 2022. It estimates that 2.4 million individuals would move from the individual and small group markets combined and enroll in AHPs under a low enrollment scenario, while 4.3 million would move to AHPs under a high enrollment scenario. *See* Avalere Health, Association Health Plans: Projecting the Impact of the Proposed Rule at 3, 5–7 (Feb. 28, 2018), available at *http://go.avalere.com/acton/attachment/12909/f-052f/1/-/-/-/-/Association%20Health%20Plans%20White%20Paper.pdf.* These figures do not appear to include otherwise uninsured individuals but are estimates of movement to AHPs from both the individual and small group markets.

depending on the generosity of AHP coverage offered). This translates into aggregate premium decreases of between $9.3 billion and $25.1 billion, with the former corresponding to more generous AHP benefits. The Department does not have sufficient data to assess the accuracy of these estimates.

A large majority of individuals insured on Exchanges will have some insulation from any premium increases resulting from the exit of individuals to AHPs, because the ACA provides a tax credit that in effect caps the premiums that those eligible taxpayers with household incomes at or below 400 percent of the federal poverty level must pay on Exchanges for coverage in a benchmark ''silver'' plan with an actuarial value of approximately 70 percent. That cap rises with income, to about $9,400 for a family of 4 at 400 percent of the federal poverty level. Consequently such a family enrolling in the benchmark plan and facing a potential premium increase from a base of $9,400 or more would be largely insulated from that increase.

Not all exchange participants will be fully insulated from increases in individual market premiums. This includes individuals with household incomes above 400 percent of the federal poverty level (for a family of four, with an annual household income of approximately $100,000 or more), individuals whose current premiums are below the applicable cap (they are exposed to premium increases up to the cap), and individuals who elect plans that cost more than the benchmark plan. Further, those insured in the small group and individual markets outside the Exchanges might also have premium increases. The Department estimates that 6 million individuals insured in individual markets in 2015 have household incomes above 400 percent of the federal poverty level and either have no connection to a small business or work for a small employer that does not offer them insurance. These individuals could be exposed to premium increases as a result of the implementation of AHPs, and generally are unlikely to qualify for AHP enrollment. The Department estimates that an additional 2 million insured in individual markets in 2015 have household incomes above 400 percent of the federal poverty level and either connection to working ownership or offers from small employers. These individuals are relatively likely to qualify for AHP enrollment but could be exposed to premium increases if they remain in the individual market.[119]

Some individuals facing premium increases may elect to go without insurance. This is especially true because Public Law 115–97, enacted December 22, 2017, will reduce to 0 percent the individual shared responsibility payment for failure to maintain minimum essential coverage or have an exemption effective beginning in 2019.[120] AHPs under this rule are likely to extend coverage to some individuals who otherwise would have dropped coverage in response to the reduction of the individual shared responsibility payment. On the other hand, some individuals who face premium increases as a result of this final rule and who might have retained coverage to avoid the individual shared responsibility payment might instead drop coverage. At the same time, the reduction of the individual shared responsibility payment to $0 might prompt some individuals who would have joined AHPs to remain uninsured instead.

With respect to small group markets, as with individual markets, this rule can be expected to increase premiums modestly on average, and those increases will vary across local markets. One estimate finds that between 1.7 million and 3.2 million enrollees will migrate from small group markets to AHPs by 2022.[121]

A recent report examined small group market experience under the ACA.[122] The report identified movement between the small group and individual markets, as small employers begin to offer or stop offering insurance to their employees in response to changing government policies and local individual and small group market conditions. Overall offer rates have declined, but less than stakeholders predicted. Premium increases on average (3.1 percent annually between 2011 and 2015) have been moderate and in-line with large employer markets and Medicare. Relative to individual markets, where the ACA compressed rates substantially, forcibly reducing premiums for many high-risk families and thereby increasing premiums for many lower-risk ones, rates in small group markets changed little, for several reasons. First, risk itself generally varies less among small groups (or at least among larger small groups) than among individuals and families. Second, the report asserts that in many places the ACA's small group rules have not been fully implemented as scheduled. Issuers and small employers in many locations so far have been allowed and have opted to retain non ACA-compliant, so-called ''grandmothered'' policies[123] whose prices are lower for low-risk groups than would be the case in the ACA-regulated small group market. Third, even under the ACA and other laws, small employers have more access than individuals to options outside of ACA regulated markets, and some have pursued these options. The options include ''level funded'' arrangements where the plan or employer self-insures expected claims but purchases stop-loss insurance for most large claims; qualified small employer health reimbursement arrangements, which may provide reimbursement for any qualified medical expense, including premiums for individual market coverage, so long as certain requirements are met; purchase of insurance that constitutes excepted benefits such as indemnity coverage; and sometimes AHPs that qualified under the Department's pre-rule guidance as single, large group plans. For these reasons, in many small group markets, AHPs under this rule may be unlikely to increase significantly the degree of risk segmentation and premium dispersion that currently exists—though they may preserve segmentation that otherwise would have waned as ACA implementation continued. AHPs' effects might be larger where States more tightly regulate small

[119] It is likely that many (but not all) of these, especially working owners with low expected claims, will gain access to affordable, attractive offers from AHPs.

[120] The reduction to $0 of the individual shared responsibility payment in 2019 is projected to decrease individual market insurance coverage by 3 million in 2019 and 5 million by 2027. See Congressional Budget Office, ''Repealing the Individual Health Insurance Mandate: An Updated Estimate'' (November 2017), *www.cbo.gov/publication/53300*.

[121] Avalere Health, Association Health Plans: Projecting the Impact of the Proposed Rule at 3, 5–7 (Feb. 28, 2018), available at *http://go.avalere.com/acton/attachment/12909/f-052f/1/-/-/-/-/Association%20Health%20Plans%20White%20Paper.pdf*.

[122] See Sabrina Corlette, Jack Hoadley, Kevin Lucia, and Dania Palanker, ''Small Business Health Insurance and the ACA: Views from the Market 2017,'' Robert Wood Johnson Foundation and Urban Institute, July 2017. For additional perspectives on small group markets under the ACA see Amy B. Monahan and Daniel Schwarcz, ''Saving Small Employer Health Insurance,'' *Iowa Law Review* Vol. 98:1935, 2013; and Deborah Chollet, ''Self-Insurance and Stop Loss for Small Employers,'' Mathematica Policy Research, June 30, 2012.

[123] Issuers and small employers in many locations so far have been allowed to retain plans that, under certain circumstances, under a transitional policy, are not considered to be out of compliance with certain ACA market reforms, whose prices are lower for low-risk groups than would be the case for plans that comply with those ACA market reforms.

group markets (unless such States also tightly regulate AHPs).

On May 23, 2018 after the comment period for the proposed rule had closed, the U.S. Congressional Budget Office (CBO) issued a report titled ''Federal Subsidies for Health Insurance Coverage for People under Age 65: 2018 to 2028.'' [124] In this report, the CBO analyzed the effects of the proposed rule for Association Health Plans issued on January 5, 2018 and the proposed rule for Short-Term, Limited Duration Insurance issued on February 21, 2018. The report states that ''[i]n 2023 and later years, about 90 percent of the 4 million people purchasing AHPs and 65 percent of the 2 million people purchasing STLDI plans would have been insured in the absence of the proposed rules, CBO and JCT estimate. Because the people newly enrolled in AHPs or STLDI plans are projected to be healthier than those enrolled in small-group or nongroup plans that comply with the current regulations governing those markets, their departure would increase average premiums for those remaining in other small-group or nongroup plans. As a result, premiums are projected to be 2 percent to 3 percent higher in most years.'' The Department did not rely on the information contained in the CBO report to reach its conclusions regarding the effects of the final rule on the insured persons, but notes that the CBO's findings are consistent with the Department's own findings.

8. Medicaid

Under the ACA, Medicaid eligibility was expanded in many States. Some Medicaid-eligible workers may become eligible to enroll in AHPs under this final rule. Among 42 million individuals under age 65 enrolled in Medicaid or CHIP in 2015, 2 million were working owners or dependents thereof, and 13 million were employees of small businesses or dependents thereof.[125] It is unclear how many Medicaid enrollees will gain AHP eligibility, or how many of those that do might elect to enroll in AHPs. Many will face strong economic incentives to continue relying exclusively on Medicaid, which generally charges no premium, imposes little or no cost sharing, and is comprehensive.

9. The Uninsured

Twenty-eight million individuals in the U.S. lacked health insurance coverage in 2015.[126] Of the 28 million uninsured, approximately 3 million are working owners or dependents thereof and an additional 12 million are employees of small businesses or dependents thereof.[127] The reduction to $0 beginning in 2019 of the individual shared responsibility payment is projected to increase the uninsured population by 4 million in 2019 and 13 million by 2027.[128] Because AHPs often can offer more affordable alternatives to individual and small group insurance policies, this rule is expected to extend insurance coverage to some otherwise uninsured individual families and small groups. On the other hand, some who face premium increases as a result of this final rule might choose to drop insurance coverage altogether.

The Department lacks data to quantify the effect of the final rule on the uninsured population. Publicly available estimates shed only limited light on the question. By one publicly available estimate, AHPs under the Proposed Rule by 2022 on net would add 130,000 individuals to the uninsured population.[129] However, it appears that this estimate may have neglected AHPs' potential to enroll individuals who would otherwise have been uninsured, focusing only on those who might drop insurance because of individual or small group market premium increases stemming from risk segmentation. Moreover, it is unclear whether this estimate took full account of the interactions among the proposed AHP rule, the ACA's continuing premium tax credit subsidies, and the reduction to $0 of the ACA's individual shared responsibility payment in 2019. If the estimate did not fully account for these interactions, it is likely to be too pessimistic. Some individuals and small businesses whose premiums will increase because of AHPs' risk segmentation effects might drop insurance, but ACA subsidies could limit this potential. Likewise, AHPs are likely to enroll many individuals who otherwise would have dropped insurance in response to the reduction to $0 of the individual shared responsibility payment in 2019. By another publicly available estimate, non ACA-compliant policies that resemble AHPs in some relevant respects might reduce the number of uninsured by 1.7 million.[130] This facially more optimistic estimate may more fully reflect the interactions between expanded availability of AHP-like policies on the one hand, and subsidies and the individual shared responsibility payment reduction on the other. On the other hand, because this estimate pertains not to AHPs but to certain other non ACA-compliant policies, it is unclear whether or how it can be compared with the first estimate. In light of these uncertainties, the Department is unable to predict with confidence whether this final rule on net will reduce or increase the number of Americans without any health coverage.

AHPs are likely to influence the *composition* of the uninsured population such that it includes, for example, proportionately fewer working owners and individuals from low-risk demographics, and proportionately more individuals from high-risk demographics, than would otherwise be the case. Individuals who themselves expect to incur high health costs would be less likely to drop insurance, however. Moreover, states may pursue steps to more generously subsidize high risk individuals.

Various studies of past federal and State reforms that tightened or loosened individual and small group market rules confronted a substantially different health insurance marketplace and hence are of only modest value in predicting the final rule's effects. The studies show that the changes may have changed the prices paid and policies selected by different businesses, somewhat improved access for targeted groups (potentially at others' expense), and/or prompted some individuals or small businesses to acquire or drop insurance, but had little *net* effect on coverage.[131]

[124] U.S. Congressional Budget Office, ''Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028.'' *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53826-healthinsurancecoverage.pdf* Estimates include the impacts of both the proposed AHP rule and the proposed Short-term, limited duration rule.

[125] DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[126] DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[127] DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[128] Congressional Budget Office, ''Repealing the Individual Health Insurance Mandate: An Updated Estimate'' (November 2017), *www.cbo.gov/publication/53300.*

[129] See Avalere Health, ''Association Health Plans: Projecting the Impact of the Proposed Rule'' at 3, 5–7 (Feb. 28, 2018), available at: *http://go.avalere.com/acton/attachment/12909/f-052f/1/-/-/-/-/Association%20Health%20Plans%20White%20Paper.pdf.*

[130] See Linda J. Blumberg, Matthew Buettgens, and Robin Wang, ''Updated: The Potential Impact of Short-Term Limited-Duration Policies on Insurance Coverage, Premiums, and Federal Spending,'' Urban Institute, March 2018, available at *https://www.urban.org/sites/default/files/publication/96781/2001727_updated_finalized.pdf.*

[131] The regulatory impact analysis of the Proposed Rule cites evidence to this effect.

AHPs' potential to expand coverage may be greater than this experience suggests, however. The final rule differs markedly from previous policy reforms that past studies examined. Furthermore, market conditions and the size and composition of the uninsured population are different today and may continue to be different. Generally it is likely that relative to past decades, fewer lower-income individuals are uninsured.[132] Also as noted earlier, small firms' propensity to offer insurance to their employees has fallen, suggesting potential opportunities for AHPs to expand coverage.

As previously noted, CBO recently analyzed the effects for the proposed rule for Association Health Plans issued on January 5, 2018 and the proposed rule for Short-Term, Limited Duration Insurance (STLDI) issued on February 21, 2018. CBO stated that ''[i]n 2023 and later years, about 90 percent of the 4 million people purchasing AHPs and 65 percent of the 2 million people purchasing STLDI plans would have insured in the absence of the proposed rules, CBO and JCT estimate.'' Thus, about 400,000, or 10 percent of the 4 million people purchasing AHPs, would come from the ranks of the uninsured. (It is unclear whether this latter estimate would have been higher or lower in the absence of the STLDI proposal, which is not part of this final rule but remains under consideration. Absent STLDI, some otherwise uninsured individuals who would have gained STLDI coverage might gain AHP coverage instead. On the other hand, some individuals facing premium increases or losing small employer offers consequent to AHPs who would have signed up for STLDI policies, absent such policies might drop insurance and become uninsured.) The Department did not rely on the information contained in the CBO report to reach its conclusions regarding the effects of the final rule on uninsured persons, but notes that the CBO's findings are consistent with the Department's own findings.

10. Operational Risks

A number of comments on the Proposed Rule expressed concern that AHPs will be vulnerable to the same sorts of mismanagement and abuse that historically afflicted a large number of MEWAs.[133] They argued that the Proposed Rule, by relaxing the criteria for groups or associations to sponsor plan MEWAs/AHPs, would contribute to such vulnerability, and questioned whether the Department and the States could sufficiently police AHPs. They questioned, for example, whether employer members can be expected to meaningfully control AHPs in cases where MEWA promoters pursuing profit launch new associations and, as founding association members, assume initial control of new AHPs. They contended that insurance markets that offer few affordable options for small businesses are fertile ground for problem MEWAs. They called on the Department to more closely examine its own experience policing MEWAs, and to factor that experience into its assessment of AHPs' potential impacts and into its deliberations about a possible final rule. Accordingly, this final rule reflects additional examination of the Department's experience policing MEWAs, and includes revised provisions that address many of the commenters' concerns.

ERISA generally classifies AHPs as MEWAs. Historically, some MEWAs have suffered from financial mismanagement or abuse, leaving participants and providers with unpaid benefits and bills.[134] Both the Department and State insurance regulators have devoted substantial resources to detecting and correcting these problems, and in some cases, prosecuting wrongdoers. Some of these entities attempt to evade oversight and enforcement actions by claiming to be something other than MEWAs, such as collectively-bargained multiemployer ERISA plans. To address this continuing risk, the ACA gave the Department expanded authority to monitor MEWAs and intervene when MEWAs are at financial or operational risk, and both the Department's and the States' enforcement efforts are ongoing.

The Department stresses that AHPs are also subject to existing federal regulatory standards governing MEWAs, and sponsors of AHPs would need to exercise care to ensure compliance with those standards. The ACA's additional enforcement tools and improvements in the MEWA registration and reporting requirements were designed to reduce MEWA fraud and abuse. Under ERISA section 521, the Secretary may issue an ex parte cease and desist order if it appears to the Secretary that the alleged conduct of a MEWA is fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury. As an example, a MEWA can be found to create an immediate danger ''for failure to establish and implement a policy or method to determine that the MEWA is actuarially sound with appropriate reserves and adequate underwriting.'' 29 CFR 2560.521–1(b)(3). Section 521(e) of ERISA authorizes the Secretary to issue a summary seizure order if it appears that a MEWA is in a financially hazardous condition. Generally, any conduct by a fiduciary that meets the requirements for the issuance of a cease and desist or summary seizure is a violation of his fiduciary duties.

The ACA also expanded reporting and required registration for MEWAs with the Department. MEWA registration requirements require plan and non-plan MEWAs to file Form M–1 under ERISA section 101(g) and 29 CFR 2520.101–2 prior to operating in a State. Further, all employee welfare benefit plans that are MEWAs subject to the Form M–1 requirements are required to file the Form 5500, regardless of the plan size or type of funding.[135] In addition, the

[132] ACA Medicaid expansions and subsidies extended coverage to many more low income individuals. See Michael E. Martinez, Emily P. Zammitti, and Robin A. Cohen, ''Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, January–September 2017,'' U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, February 2018, *https://www.cdc.gov/nchs/data/nhis/earlyrelease/insur201802.pdf*; and Sara R. Collins, Munira Z. Gunja, Michelle M. Doty and Herman K. Bhupal, ''First Look at Health Insurance Coverage in 2018 Finds ACA Gains Beginning to Reverse: Findings from the Commonwealth Fund Affordable Care Act Tracking Survey, February–March 2018,'' May 1 2018, *http://www.commonwealthfund.org/publications/blog/2018/apr/health-coverage-erosion?omnicid=EALERT1395236&mid=ainserro@ajmc.com.*

[133] See for example comment 680 from Marc I. Machiz, available at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00680.pdf.*

[134] For discussions of this history, *see:* (1) U.S. Gov't Accountability Office, GAO–92–40, ''State Need Labor's Help Regulating Multiple Employer Welfare Arrangements.'', March 1992, available at *http://www.gao.gov/assets/220/215647.pdf*; (2) U.S. Gov't Accountability Office, GAO–04–312, ''Employers and Individuals Are Vulnerable to Unauthorized or Bogus Entities Selling Coverage.'' February 2004, available at *http://www.gao.gov/new.items/d04312.pdf*; and (3) Mila Kofman and Jennifer Libster, ''Turbulent Past, Uncertain Future: Is It Time to Re-evaluate Regulation of Self-Insured Multiple Employer Arrangements?'', Journal of Insurance Regulation, 2005, Vol. 23, Issue 3, p. 17–33.

[135] ERISA requires any plan MEWA/AHP (a MEWA that is also an ERISA plan) to file an additional report annually with the Department. This is the same annual report filed by all ERISA plans that include 100 or more participants or hold plan assets, filed using Form 5500. The Department has verified receipt of the required Form 5500 from approximately two-thirds of plan MEWAs filing Forms M–1. While more than 90 percent of 2012 Form M–1 filers reported that they were plan MEWAs, only a bit more than one-half of these entities also filed Form 5500 for that year. Among those that did, frequently some of the information reported across the two forms was inconsistent. These reporting inconsistencies raise questions about the reliability of MEWAs' compliance with

Continued

ACA added new criminal penalties under ERISA section 519 for any person who knowingly submits false statements or makes false representations of fact about the MEWA's financial condition, the benefits it provides, or its regulatory status as a MEWA in the marketing of a MEWA. The ACA also amended ERISA section 501(b) to impose criminal penalties on any person who is convicted of violating the prohibition in ERISA section 519.

The Department recently examined the universe of these reports for MEWAs (including AHPs) operating in each year from 2012 through 2016. According to this examination, in 2016, 536 MEWAs covered approximately 1.9 million employees. The vast majority of these MEWAs reported themselves as ERISA plans that covered employees of two or more employers. Nearly all of these covered more than 50 employees and therefore constituted large-group employer plans for purposes of the ACA. A small fraction reported as so-called ''non-plan'' MEWAs, that provided or purchased health or other welfare benefits for two or more ERISA plans sponsored by individual employers (most of which probably were small group plans for ACA purposes). Some of these might qualify to begin operating as ''plan-MEWAs'' (or AHPs) under this final rule, which is intended to facilitate the establishment of more new plan-MEWAs/AHPs, all of which would be required to report annually to the Department.

A little more than one-half of reporting MEWAs operate in just one State, while a handful operate in all 50 States. In 2016, 58 MEWAs reported expanding operations into one or more new States. States with the most plan-MEWAs/AHPs in 2016 included California (122), Texas (98), Washington (95), New York (94), and Ohio (91). Only one had fewer than 20 (Hawaii had 17). Self-insured MEWAs generally are more vulnerable to financial mismanagement and abuse than fully-insured ones. MEWAs were most likely to be entirely or partly self-insured in certain western States including North Dakota (42 percent), Wyoming (41 percent), and Montana (37 percent). About one-fourth of reporting MEWAs are entirely or partly self-insured in all the States in which they operate, and another 4 percent are entirely or partly self-insured in some States. The remaining majority does not self-insure and instead is fully insured by issuers in all States in which they operate. Nearly all reporting MEWAs offered health coverage, and many offered other additional welfare benefits (such as dental, vision, life insurance, and/or disability insurance).

While plan MEWAs generally are required to file both Form M–1 and Form 5500, many fail to file both or report potentially inconsistent information across the two forms. Among plan MEWAs filing Form M–1 for 2015, approximately two-thirds can be linked readily with a corresponding Form 5500, suggesting that many either fail to file one or both forms, or file inconsistent identifying information that inhibits linking the two. Among those that can be linked, information provided sometimes is not consistent across the two forms. In addition, among self-insured MEWAs, 41 percent indicated that they had not obtained actuarial opinions about their financial stability. MEWAs must indicate on Form M–1 whether they are in compliance with a number of ERISA's minimum health plan standards and with ERISA's general requirement that plans hold assets in trust. As of 2016 nearly none reported lack of compliance with the former, but 14 percent reported that they did not comply with the trust requirement. These apparent reporting and operational deficiencies underscore the need for the Department and States to allocate resources to effectively oversee AHP operations and prevent mismanagement and abuse.

Since 1985, the Department's records indicate that it has pursued a total of 968 civil enforcement cases involving MEWAs, affecting more than 3 million participants. Among these cases, 338 involved allegations of fiduciary violations, 215 involved allegations of prohibited transactions (generally involving financial conflicts of interest), and 301 yielded monetary restitution of more than $235 million from the violations. (Many of these and other related cases involved other types of violations such as failure to follow plan terms or healthcare laws, provide plan benefits, or reporting and disclosure deficiencies.) The Department's enforcement efforts often were too late to prevent or fully recover major financial losses. The Department generally does not consistently measure or record those associated unpaid claims or their financial impacts on patients and healthcare providers. The Department additionally has pursued 317 criminal MEWA-related cases, resulting in 118 convictions and guilty pleas, and $173 million in ordered restitution.[136]

This rule includes provisions intended to protect AHPs against mismanagement and abuse. It requires the group or association to have a formal organizational structure with a governing body and by-laws or other similar indications of formality appropriate for the legal form in which the group or association is operated. This requirement is intended to ensure that the organizations are bona fide organizations with the organizational structure necessary to act ''in the interests'' of participating employers with respect to employee benefit plans as ERISA requires. The rule also requires employer members to control the functions and activities of the group or association and the employer members that participate in the plan to control the plan. This requirement is necessary both to satisfy ERISA's requirement that the group or association must act directly or indirectly in the interest of employers in relation to the employee benefit plan to meet the definition of employer, and to prevent formation of commercial enterprises that claim to be AHPs but that operate like traditional issuers selling insurance in the employer marketplace and that may be vulnerable to abuse. In addition, the final rule allows only employer members to participate in the AHP, and health coverage must only be available to or in connection with a member of the group or association, in order for the group or association to qualify as bona fide. Together, these criteria are intended to ensure that groups or associations sponsoring AHPs are bona fide employment-based groups or associations and more likely to be resistant to abuse.

An AHP sponsored by a bona fide group or association under this final rule is a group health plan under ERISA. Accordingly, AHPs are subject to all of the provisions of Title I of ERISA applicable to group health plans. Therefore, participants and beneficiaries receiving their health coverage through AHPs are entitled to the same protections under ERISA that are available to participants in single employer group health plans. For example, AHPs may not exclude coverage for preexisting conditions, impose lifetime and annual dollar limits on essential health benefits, or discriminate based on health factors. AHPs that provide dependent coverage must permit dependents to remain

ERISA's reporting requirements and the reliability of the information recounted here.

[136] Since 1985 EBSA's case information database system has experienced various upgrades and enhancements, impacting the collection of data on MEWA cases. Due to these changes over the more than 30 years, the reported number of MEWA cases may be slightly under or over estimated.

enrolled until they reach the age of 26. AHPs may not rescind a participant's or beneficiary's coverage except in the event of fraud or intentional misrepresentation of a material fact.

Nevertheless, the Department anticipates that the increased flexibility afforded AHPs under this rule will introduce increased opportunities for mismanagement or abuse, in turn increasing oversight demands on the Department and State regulators. A report responding to Executive Order 13813 notes that States can require self-insured AHPs to meet the same solvency and governance standards as issuers and to participate in guaranty funds that protect policyholders when issuers fail. States also can clarify or enact laws allowing their insurance departments to place AHPs into receivership if needed.[137] In this regard, the Department affirms above in this preamble that the final rule does not modify or otherwise limit existing State authority as established under section 514 of ERISA. Section 514(b)(6) of ERISA gives the Department and State insurance regulators joint authority over MEWAs, including AHPs (which are a type of MEWA), to ensure appropriate consumer protections for employers and employees relying on an AHP for healthcare coverage. Nothing in the final rule changes this joint structure, or is meant to reduce the historically broad role of the States when it comes to regulating MEWAs.

11. Federal Budget Impacts

The rule is likely to have both positive and negative effects on the budget, with some increasing and others reducing the deficit. On balance, the final rule's net impact on the federal budget is likely to be negative, increasing the deficit.

In 2005, the Congressional Budget Office (CBO) estimated the potential budget impacts of a 2005 legislative proposal to expand AHPs. As noted earlier, that legislative proposal predated the ACA and differed from this final rule, and the impacts of that proposal likely would differ from the impacts of this final rule in the market in 2018 and 2019. Under the 2005 legislation and contemporaneous law, many individuals joining AHPs previously would have been uninsured or purchased individual policies without the benefit of any subsidies; by joining AHPs they stood to gain potentially large subsidies in the form of tax exclusions. CBO predicted that the legislation, by increasing spending on employer-provided insurance, would reduce federal tax revenue by $261 million over 10 years, including a $76 million reduction in Social Security payroll taxes. CBO also predicted that AHPs would displace some Medicaid coverage and thereby reduce federal spending by $80 million over 10 years. Finally, according to CBO, the legislation would have required the Department to hire 150 additional employees and spend an additional $136 million over 10 years to properly oversee AHPs.[138] Together these budget impacts would have increased the federal deficit by $317 million over 10 years.

Today, many individuals who might have been uninsured in 2005 instead are enrolled in Medicaid or insured and receiving subsidies on Exchanges. When joining AHPs, these individuals in effect would trade existing subsidies for tax exclusions. Market forces generally favor individuals capturing the larger available subsidy, so it is more likely that higher income individuals will have an incentive to enroll in AHPs. To the extent that AHPs may increase premiums in Exchanges, subsidies paid there may also increase. This arguably could improve equity, insofar as transfers from taxpayers are likely to be more progressive than the cross-subsidies from low-risk individuals such transfers would replace. In 2017 approximately 8 million individuals insured on Exchanges received $34 billion in tax credit subsidies.[139] If, however, AHPs enroll some Medicaid enrollees or some individuals otherwise receiving large subsidies on individual Exchanges, savings from these impacts might offset a portion of these deficit increases.

12. Applicability Date

As discussed later in the preamble, the final rule includes a phased or staged applicability date that provides prompt expansion of AHP availability while addressing certain concerns raised by commenters. The final rule allows fully insured plans to begin operating under the new rule on September 1, 2018. Existing self-insured AHPs can begin operating under the new rule on January 1, 2019, and new self-insured AHPs can begin on April 1, 2019. This phased approach will provide prompt relief to individuals seeking affordable health coverage through AHPs while allotting some additional time for the Department and State authorities to address concerns about self-insured AHPs' vulnerability to financial mismanagement and abuse.

Some comments urge quick action to make AHPs available. Many express impatience for more affordable alternatives to ACA-compliant small group and especially individual policies. These comments appear to be motivated by both the sharp premium increases and scarcity of choices that characterize certain local markets. Absent more affordable alternatives, many small businesses have opted to go without insurance. It is likely that, absent alternatives, more would drop insurance in 2019 as premiums continue to increase and the individual shared responsibility payment is reduced to $0. Many of those who did not drop insurance would be forced to make other economic sacrifices to maintain coverage.

Other comments call for delay. Some comments say delay is needed to accommodate the annual cycle for insurance policy premium approvals by State insurance regulators. The cycle for calendar year 2019 in many States is already underway (March through May, according to one comment),[140] and the uncertain impact of the final rule on the individual market and small group market may or may not be factored into individual and small group ACA-compliant issuers' 2019 premiums for those markets. If AHPs enter markets in 2019 and ACA compliant issuers' rates for the individual and small group markets fail to account for associated adverse selection, those rates may be insufficient to cover the issuers' expenses. Some comments accordingly call for applicability of the final rule to be delayed until at least 2020.

Some comments urge delay to reduce risks of mismanagement and abuse. Effective AHPs need time to establish robust governance structures, financial arrangements, and businesses practices. Comments claim that any AHP that rushes to begin or expand operations in 2019 could pose risks. The Department and State authorities both need time to build and implement adequate supervision and possible infrastructure to prevent fraud and abuse and possibly

[137] Georgetown University Health Policy Institute, Center on Health Insurance Reforms, ''State Options to Protect Consumers and Stabilize the Market: Responding to President Trump's Executive Order on Association Health Plans,'' December 2017.

[138] CBO cost estimate, H.R. 525 Small Business Health Fairness Act of 2005. April 8, 2005. *https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/costestimate/hr52500.pdf.*

[139] U.S. Congressional Budget Office, ''Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2017 to 2027,'' September 2017.

[140] See comment letter from BlueCross BlueShield, March 6, 2018 (Comment #549 on EBSA web page last accessed at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00549.pdf*).

to revise other relevant rules to optimize AHPs' role in local markets.[141]

Commenters pointed out that State insurance regulators actively provide oversight and enforcement in the MEWA area to, among other things, prevent fraud, abuse, incompetence and mismanagement, and avoid unpaid health claims. Many States say they will need time for new AHP specific legislation and/or modification of existing regulations and expanded funding for enforcement programs. Commenters also said time will be needed for State regulators to coordinate with the Department on the scope of State authority to regulate, especially with respect to inter-state AHP operations.

Commenters also called for the Department to increase its enforcement activities. This increase would require Congress to appropriate additional funding for the Department's oversight of expanded AHPs and for the Department to expand staff and related enforcement support resources to meet that broader enforcement/oversight mission.

This final rule's phased applicability dates aim to balance the prompt promotion of more affordable health coverage options with caution about market and operational risks. Expanded AHP operations beginning on or after September 1, 2018 will be limited to fully insured AHPs because these AHPs are best positioned to take advantage of this earliest opportunity to offer coverage to individuals and small business and likely to be less susceptible to problems and more prepared to deliver reliable coverage in an orderly fashion. First, such AHPs must be fully insured and therefore protected by already established State oversight of large group issuers' financial stability and market conduct. Second, it is likely that many or most of the earliest AHP growth will build upon existing AHP or group and association operations. This might include for example: (1) An existing plan MEWA/AHP expanding availability to more industries and/or to working owners; (2) an existing non-plan MEWA that currently distributes small group policies to small businesses in multiple industries converting itself into a plan MEWA/AHP that offers large group polices covering the same and possibly additional businesses; and (3) an existing local group or association, such as a local chamber of commerce, that currently does not offer members health insurance partnering with a local large-group issuer to establish an AHP for its members.

Additional expanded AHP operations under this final rule will be limited to currently existing self-insured AHPs beginning on or after January 1, 2019. Starting then, such AHPs could, for example, expand availability to additional industries within a geographic location and/or to working owners without employees, subject to the provisions of this final rule. Existing self-insured AHPs already have been subject to ERISA's fiduciary standards of loyalty and care, and barred from engaging in financial conflicts of interest (except where permitted under an applicable prohibited transaction exemption). Moreover, this final rule leaves intact States' broad authority to oversee these AHPs. Therefore, self-insured AHPs that expand operations pursuant to this final rule's January 1, 2019 applicability date will be the same entities, overseen by the same federal and State authorities, as in the recent past. Extending these entities' ability to offer more affordable health insurance to additional small businesses and working owners justifies any attendant extension of their operational risks.[142]

The last expansion of AHP operations under this final rule applies to new self-insured AHPs' operations beginning on or after April 1, 2019. This modest delay of the applicability date for such AHPs is intended to enable and encourage them to fully prepare for sound operations and provide sufficient time for the Department and the States to implement a robust supervisory infrastructure and program. The Department intends to immediately increase its focus on compliance guidance and enforcement in collaboration with the States.

As noted later in this preamble, this final rule's prompt but phased applicability dates aim to balance quick access to affordable insurance with due caution about adverse market impacts and operational risks. Market forces may favor AHPs that grow fastest in areas where needs are greatest, but such needs magnify AHPs' potential to do both good and harm. The sequencing of applicability dates—fully insured AHPs first, existing self-insured AHPs second, new self-insured AHPs last—responds to this tension by opening the door soonest for earlier growth by lower risk arrangements. Early availability of more affordable insurance for small businesses, especially for those who otherwise would forgo coverage, justifies any possible disruption to individual and small group issuers who have already begun setting 2019 rates and the markets in which they operate.

Further, consistent with EBSA's longstanding commitment to providing compliance assistance to employers, plan sponsors, plan fiduciaries, other employee benefit plan officials and service providers in understanding and complying with the requirements of ERISA, the Department intends to provide affected parties with significant assistance and support during the transition period and thereafter with the aim of helping to ensure the important benefits of the final rule are implemented in an efficient and effective manner.

AHPs' growth and impacts are likely to be more gradual than the phased applicability dates alone would allow. Some comments suggest that many of the most substantial and fully insured AHPs are expected to choose to delay modifying their programs to reflect the new AHP rule and new enrollment activity until calendar year 2020 (the next rating cycle), when the rate environment is more settled and certain.

13. Regulatory Alternatives

As required by E.O. 12866, the Department considered various alternative approaches in developing this final rule that are discussed below.

Retain the Department's existing AHP sub-regulatory guidance. As discussed above, in response to the Proposed Rule, several commenters requested the Department allow entities meeting the Department's previous sub-regulatory guidance defining the term ''bona fide group or association of employers'' to continue to rely on such guidance without meeting the criteria set forth in the new rule. They argued that existing AHPs that relied on the Department's pre-rule guidance on ''bona fide group or association of employers'' did not design their operations with the new requirements in mind. As a consequence, they may not be able to comply with the new conditions without reducing existing options for affordable healthcare. A primary rationale for the commenters was that some type of grandfathering would accommodate AHPs that have used experience-rating for each employer member in the past to prevent undue disruption and burdens associated with

[141] As noted above, the Department intends to reexamine existing reporting requirements for AHPs/MEWAs, including the Form M–1 and possibly the Form 5500, and may be asked to propose class or individual prohibited transaction exemptions for AHPs that want to use affiliates to serve as their administrative service providers or act as issuers providing benefits under the AHP.

[142] Some self-insured AHPs historically have subjected consumers to fraud, mismanagement, and abuse. Six in ten MEWAs that self-insure in all or some States in which they operated in 2016 reported obtaining opinions about their financial stability from independent actuaries.

coming into compliance with new rules that are inconsistent with long-standing business practices.

Other commenters asserted that allowing new entities to satisfy the Department's prior guidance under a grandfathering approach potentially would result in more choice for small businesses by allowing them to choose from providing coverage in plans in the traditional health insurance market, the grandfathered AHP market, and the newly expanded AHP market under the final rule.

On the other hand, some commenters were opposed to the Department adding a grandfathering provision, because exempting groups or associations from the nondiscrimination requirements and allowing them to experience rate member employers would result in some entities offering coverage in ways that are inconsistent with the final rule and put new AHPs at a competitive disadvantage compared to grandfathered AHPs.

After considering these comments, the Department has determined that the requirements of the final rule do not supplant the Department's previously issued guidance. As stated above, the final rule expands the opportunities for employer groups or associations to form AHPs by establishing an alternative mechanism for meeting the ''employer'' requirements specifically by relaxing the commonality requirement, allowing the employer group or association to exist for a principal purpose of offering health coverage, and providing coverage to working owners without employees.

The Department intends for the criteria set forth in this final rule to provide an alternative basis for groups or associations to meet the definition of an ''employer'' under ERISA section 3(5). Accordingly, the final rule does not require employer groups and associations meeting the criteria under the Department's prior AHP guidance to comply with the nondiscrimination provision of the final rule (although, of course, the HIPAA health nondiscrimination rules continue to apply to the AHP, as a group health plan). Therefore, such AHPs may treat each employer-member as a distinct group of similarly situated individuals to the extent permissible under current HIPAA health nondiscrimination rules based on the facts and circumstances of the particular situation. Allowing new AHPs to operate pursuant to either this new rule or the Department's pre-rule guidance, rather than simply grandfathering existing AHPs to continue operating as before, ensures that new AHPs can compete with existing ones on equal footing.

Modifying the control requirement. The proposal generally required that groups or association members control the AHP's functions and activities, including the establishment and maintenance of the group health plan in order for the group or association to qualify as bona fide. Such control under the proposal could be direct or indirect through the regular election of directors, officers, or other similar representatives that control the group or association and the establishment and maintenance of the plan.

A number of commenters supporting the Proposed Rule acknowledged that a control test is necessary to ensure that groups or associations act ''in the interest'' of participating employers in relation to the group health plan, as required by section 3(5) of ERISA. A number of commenters who generally opposed the proposal were skeptical that the proposed control test could adequately protect against fraudulent MEWAs and other entities that may not act in the best interest of the employer members. A few commenters opposed the proposed control test entirely. These commenters generally expressed apprehension about the logistics of requiring participating employer members to control the functions and activities of a large group or association.

After careful consideration of these comments, the Department has determined that the control test is necessary to satisfy the statutory requirement in ERISA section 3(5) that the group or association must act ''in the interest of'' the employer members in relation to the employee benefit plan in order to qualify as an employer. The control test is also necessary to prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate similar to traditional insurers selling insurance in the group market.

The Department, however, slightly modified the language in the final rule to better align the control test with the Department's existing sub-regulatory guidance. Specifically, as revised, the control test provides that the functions and activities of the group or association must be controlled by its employer members in order for it to qualify as bona fide. The control test also requires the group or association's employer members that participate in the group health plan to control the plan. Control must be present both in form and in substance. The determination of whether control exists is based on a facts and circumstances test.

Subjecting AHPs to ACA individual and small group market rules. A number of public comments raised the risk that AHPs would exercise their flexibility in ways that harm local individual and small group markets. Some advocated a level playing field where AHPs compete with issuers under the same rules. However, AHPs' flexibility to offer products and premiums that more closely align with their members' preferences is a significant benefit for those members. That flexibility also frees AHPs from some regulatory overhead, and may enable some AHPs to achieve the scale necessary for administrative efficiency and market power. States retain discretion to regulate AHPs. For these reasons, this final rule does not subject AHPs to the ACA's individual and small group market rules.

Allowing new AHPs to exist for the sole purpose of providing insurance. The Proposed Rule stated that a bona fide group or association of employers may act as an employer sponsoring a group health plan if it exists for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members. This represents a departure from previously issued sub-regulatory guidance, which required a group or association to exist for purposes other than providing health benefits in order to act as an employer for purposes of sponsoring a group health plan.

As discussed earlier in this preamble, many commenters, including some who were otherwise supportive of the Proposed Rule, objected to this provision. Several commenters believed that, because most small businesses already have the opportunity to belong to a chamber of commerce or other professional group or association, allowing a group or association to be formed solely for the purpose of sponsoring a group health plan is unnecessary to achieve the Department's goals. Commenters believed that a proliferation of associations established for the exclusive purpose of sponsoring an AHP could diminish the value of existing trade and professional groups. Similarly, a proliferation of groups or associations could also diminish the market power of existing AHPs and those that may be formed by groups and associations that exist for other purposes. In particular, a proliferation of groups or associations could limit these entities' opportunities to achieve the economies of scale that make AHPs an attractive vehicle for providing affordable coverage in the first place. Commenters also argued that allowing groups and associations formed for the sole purpose of offering an AHP could invite unscrupulous promoters to enter

the market with mismanaged and thinly funded AHPs that could engage in fraudulent and abusive practices.

Commenters offered numerous suggestions for alternative criteria determining a bona fide group or association of employers for purposes of the new rule with the aim that those eligible be limited to legitimate, well-managed, and well-intended organizations with the ability to properly operate an AHP. Some commenters supported retaining the requirement in the Department's prior guidance that the group or association exist for other purposes unrelated to the provision of benefits in order for the group or association to qualify as bona fide. Some suggested requiring a group or association to exist for a specified minimum length of time before it could sponsor an AHP. Others suggested requiring the group or association to meet certain criteria for tax-exempt organizations, have minimum revenues unrelated to AHP operations, or demonstrate by other means the capacity to oversee the administrative requirements associated with managing the complexities of an AHP.

After consideration of the public comments, the Department determined that some modification of this provision is appropriate, because the intent of this final rule is to expand access to AHP coverage options, while protecting plan participants and beneficiaries from imprudent, abusive, or fraudulent arrangements. Removing undue restrictions for existing groups and associations as well as for newly-formed groups and associations of employers and working owners is critical to achieving the Department's goal of expanding choice in health coverage options. But the Department shares concerns regarding operational risks such as fraud and insolvency that commenters believed would be more likely with respect to AHPs offered by newly-formed groups and associations that exist solely for the purpose of sponsoring an AHP. In addition, the Department's revisions of the final rule are responsive to concerns that, in the absence of some purpose other than providing health benefits, there may be insufficient basis for treating the group or association as the sort of employment-based group or association contemplated by ERISA section 3(5). Accordingly, the Department is modifying this provision in the final rule to establish a general legal standard requiring a group or association of employers to have at least one substantial business purpose unrelated to offering and providing health care coverage or other employee benefits to its employer members and their employees, even if the primary purpose of the group or association is to offer such coverage to its members. Although the final rule does not define the term ''substantial business purpose,'' the rule contains an explicit safe harbor under which a substantial business purpose is considered to exist in cases where the group or association can establish that it would be a viable entity even in the absence of sponsoring an employee benefit plan and states that a business purposes does not require a for-profit purpose. The Department believes these modifications assist substantially in drawing a clean line between entities that might exist only to underwrite and sell insurance, on the one hand, and those that qualify as an ''employer'' under section 3(5) of ERISA, on the other, because of their other substantial business purpose.

Determining Effective and Applicability Date. As discussed above, the Proposed Rule did not include a discussion of the effective and applicability date for the rule and exemptions. Nevertheless, the Department received a significant number of comments regarding the importance of properly timing implementation of the final rule. Some commenters suggested that the effective date of the final rule should be no less than a year after it is published in the **Federal Register**. Others suggested an effective date of January 1st of the first full calendar year to fall at least 12 months from the date of publication of the final rule. Still others urged an effective date of January 1, 2020, or later. Still others argued that the effective date should be no less than three years after publication of the final rule for self-insured AHPs with a grandfathering exemption date of December 31, 2017 that will allow existing bona fide AHPs to remain operational.

After careful consideration of the public comments, the Department has determined that it is important for the final rule to become effective on the earliest possible date to provide plans, plan fiduciaries, plan participants and beneficiaries, and other stakeholders with certainty that will allow them to allocate capital and other resources and make decisions to prepare to implement AHPs pursuant to the final rule.

The Department considered providing the same applicability date for fully insured and self-insured AHPs, but instead chose the following trifurcated applicability dates: September 1, 2018 for new fully insured arrangements; January 1, 2019, for existing self-insured plan MEWAs that meet the employer definition by satisfying the Department's existing sub-regulatory guidance and want to comply with the final rule; and April 1, 2019 for new self-insured AHPs. The Department believes that this approach will allow AHPs in each category to become operational as soon as possible while providing adequate time for plans and their affected service providers to adjust to the final rule. The Department has concluded that a phased or staged compliance date would address the concerns raised in the comments while also facilitating an immediate expansion of AHP availability in the marketplace.

Omitting Working Owners from AHP Eligibility. The Department considered whether to omit from AHP eligibility working owners with no employees. Some commenters questioned whether their inclusion was consistent with ERISA's application to employers only. Some saw their inclusion as likely to produce too much adverse selection against local individual markets. Other commenters, however, argued that working owners currently are particularly disadvantaged by the limited choices and high prices that afflict many local individual markets, and consequently can gain much from AHP eligibility.

Under this final rule, AHPs can extend eligibility to both employers and working owners without employees. The Department separately considered eligibility for each, together with the respective separate implications for local small group and individual markets, and concluded that each was separately justified. The expansion of AHP opportunities for small employers under this rule will make more affordable choices available to many, including choices provided by geographically-based AHPs that benefit from large local market shares. This justifies any attendant adverse selection against local small group markets. Likewise, the extension of AHP eligibility and choices to working owners will make more affordable choices available to many, including some who otherwise would have dropped insurance altogether. Relative to small employers, the stakes for many working owners are likely to be higher. Working owners without employees currently are confined to local individual markets, many of which are beset by very limited choices and/or very high or rapidly increasing premiums. AHPs can offer many such working owners far more affordable alternatives. Relative to small group markets, such affected individual markets may be both more fragile and more susceptible to adverse selection,

but the attendant risks for most individuals insured there are limited by the availability of subsidies for most individuals who purchase coverage on Exchanges. The availability of more affordable options for working owners justifies consequent cost increases for taxpayers and for affected individuals.

The final rule does not disturb states' authority to regulate AHPs in order to optimize their benefits for working owners and/or ameliorate any attendant negative consequences for local ACA-compliant individual markets.

Expanding or Omitting the Proposed Rule's Paragraph (d)(4) Nondiscrimination Provision. As stated earlier in this preamble, the Proposed Rule included certain nondiscrimination requirements that built on the existing health nondiscrimination provisions applicable to group health plans under HIPAA, as amended by the ACA, referred to as the HIPAA health nondiscrimination rules.[143] The proposal prohibited the group or association from treating member employers as distinct groups of similarly-situated individuals when applying the HIPAA health nondiscrimination rules for defining similarly-situated individuals if the group or association wishes to qualify as bona fide. Therefore, groups or associations that conditioned individual employer members' eligibility for benefits or premiums on their respective employees' health status could not qualify as bona fide.

The Department considered expanding or omitting this provision from the final rule. Some commenters criticized this provision as an undue obstacle to AHPs' proliferation and growth. Some expressed concern that the provision would expose AHPs to adverse selection, while some noted that some existing AHPs currently do condition employer members' eligibility for benefits and/or premiums on their employees' health status. Other commenters praised the provision as a necessary and justified check against AHPs' ability to segment good risks from ACA-compliant individual and small group markets. Some generally criticized discrimination based on health status as contrary to fairness and an obstacle to access and affordability to individuals with health problems who need insurance most. Some argued that this provision alone was inadequate to protect ACA-compliant markets from adverse selection and to preserve fairness, access, and affordability for people with health problems, and that AHPs additionally should be subject to some or all of the ACA and state rules applicable to the individual and small group markets in which they operate.

After careful consideration of the comments, the Department agrees that it is unnecessary and would be counterproductive to outlaw currently existing lawful and successful AHP practices. Therefore, AHPs established under pre-rule guidance will retain the same flexibility as in the past to condition individual employer members' premiums on their respective employees' health status, to the extent permissible under the current HIPAA nondiscrimination rules based on the facts and circumstances of the particular situation.[144]

The Department notes that this final rule's nondiscrimination provisions will limit AHPs' flexibility to set actuarially fair prices, and will reduce risk segmentation that favors AHPs over individual and small group markets. This final rule newly authorizes multi-industry, geographically-based AHPs, and AHPs that include working owners. In combination, the flexibility to condition employer members' premiums on health status and the ability to claim a large local market share would pose a greater potential for adverse selection against ACA-compliant markets than that presented by existing AHPs. The Department further notes that this final rule's nondiscrimination provision will increase AHPs' exposure to adverse selection, and with it their propensity to defend against adverse selection by limiting some benefits.

However, after careful consideration of the comments, the Department decided the nondiscrimination provision in paragraph (d)(4) should be retained. As discussed in section B.2.g. of the preamble, above, under the heading *Nondiscrimination,* because the final rule relaxes the Department's pre-rule guidance on the groups or associations that may sponsor a single ERISA-covered group health plan, it is especially important to maintain paragraph (d)(4) as proposed. In the context of these new, broader arrangements, paragraph (d)(4) helps ensure that the group or association is distinguishable from commercial-insurance-type arrangements.

14. Conclusion

The expansion of AHPs under this final rule will provide small businesses, including working owners, with additional and more affordable health insurance options that will more closely match their preferences. Many employees of small businesses will appreciate the more affordable health insurance provided through AHPs. Relative to ACA-regulated health insurance issuers in individual and small group markets, AHPs will be able to offer more affordable options by pursuing economies of scale and offering more tailored, often less comprehensive benefit packages that are priced in a more actuarially fair manner.

Increased regulatory flexibility will necessarily result in some segmentation of risk that favors AHPs over individual and small group markets. However, practical considerations and federal nondiscrimination rules will limit such segmentation. States may further limit risk segmentation. Favorable selection toward AHPs will help reduce premiums for many small businesses, but will increase premiums somewhat for individuals and other small business remaining in the ACA-compliant individual and small group markets. Subsidy-eligible taxpayers with household incomes at or below 400 percent of poverty purchasing coverage on Exchanges generally will be protected from these premium increases.

Operational risks demand increased federal and state oversight. Overall, this rule delivers social benefits that justify any attendant social costs.

15. Paperwork Reduction Act

The final rule is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501, *et seq.*), because it does not contain a collection of information as defined in 44 U.S.C. 3502(3).

16. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the final rule. The Department has determined that this final rule, which would broaden the criteria for determining when employers may join together in a

[143] 29 CFR 2590.702(d)(3). *See also* 29 CFR 2590.702(d)(4) Example 5.

[144] *See* discussion in section B.2.g. of the preamble, above, under the heading *Nondiscrimination.*

group or association to sponsor a group health plan under ERISA, is likely to have a significant impact on a substantial number of small entities. Therefore, the Department provides its FRFA of the final rule, below.

Need for and Objectives of the Rule

This final rule is intended and expected to deliver benefits primarily to the employees of many small businesses and their families including many working owners, as well as many small businesses themselves. As discussed in more detail in section 2 of the RIA, this final rule would encourage the establishment and growth of AHPs. AHPs may offer many small businesses and working owners additional and more affordable health benefit options than otherwise are available to them in the individual and small group markets.

Affected Small Entities

The Small Business Administration estimates that 99.7 percent of employer firms meet its definition of a small business.[145] The applicability of these final rules does not depend on the size of the firm as defined by the Small Business Administration. Small businesses, including sole proprietors can join AHPs as long as they are eligible to do so and the AHP sponsor meets the requirements of the final rule. The Department believes that the smallest firms, those with less than 50 employees, are most likely to benefit from the savings and increased choice derived from AHP coverage under the final rule and include some subset of:

- The 25 million individuals under age 65 who currently are covered in individual markets, including approximately three million who are sole proprietors or dependents thereof, and an additional 12 million who are employees of small businesses or dependents thereof; [146]
- The 28 million individuals under age 65 who currently lack insurance, including three million who are sole proprietors or dependents thereof, and an additional 12 million who are employees of small businesses or dependents thereof; [147] and
- The 1.6 million private, small-firm establishments (those with fewer than 50 employees) that currently offer insurance and the four million that do not.[148]

Impact of the Rule

As stated above, by expanding AHPs, this final rule would provide additional and more affordable health coverage options for many small businesses, thereby potentially yielding economic benefits for participating small businesses and their employees. The rule may impact individual and small group issuers whose enrollees might switch to AHPs; many of these issuers would likely be small entities. Some small businesses obtaining coverage in the small group health insurance market will experience an increase in premiums. Some of those will not receive attractive alternative offers from AHPs. Some of those may see decreased choice and may even stop offering insurance to their employees due to the premium increases or to issuers withdrawing some offers. The final rule allows states to continue to regulate AHPs, which can serve to mitigate any adverse impacts on small businesses due to the expansion of AHPs.

The RIA and preamble to the final rule includes a discussion of the changes to the Proposed Rule in response to comments. These changes include applying phased applicability dates, modifying the ''control'' requirement, allowing continued reliance on previous AHP rules so existing AHPs can continue to operate as they do today and new AHPs can form under the Department's previously issued guidance, lowering the hours worked threshold for working owners without employees to 20 hours per week, and requiring AHPs to be established and maintained for at least one substantial business purpose that is not sponsoring a group health plan. The ''Regulatory Alternatives'' section of the RIA above discusses significant regulatory alternatives considered by the Department.

Duplication, Overlap, and Conflict With Other Rules and Regulations

The final rule would not conflict with any relevant federal rules. As discussed above, the final rule would merely broaden the conditions under which a group or association can act as an ''employer'' under ERISA for purposes of offering a group health plan and would not change AHPs' status as large group plans and MEWAs, under ERISA, the ACA, and state law. In the final rule, the Department affirms that the rule does not modify existing State authority as established under ERISA section 514(b)(6), which gives the Department and state insurance regulators joint authority over MEWAs, including AHPs, to ensure appropriate consumer protections for employers and employees relying on an AHP for health coverage. Nothing in the final rule changes this joint structure, or is meant to reduce the historically broad role of the States when it comes to regulating MEWAs.

17. Congressional Review Act

The final rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq.*) and will be transmitted to Congress and the Comptroller General for review.

The final rule is a ''major rule'' as that term is defined in 5 U.S.C 804, because it is likely to result in an annual effect on the economy of $100 million or more.

18. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this rule does not include any federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments, or the private sector. The rule merely broadens the conditions under which AHPs will be treated as large group health benefit plans under ERISA, the ACA and state law.

19. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have

[145] SBA Office of Advocacy Frequently Asked Questions. *https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.*

[146] DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[147] DOL calculations based on the Abstract of Auxiliary Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey, U.S. Department of Labor.

[148] DOL calculations based on the Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends. Medical Expenditure Panel Survey-Insurance Component, 2016. Medical Expenditure Panel Survey Private Sector Insurance Component, Table I.A.1 and Table I.A.2.

federalism implications must consult with state and local officials and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department's view, this final rule would have federalism implications because they would have direct effects on the States, the relationship between the national government and the States, and on the distribution of power and responsibilities among various levels of government. The Department believes these effects are limited, insofar as the final rule would not change AHPs' status as large group plans and MEWAs, under ERISA, the ACA, and state law. As discussed above in this preamble, because ERISA classifies AHPs as MEWAs, they generally are subject to state insurance regulation. Specifically, if an AHP is not fully insured, then under ERISA section 514(b)(6)(A)(ii) any state insurance law that regulates insurance may apply to the AHP to the extent that such state law is not inconsistent with ERISA. If, on the other hand, an AHP is fully insured, ERISA section 514(b)(6)(A)(i) provides that only those state insurance laws that regulate the maintenance of specified contribution and reserve levels may apply to the AHP, although the States, of course, retain regulatory authority over the insurance company itself and any policies it issues. The Department notes that state rules vary widely in practice, and many States regulate AHPs less stringently than individual or small group insurance.

In the course of developing this final rule, the Department consulted directly with a number of state officials, including state insurance department representatives and state-based Exchange representatives, as well as with the National Association of Insurance Commissioners.

The Department received many comments, including from several state insurance regulators, asserting that it is very important for the Department not to draft or implement the final rule in a manner that undermines or impairs the current ERISA preemption provisions that broadly permit states to regulate AHPs. They maintained that if the final rule prevents states from applying their insurance laws to AHPs, market fragmentation could result, because AHPs could be established in a state with less restrictive issuer and rating rules relative to other states. These commenters argued that AHPs operating in multiple states should be required to abide by the regulations of each of the states in which the plan operates, and not just the state in which the group or association or their AHP is deemed to be domiciled. Another commenter suggested that the final rule should distinguish self-insured AHPs, which have historically presented problems in the market, from fully-insured AHPs, which are backed by licensed insurance companies and subject to oversight by state insurance commissioners and HHS. A few commenters asked that DOL promulgate a rule under ERISA section 520 which authorizes the Department to make persons operating AHPs subject to otherwise preempted state insurance laws to prevent fraud and abuse.

The main point of these commenters is that the Department should make a clear and unequivocal statement in the final rule that States retain full authority to set and enforce solvency standards for all AHPs, and comprehensive licensure requirements and oversight for non-fully-insured AHPs including benefit, rating and consumer protection standards, and laws specifying who is eligible to apply for licensure. The Department agrees that the final rule does not modify existing state authority. ERISA section 514(b)(6) gives the Department and state insurance regulators joint authority over MEWAs, including AHPs (which are a type of MEWA), to ensure appropriate regulatory and consumer protections for employers and employees relying on an AHP for healthcare coverage. The Department therefore states in this final rule that nothing in the rule changes this joint structure, or is meant to reduce the historically broad role of the States when it comes to regulating MEWAs, including AHPs.

Thus, under this framework, if an AHP established pursuant to this final rule is not fully insured, any state law that regulates insurance may apply to the MEWA to the extent that such state law is ''not inconsistent'' with ERISA. If an AHP is fully insured, state laws that regulate the maintenance of specified contribution and reserve levels (and that enforce those standards) may apply to the MEWA, and state insurance laws are generally saved from preemption when applied to insurance companies that sell policies to AHPs and to insurance policies that AHPs purchase to provide benefits. In addition, with respect to fully-insured AHPs, the Department's view is that ERISA section 514(b)(6) clearly enables states to subject such AHPs to licensing, registration, certification, financial reporting, examination, audit and any other requirement of State insurance law necessary to ensure compliance with the State insurance reserves, contributions and funding requirements.

20. Executive Order 13771 Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. This rule is expected to be an E.O. 13771 deregulatory action, because it will expand small businesses' access to more lightly regulated and more affordable health insurance options, by removing certain restrictions on the establishment and maintenance of AHPs under ERISA.

D. Effective Date, Applicability Dates and Severability

Although the Proposed Rule did not contain a separate discussion of an effective date or applicability date for the final rule, the Department received a significant number of comments regarding the importance of properly timing implementation of the final rule. The comments supporting delay pointed to a number of challenges in moving forward with new AHPs on an expedited schedule. For example, some asserted that early applicability dates would be poor matches for state timelines for setting premium rates. According to some commenters, the annual cycle for insurance policy premium approvals supports an applicability date after January 1, 2019. According to one commenter, in many states, the critical period for 2019 pricing is March through May of 2018. As a result, the impact of this rule may or may not be factored into 2019 premiums. Similarly, some commenters suggested that many fully-insured AHPs and the largest self-insured AHPs are expected to choose to delay modifying their programs until calendar year 2020, when the implications of the rule and the rate environment is more settled and certain. Commenters supporting delay also argued that the effect of an immediate effective date may be to encourage the establishment of AHPs that enter the market (both self- and fully-insured arrangements) prematurely without the proper administrative processes necessary to avoid consumer harm (*e.g.,* adequate reserves and appropriate premium structures). They expressed concern that this could result in an initial AHP implementation marked by a higher concentration of riskier, or even fraudulent, structures capturing the market.

Many commenters also noted that regulators, as well as AHPs, need time to prepare for change. For example, there will be a need to modify existing reporting requirements for AHPs and other MEWAs, including at least the

Form M–1 and possibly the Form 5500. That will require APA rulemaking and/or Paperwork Reduction Act notice and comment processes that optimally would need to be completed in advance of the applicability date of the new AHP rule. Similarly, there may be a need for class or individual prohibited transaction exemptions in the case of AHPs that want to use affiliates to be administrative service providers to the AHP or to act as issuers providing benefits under the AHP. ERISA requires a notice and comment process for issuance of prohibited transaction exemptions, which necessarily takes time. Similarly, the final rule importantly depends on state insurance regulators for oversight and enforcement to, among other things, prevent fraud, abuse, incompetence and mismanagement, and avoid unpaid health claims. Some states say they will need time for new AHP-specific legislation and/or modification of existing regulations and enforcement programs.

The comments also included specific suggestions. For example, some said the applicability date of the new rule needs to be delayed for no less than a year after it is published in the **Federal Register**. Others suggested an applicability date of January 1 of the first full calendar year to fall at least 12 months from the date of publication of the final rule. Still others urged an applicability date of January 1, 2020, or later. Others argued that the applicability date should be delayed no fewer than three years for self-insured AHPs with a grandfathering exemption date of December 31, 2017 that will allow existing bona fide AHPs to remain operational. Some said the final rule should not become applicable until Congress has appropriated funding for DOL oversight of an expanded universe of AHPs. Some commenters expressed skepticism about the Department's ability to effectively police AHPs for abuse at current resource levels and stressed the need for increased resources and coordination between the States and the Department.

The Department has determined that a prolonged delay in applicability of the final rule is not in the public interest. As noted above, the Department received many comments from individuals in immediate distress due to the unavailability of affordable healthcare coverage and expressing the challenges they have faced since the enactment of the ACA. A significant number of commenters expressed serious concerns regarding the rising cost of health insurance. Many of them were small business owners that currently do not offer health insurance to their employees and who cited ever-increasing costs as the primary reason for their inability to provide their employees and their families with affordable health coverage. Even business owners that do provide health coverage stressed that the premiums are exceedingly costly, and the increases in premiums are frequent and unsustainable. Many self-employed individuals, for example real estate agents, stated that they are forced to purchase insurance in a volatile individual insurance market, which tends to offer fewer choices at much higher costs. These business owners said they wanted access to AHPs at the earliest possible date to obtain more affordable healthcare coverage for themselves and their employees.

These concerns were also important in the Department's consideration of the request for a public hearing by some commenters who opposed the proposal. The Department was not persuaded that a public hearing is necessary or appropriate in connection with this rulemaking. A substantial and comprehensive public record has already been established through the comment process, which generated over 900 comment letters, many of which included substantial attachments and citations to reports and other data. The Department does not believe that a public hearing would meaningfully add data and information germane to the examination of the merits of the proposal or would provide substantive factual information that would assist the Department in improving the rule in material ways. Furthermore, the Department believes that it has made changes to the rule and included clarifications in this preamble that address the important issues raised by parties who requested a hearing. The Department believes that the scope and depth of the public record that has been developed also belies arguments by some that a 60 day comment period was not a sufficient period of time to provide the data needed to support their arguments against the proposal.

After careful consideration of the public comments, the Department has determined that it is important for the final rule to become effective on the earliest possible date to provide certainty regarding the Department's interpretation for affected entities, with a staged series of applicability dates for pre-existing and new AHPs to respond to implementation issues. Accordingly, the final rule is effective August 20, 2018, however see below for a discussion of the staggered applicability dates.

The Department acknowledges the issues raised about insurance rate setting processes, state regulator and DOL preparedness for oversight roles, and steps other stakeholders may need to take to revise governing structures, memberships, and benefit offerings. At the same time, the Department needs to balance these concerns against the immediate need for improved options for healthcare coverage. The Department believes that a staged applicability process is an appropriate way to respond to those concerns in light of the public demand for help. Specifically, September 1, 2018 is the applicability date for fully-insured AHPs; January 1, 2019 is the applicability date for existing self-insured AHPs that are in compliance with the Department's previous sub-regulatory guidance on bona fide groups or associations, and that choose to expand the group or association and its plan pursuant to the terms of the final rule (*e.g.,* in order to expand to a broader group of individuals, such as working owners without employees); and April 1, 2019 is the applicability date for new self-insured AHPs formed pursuant to the final rule.

The Department expects fewer oversight and operational issues for fully-insured AHPs. This is, in part, because many fully-insured AHPs already exist. Issuers have already developed products and services tailored to those plans. Application of state insurance regulations presents fewer issues because of the existing state rules that govern insurance companies and the policies they sell to employment-based group health plans. And fully-insured AHPs have traditionally been least likely to experience fraud. Allowing existing self-insured AHPs formed under the Department's pre-rule guidance next to expand consistent with the final rule similarly involves employment-based group health plans that currently exist and with respect to which state insurance regulators have had regulatory authority for many years. The Department does not believe that changes to those existing and already regulated AHPs should present immediate or acute new challenges for state regulators. Delaying the applicability of the final rule for new self-insured AHPs until nearly a year after publication of the final rule in the **Federal Register** is consistent with and adequate to the objective of managing implementation of the final rule in a way that allows stakeholders, including states and state insurance regulators, an appropriate amount of time to tailor

their groups or associations, plans, and regulations. This is true especially because self-insured AHPs, while offering very important benefits when properly managed, have historically been at greater risk of fraud, and are also less common than fully-insured AHPs at this time. Thus, State regulators may benefit from extra time to strengthen their enforcement programs where self-insured AHPs are concerned. Furthermore, a special applicability date is not needed for existing AHPs operating as multiple employer plans pursuant to pre-rule advisory opinions issued by the Department because this rule is an alternative to, and does not preclude employer groups or associations from relying on, the Department's pre-rule advisory opinions either before or after the effective date of this final rule. This final rule also does not incorporate the Department's pre-rule advisory opinions into this regulation, and, accordingly, does not change the legal force of any advisory opinions issued by the Department under ERISA.[149] The Department has procedures to answer inquiries from individuals or organizations regarding other circumstances in which the Department will view a person as an employer under ERISA section 3(5) that is able to sponsor a group health plan. We invite individuals who seek clarification regarding whether a group or association is an employer under previously-issued subregulatory guidance (*e.g.,* whether there is a sufficiently close nexus between the employers to maintain a multiple employer plan) to seek informal compliance assistance or request a formal advisory opinion.[150]

The Department has a longstanding practice of providing compliance assistance to employers, plan sponsors, plan fiduciaries, other employee benefit plan officials and service providers to foster understanding and compliance with the requirements of ERISA. Consistent with that practice, the Department intends to provide affected parties with significant assistance and support to promote the efficient and effective implementation of the final rule. The Department also intends to examine the current Form M–1 for appropriate changes to address reporting and disclosure issues and other general improvements in information collection related to AHPs under the final rule. As discussed earlier in this preamble, MEWA registration requirements require plan and non-plan MEWAs to file the Form M–1 under ERISA section 101(g) and 29 CFR 2520.101–2. All AHPs under the final rule will be required to file the Form M–1 regardless of the plan size or type of funding. The Department will also be working with other federal and state regulators to prepare for the new plan structures. Groups or associations should also seek qualified legal counsel to determine whether any proposed structure or operations may create potential prohibited transactions. In that case, the group or association may apply to the Department under ERISA section 408(a) for an exemption from the prohibited transaction provisions to avoid ERISA personal liability for the prohibited transaction and civil penalty assessments.

The Department acknowledges commenters' concerns about whether it has the tools and capacity to adequately oversee an expanded AHP marketplace and protect the public from harms that have materialized in the past from fraudulent and poorly operated MEWAs, including many that were not AHPs and some that were or claimed to be AHPs. However, the Department has a long history of regulating ERISA-covered group health plans, including plan-MEWAs, and AHPs under the final rule will be in that category. Significantly, recent changes in federal law equipped the Department with new ''cease and desist'' authority to quickly intervene in cases when MEWAs (including AHPs) pose a risk the public. This new authority augments the criminal penalties for healthcare fraud enacted as part of HIPAA. Further, as noted elsewhere in this preamble, the States' traditional oversight and police authority over MEWAs (and AHPs) is not diminished by or because of this final rule. This decision was deliberate, in recognition by the Department of the vast expertise of the States in combating MEWA fraud and mismanagement, and is supported by the majority of public commenters. Even more so than in the past, the Department intends to coordinate and work with the States in exercising the joint oversight responsibilities conferred by section 514 of ERISA. The Department presently has written agreements in place with 34 States to foster cooperative enforcement efforts. The Department will review these agreements to make sure they continue to serve their purpose under the final rule. Further, as necessary and feasible, more agreements with other States will be put into place in concert with the delayed applicability dates in the final rule. In addition, the Department intends to review existing reporting requirements for AHPs to enhance the oversight capability of federal and State regulators. New reporting requirements would focus on capturing data to minimize the risk of unpaid claims. In concert with any new reporting requirements, the Department, if necessary, will consider imposing AHP-specific audit requirements with conditions that are designed to identify and minimize potential risks for AHP's failing to pay health claims when due.

Finally, the final rule includes a severability provision that provides that if any of the provisions in the final rule are found to be invalid or stayed pending further agency action, the remaining portions of the rule would remain operative and available for qualifying employer groups or associations. For example, a ruling by a federal court that the ''working owners'' provision in section 2510.3–5(e) is void will not impact the ability of an employer group or association to meet the ''commonality of interest'' requirement in section 2510.3–5(c) by being located in the same geographic locale.

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(5), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457 (1997).

■ 2. Section 2510.3–3 is amended by revising paragraph (c) introductory text to read as follows:

§ 2510.3–3 Employee benefit plan.

* * * * *

(c) *Employees.* For purposes of this section and except as provided in § 2510.3–5(e):

* * * * *

■ 3. Section 2510.3–5 is added to read as follows:

§ 2510.3–5 Employer.

(a) *In general.* The purpose of this section is to clarify which persons may

[149] ERISA Advisory Opinion Procedure 76–1, Section 10. (available at FR Doc. 76–25168 and *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/filing-requests-for-erisa-aos*).

[150] Id.

act as an ''employer'' within the meaning of section 3(5) of the Act in sponsoring a multiple employer group health plan. Section 733(a)(1) defines the term ''group health plan,'' in relevant part, as an employee welfare benefit plan to the extent that the plan provides medical care to employees or their dependents through insurance, reimbursement, or otherwise. The Act defines an ''employee welfare benefit plan'' in section 3(1), in relevant part, as any plan, fund, or program established or maintained by an employer, employee organization, or by both an employer and an employee organization, for the purpose of providing certain listed welfare benefits to participants or their beneficiaries. For purposes of being able to establish and maintain a welfare benefit plan, an ''employer'' under section 3(5) of the Act includes any person acting directly as an employer, or any person acting indirectly in the interest of an employer in relation to an employee benefit plan. A group or association of employers is specifically identified in section 3(5) of the Act as a person able to act directly or indirectly in the interest of an employer, including for purposes of establishing or maintaining an employee welfare benefit plan. A bona fide group or association shall be deemed to be able to act in the interest of an employer within the meaning of section 3(5) of the Act by satisfying the criteria set forth in paragraphs (b) through (e) of this section. This section does not invalidate any existing advisory opinions, or preclude future advisory opinions, from the Department under section 3(5) of the Act that address other circumstances in which the Department will view a person as able to act directly or indirectly in the interest of direct employers in sponsoring an employee welfare benefit plan that is a group health plan.

(b) *Bona fide group or association of employers.* For purposes of Title I of the Act and this chapter, a bona fide group or association of employers capable of establishing a group health plan that is an employee welfare benefit plan shall include a group or association of employers that meets the following requirements:

(1) The primary purpose of the group or association may be to offer and provide health coverage to its employer members and their employees; however, the group or association also must have at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees. For purposes of satisfying the standard of this paragraph (b)(1), as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan. For purposes of this paragraph (b)(1), a business purpose includes promoting common business interests of its members or the common economic interests in a given trade or employer community, and is not required to be a for-profit activity;

(2) Each employer member of the group or association participating in the group health plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan,

(3) The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality,

(4) The functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the group health plan control the plan. Control must be present both in form and in substance,

(5) The employer members have a commonality of interest as described in paragraph (c) of this section,

(6)(i) The group or association does not make health coverage through the group's or association's group health plan available other than to:

(A) An employee of a current employer member of the group or association;

(B) A former employee of a current employer member of the group or association who became eligible for coverage under the group health plan when the former employee was an employee of the employer; and

(C) A beneficiary of an individual described in paragraph (b)(6)(i)(A) or (b)(6)(i)(B) of this section (*e.g.,* spouses and dependent children).

(ii) Notwithstanding paragraph (b)(6)(i)(B) of this section, coverage may not be made available to any individual (or beneficiaries of the individual) for any plan year following the plan year in which the plan determines pursuant to reasonable monitoring procedures that the individual ceases to meet the conditions in paragraph (e)(2) of this section (unless the individual again meets those conditions), except as may be required by section 601 of the Act.

(7) The group or association and health coverage offered by the group or association complies with the nondiscrimination provisions of paragraph (d) of this section.

(8) The group or association is not a health insurance issuer described in section 733(b)(2) of the Act, or owned or controlled by such a health insurance issuer or by a subsidiary or affiliate of such a health insurance issuer, other than to the extent such entities participate in the group or association in their capacity as employer members of the group or association.

(c) *Commonality of interest*—(1) Employer members of a group or association will be treated as having a commonality of interest if the standards of either paragraph (c)(1)(i) or (c)(1)(ii) of this section are met, provided these standards are not implemented in a manner that is subterfuge for discrimination as is prohibited under paragraph (d) of this section:

(i) The employers are in the same trade, industry, line of business or profession; or

(ii) Each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).

(2) In the case of a group or association that is sponsoring a group health plan under this section and that is itself an employer member of the group or association, the group or association will be deemed for purposes of paragraph (c)(1)(i) of this section to be in the same trade, industry, line of business, or profession, as applicable, as the other employer members of the group or association.

(d) *Nondiscrimination.* A bona fide group or association, and any health coverage offered by the bona fide group or association, must comply with the nondiscrimination provisions of this paragraph (d).

(1) The group or association must not condition employer membership in the group or association on any health factor, as defined in § 2590.702(a) of this chapter, of any individual who is or may become eligible to participate in the group health plan sponsored by the group or association.

(2) The group health plan sponsored by the group or association must comply with the rules of § 2590.702(b) of this chapter with respect to nondiscrimination in rules for eligibility for benefits, subject to paragraph (d)(4) of this section.

(3) The group health plan sponsored by the group or association must comply with the rules of § 2590.702(c) of this chapter with respect to nondiscrimination in premiums or contributions required by any participant or beneficiary for coverage under the plan, subject to paragraph (d)(4) of this section.

(4) In applying the nondiscrimination provisions of paragraphs (d)(2) and (3)

of this section, the group or association may not treat the employees of different employer members of the group or association as distinct groups of similarly-situated individuals based on a health factor of one or more individuals, as defined in § 2590.702(a) of this chapter.

(5) The rules of this paragraph (d) are illustrated by the following examples:

Example 1. (i) *Facts.* Association *A* offers group health coverage to all members. According to the bylaws of Association *A,* membership is subject to the following criteria: All members must be restaurants located in a specified area. Restaurant *B,* which is located within the specified area, has several employees with large health claims. Restaurant *B* applies for membership in Association *A,* and is denied membership based on the claims experience of its employees.

(ii) *Conclusion.* In this *Example 1,* Association *A*'s exclusion of Restaurant *B* from Association *A* discriminates on the basis of claims history, which is a health factor under § 2590.702(a)(1) of this chapter. Accordingly, Association *A* does not satisfy the requirement in paragraph (d)(1) of this section, and, therefore would not meet the definition of a bona fide group or association of employers under paragraph (b) of this section.

Example 2. (i) *Facts.* Association *C* offers group health coverage to all members. According to the bylaws of Association *C,* membership is subject to the following criteria: All members must have a principal place of business in a specified metropolitan area. Individual *D* is a sole proprietor whose principal place of business is within the specified area. As part of the membership application process, Individual *D* provides certain health information to Association *C.* After learning that Individual *D* has diabetes, based on *D*'s diabetes, Association *C* denies Individual *D*'s membership application.

(ii) *Conclusion.* In this *Example 2,* Association *C*'s exclusion of Individual *D* because *D* has diabetes is a decision that discriminates on the basis of a medical condition, which is a health factor under § 2590.702(a)(1) of this chapter. Accordingly, Association *C* does not satisfy the requirement in paragraph (d)(1) of this section and would not meet the definition of a bona fide group or association of employers under paragraph (b) of this section.

Example 3. (i) *Facts.* Association *F* offers group health coverage to all plumbers working for plumbing companies in a State, if the plumbing company employer chooses to join the association. Plumbers employed by a plumbing company on a full-time basis (which is defined under the terms of the arrangement as regularly working at least 30 hours a week) are eligible for health coverage without a waiting period. Plumbers employed by a plumbing company on a part-time basis (which is defined under the terms of the arrangement as regularly working at least 10 hours per week, but less than 30 hours per week) are eligible for health coverage after a 60-day waiting period.

(ii) *Conclusion.* In this *Example 3,* making a distinction between part-time versus full-time employment status is a permitted distinction between similarly-situated individuals under § 2590.702(d) of this chapter, provided the distinction is not directed at individuals under § 2590.702(d)(3) of this chapter. Accordingly, the requirement that plumbers working part time must satisfy a waiting period for coverage is a rule for eligibility that does not violate § 2590.702(b) and, as a consequence, satisfies paragraph (d)(2) of this section.

Example 4. (i) *Facts.* Association *G* sponsors a group health plan, available to all employers doing business in Town *H.* Association *G* charges Business *I* more for premiums than it charges other members because Business *I* employs several individuals with chronic illnesses.

(ii) *Conclusion.* In this *Example 4,* the employees of Business *I* cannot be treated as a separate group of similarly-situated individuals from other members based on a health factor of one or more individuals under paragraph (d)(4) of this section. Therefore, charging Business *I* more for premiums based on one or more health factors of the employees of Business *I* does not satisfy the requirements in paragraph (d)(4) of this section.

Example 5. (i) *Facts.* Association *J* sponsors a group health plan that is available to all members. According to the bylaws of Association *J,* membership is open to any entity whose principal place of business is in State *K,* which has only one major metropolitan area, the capital city of State *K.* Members whose principal place of business is in the capital city of State *K* are charged more for premiums than members whose principal place of business is outside of the capital city.

(ii) *Conclusion.* In this *Example 5,* making a distinction between members whose principal place of business is in the capital city of State *K,* as compared to some other area in State *K,* is a permitted distinction between similarly-situated individuals under § 2590.702(d) of this chapter, provided the distinction is not directed at individuals under § 2590.702(d)(3) of this chapter. Accordingly, Association *J*'s rule for charging different premiums based on principal place of business satisfies paragraph (d)(3) and (d)(4) of this section.

Example 6. (i) *Facts.* Association *L* sponsors a group health plan, available to all its members. According to the bylaws of Association *L,* membership is open to any entity whose principal place of business is in State *M.* Sole Proprietor *N*'s principal place of business is in City *O,* within State *M.* It is the only member whose principal place of business is in City *O,* and it is otherwise similarly situated with respect to all other members of the association. After learning that Sole Proprietor *N* has been diagnosed with cancer, based on the cancer diagnosis, Association *L* changes its premium structure to charge higher premiums for members whose principal place of business is in City *O.*

(ii) *Conclusion.* In this *Example 6,* cancer is a health factor under § 2590.702(a) of this chapter. Making a distinction between groups of otherwise similarly situated individuals that on its face is based on geography (which is not a health factor), but that is directed at one or more individuals based on a health factor (cancer), is in this case a distinction directed at an individual under § 2590.702(d)(3) of this chapter and is not a permitted distinction. Accordingly, by charging higher premiums to members whose principal place of business is City *O,* Association *L* violates § 2590.702(c) of this chapter and, consequently, the conditions of paragraphs (d)(3) and (d)(4) of this section are not satisfied.

Example 7. (i) *Facts.* Association *P* is an agriculture industry association. It sponsors a group health plan that charges employers different premiums based on their primary agriculture subsector, defined under the terms of the plan as: Crop farming, livestock, fishing and aquaculture, and forestry. The distinction is not directed at individual participants or beneficiaries based on a health factor.

(ii) *Conclusion.* In this *Example 7,* the premium distinction between members is permitted under paragraphs (d)(3) and (d)(4) because it is not based on a health factor and is not directed at individual participants and beneficiaries based on a health factor.

Example 8. (i) *Facts.* Association *Q* is a retail industry association. It sponsors a group health plan that charges employees of employers different premiums based on their occupation: Cashier, stockers, and sales associates. The distinction is not directed at individual participants or beneficiaries based on a health factor.

(ii) *Conclusion.* In this *Example 8,* the premium distinction is permitted under paragraph (d)(3) and (d)(4) of this section because it is not based on a health factor and is not directed at individual participants and beneficiaries based on a health factor.

Example 9. (i) *Facts.* Association *R* sponsors a group health plan that is available to all employers with a principal place of business in State *S.* Employers are charged different premiums based on their industry subsector, defined under the terms of the plan as: Construction, education, health, financial services, information services, leisure and hospitality, manufacturing, transportation, natural resources, and other. In addition, within any employer, employees are charged different premiums based on part-time versus full-time status (part time status is defined, under the terms of the plan, as regularly working at least 40 hours, but less than 120 hours, per month). These distinctions are not directed at individual participants or beneficiaries based on a health factor.

(ii) *Conclusion.* In this *Example 9,* the premium distinctions between employer members of a State AHP based on industry, and between employees of employer members who are working part-time versus full-time, are permitted under paragraphs (d)(3) and (d)(4) of this section because these distinctions are not based on a health factor or directed at individual participants and beneficiaries based on a health factor.

Example 10. (i) *Facts.* Association *T* sponsors a group health plan that offers a premium discount to participants who

participate in a wellness program that complies with section 2590.702(f) of this chapter.

(ii) *Conclusion.* In this *Example 10,* providing a reward (such as a premium discount or rebate, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive, as well as avoiding a penalty such as the absence of a premium surcharge or other financial or nonfinancial disincentive) in return for adherence to a wellness program that satisfies conditions of § 2590.702(f) of this chapter is permissible under this paragraph (d).

(e) *Dual treatment of working owners as employers and employees*—(1) A working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in paragraph (b) of this section, including the requirement in paragraph (b)(2) that each employer member of the group or association participating in the group health plan must be a person acting directly as an employer of one or more employees who are participants covered under the plan, and the requirement in paragraph (b)(6) that the group or association does not make health coverage offered to employer members through the association available other than to certain employees and former employees and their beneficiaries.

(2) The term ''working owner'' as used in this paragraph (e) of this section means any person who a responsible plan fiduciary reasonably determines is an individual:

(i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner and other self-employed individual;

(ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and

(iii) Who either:

(A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner's trade or business, or

(B) Has wages or self-employment income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.

(3) The determination under this paragraph must be made when the working owner first becomes eligible for coverage under the group health plan and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

(f) *Applicability dates*—(1) This section is applicable on September 1, 2018, for employee welfare benefit plans that are fully insured and that meet the requirements for being an association health plan sponsored by a bona fide group or association of employers pursuant to paragraphs (b) through (e) of this section.

(2) This section is applicable on January 1, 2019, for any employee welfare benefit plan that is not fully insured, is in existence on June 21, 2018, meets the requirements that applied before June 21, 2018, and chooses to become an association health plan sponsored by a bona fide group or association of employers pursuant to paragraphs (b) through (e) of this section (*e.g.,* in order to expand to a broader group of individuals, such as working owners without employees).

(3) This section is applicable on April 1, 2019, for any other employee welfare benefit plan established to be and operated as an association health plan sponsored by a bona fide group or association of employers pursuant to pursuant to paragraphs (b) through (e) of this section.

(g) *Severability.* If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof.

Preston Rutledge,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2018–12992 Filed 6–20–18; 8:45 am]

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FEDERAL REGISTER

Vol. 83 Thursday,
No. 120 June 21, 2018

Part III

The President

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 9765 of June 15, 2018

Father's Day, 2018

By the President of the United States of America

A Proclamation

On Father's Day, we pay special tribute to the men who devote themselves to supporting and caring for their loved ones. We take this occasion to show our gratitude to our fathers, to thank them for inspiring us to be our best, and to appreciate the influence they have in shaping our character and guiding our futures.

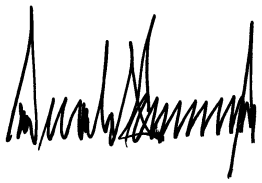
Fathers across our country serve as role models for their children and families. Through their examples, they display the fundamental American values of hard work and dedication, which are so important to fulfilling our potential and achieving the American Dream. In each stage of our development, their unwavering support inspires us to take on the next big challenge and to pursue ambitious goals we might otherwise have thought beyond our reach. Their engagement in our communities, from the soccer field to Main Street to the town hall, enriches American life and encourages others to get involved.

As a Nation, we reaffirm our commitment to promoting fatherhood in our neighborhoods and communities. All fathers must know and harness their power to shape the future of their children. More and more, scientific studies show that fathers who actively invest in their children improve their lives emotionally, physically, academically, and economically. My Administration supports the continuation of grant funding to States and community organizations that educate men on the significance of active fatherhood and assist them with entering or staying in the workforce so they can contribu te to the emotional and financial well-being of their children and families.

Today, and every day, we honor our fathers who serve their families with humble and giving hearts. Whether we became their children through birth, adoption, or foster care, the incredible fathers in our lives generously share with us the powerful gifts of love and care through their presence and dedication. We express our love and gratitude to our fathers for the countless ways they have improved our lives and acknowledge the tremendous importance of active fatherhood to our families, communities, and country.

NOW, THERFORE, I, DONALD J. TRUMP, President of the United States of America, in accordance with a joint resolution of the Congress approved April 24, 1972, as amended (36 U.S.C. 109), do hereby proclaim June 17, 2018, as Father's Day. I call on United States Government officials to display the flag of the United States on all Government buildings on Father's Day and invite State and local governments and the people of the United States to observe Father's Day with appropriate ceremonies.

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



[FR Doc. 2018–13514
Filed 6–20–18; 11:15 am]
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Presidential Documents

Space Policy Directive–3 of June 18, 2018

National Space Traffic Management Policy

Memorandum for the Vice President[,] the Secretary of State[,] the Secretary of Defense[,] the Secretary of Commerce[,] the Secretary of Transportation[,] the Secretary of Homeland Security[,] the Director of National Intelligence[,] the Director of the Office of Management and Budget[,] the Assistant to the President for National Security Affairs[,] the Administrator of the National Aeronautics and Space Administration[,] the Director of the Office of Science and Technology Policy[,] the Deputy Assistant to the President for Homeland Security and Counterterrorism[, and] the Chairman of the Joint Chiefs of Staff

Section 1. *Policy.* For decades, the United States has effectively reaped the benefits of operating in space to enhance our national security, civil, and commercial sectors. Our society now depends on space technologies and space-based capabilities for communications, navigation, weather forecasting, and much more. Given the significance of space activities, the United States considers the continued unfettered access to and freedom to operate in space of vital interest to advance the security, economic prosperity, and scientific knowledge of the Nation.

Today, space is becoming increasingly congested and contested, and that trend presents challenges for the safety, stability, and sustainability of U.S. space operations. Already, the Department of Defense (DoD) tracks over 20,000 objects in space, and that number will increase dramatically as new, more capable sensors come online and are able to detect smaller objects. DoD publishes a catalog of space objects and makes notifications of potential conjunctions (that is, two or more objects coming together at the same or nearly the same point in time and space). As the number of space objects increases, however, this limited traffic management activity and architecture will become inadequate. At the same time, the contested nature of space is increasing the demand for DoD focus on protecting and defending U.S. space assets and interests.

The future space operating environment will also be shaped by a significant increase in the volume and diversity of commercial activity in space. Emerging commercial ventures such as satellite servicing, debris removal, in-space manufacturing, and tourism, as well as new technologies enabling small satellites and very large constellations of satellites, are increasingly outpacing efforts to develop and implement government policies and processes to address these new activities.

To maintain U.S. leadership in space, we must develop a new approach to space traffic management (STM) that addresses current and future operational risks. This new approach must set priorities for space situational awareness (SSA) and STM innovation in science and technology (S&T), incorporate national security considerations, encourage growth of the U.S. commercial space sector, establish an updated STM architecture, and promote space safety standards and best practices across the international community.

The United States recognizes that spaceflight safety is a global challenge and will continue to encourage safe and responsible behavior in space while emphasizing the need for international transparency and STM data sharing. Through this national policy for STM and other national space

strategies and policies, the United States will enhance safety and ensure continued leadership, preeminence, and freedom of action in space.

Sec. 2. *Definitions.* For the purposes of this memorandum, the following definitions shall apply:

(a) Space Situational Awareness shall mean the knowledge and characterization of space objects and their operational environment to support safe, stable, and sustainable space activities.

(b) Space Traffic Management shall mean the planning, coordination, and on-orbit synchronization of activities to enhance the safety, stability, and sustainability of operations in the space environment.

(c) Orbital debris, or space debris, shall mean any human-made space object orbiting Earth that no longer serves any useful purpose.

Sec. 3. *Principles.* The United States recognizes, and encourages other nations to recognize, the following principles:

(a) Safety, stability, and operational sustainability are foundational to space activities, including commercial, civil, and national security activities. It is a shared interest and responsibility of all spacefaring nations to create the conditions for a safe, stable, and operationally sustainable space environment.

(b) Timely and actionable SSA data and STM services are essential to space activities. Consistent with national security constraints, basic U.S. Government-derived SSA data and basic STM services should be available free of direct user fees.

(c) Orbital debris presents a growing threat to space operations. Debris mitigation guidelines, standards, and policies should be revised periodically, enforced domestically, and adopted internationally to mitigate the operational effects of orbital debris.

(d) A STM framework consisting of best practices, technical guidelines, safety standards, behavioral norms, pre-launch risk assessments, and on-orbit collision avoidance services is essential to preserve the space operational environment.

Sec. 4. *Goals.* Consistent with the principles listed in section 3 of this memorandum, the United States should continue to lead the world in creating the conditions for a safe, stable, and operationally sustainable space environment. Toward this end, executive departments and agencies (agencies) shall pursue the following goals as required in section 6 of this memorandum:

(a) *Advance SSA and STM Science and Technology.* The United States should continue to engage in and enable S&T research and development to support the practical applications of SSA and STM. These activities include improving fundamental knowledge of the space environment, such as the characterization of small debris, advancing the S&T of critical SSA inputs such as observational data, algorithms, and models necessary to improve SSA capabilities, and developing new hardware and software to support data processing and observations.

(b) *Mitigate the effect of orbital debris on space activities.* The volume and location of orbital debris are growing threats to space activities. It is in the interest of all to minimize new debris and mitigate effects of existing debris. This fact, along with increasing numbers of active satellites, highlights the need to update existing orbital debris mitigation guidelines and practices to enable more efficient and effective compliance, and establish standards that can be adopted internationally. These trends also highlight the need to establish satellite safety design guidelines and best practices.

(c) *Encourage and facilitate U.S. commercial leadership in S&T, SSA, and STM.* Fostering continued growth and innovation in the U.S. commercial space sector, which includes S&T, SSA, and STM activities, is in the national interest of the United States. To achieve this goal, the U.S. Government should streamline processes and reduce regulatory burdens that could inhibit commercial sector growth and innovation, enabling the U.S. commercial

sector to continue to lead the world in STM-related technologies, goods, data, and services on the international market.

(d) *Provide U.S. Government-supported basic SSA data and basic STM services to the public.* The United States should continue to make available basic SSA data and basic STM services (including conjunction and reentry notifications) free of direct user fees while supporting new opportunities for U.S. commercial and non-profit SSA data and STM services.

(e) *Improve SSA data interoperability and enable greater SSA data sharing.* SSA data must be timely and accurate. It is in the national interest of the United States to improve SSA data interoperability and enable greater SSA data sharing among all space operators, consistent with national security constraints. The United States should seek to lead the world in the development of improved SSA data standards and information sharing.

(f) *Develop STM standards and best practices.* As the leader in space, the United States supports the development of operational standards and best practices to promote safe and responsible behavior in space. A critical first step in carrying out that goal is to develop U.S.-led minimum safety standards and best practices to coordinate space traffic. U.S. regulatory agencies should, as appropriate, adopt these standards and best practices in domestic regulatory frameworks and use them to inform and help shape international consensus practices and standards.

(g) *Prevent unintentional radio frequency (RF) interference.* Growing orbital congestion is increasing the risk to U.S. space assets from unintentional RF interference. The United States should continue to improve policies, processes, and technologies for spectrum use (including allocations and licensing) to address these challenges and ensure appropriate spectrum use for current and future operations.

(h) *Improve the U.S. domestic space object registry.* Transparency and data sharing are essential to safe, stable, and sustainable space operations. Consistent with national security constraints, the United States should streamline the interagency process to ensure accurate and timely registration submissions to the United Nations (UN), in accordance with our international obligations under the Convention on Registration of Objects Launched into Outer Space.

(i) *Develop policies and regulations for future U.S. orbital operations.* Increasing congestion in key orbits and maneuver-based missions such as servicing, survey, and assembly will drive the need for policy development for national security, civil, and commercial sector space activities. Consistent with U.S. law and international obligations, the United States should regularly assess existing guidelines for non-government orbital activities, and maintain a timely and responsive regulatory environment for licensing these activities.

Sec. 5. *Guidelines.* In pursuit of the principles and goals of this policy, agencies should observe the following guidelines:

(a) *Managing the Integrity of the Space Operating Environment.*

(i) Improving SSA coverage and accuracy. Timely, accurate, and actionable data are essential for effective SSA and STM. The United States should seek to minimize deficiencies in SSA capability, particularly coverage in regions with limited sensor availability and sensitivity in detection of small debris, through SSA data sharing, the purchase of SSA data, or the provision of new sensors.

New U.S. sensors are expected to reveal a substantially greater volume of debris and improve our understanding of space object size distributions in various regions of space. However, very small debris may not be sufficiently tracked to enable or justify actionable collision avoidance decisions. As a result, close conjunctions and even collisions with unknown objects are possible, and satellite operators often lack sufficient insight to assess their level of risk when making maneuvering decisions. The United States should develop better tracking capabilities, and new means to catalog such

debris, and establish a quality threshold for actionable collision avoidance warning to minimize false alarms.

Through both Government and commercial sector S&T investment, the United States should advance concepts and capabilities to improve SSA in support of debris mitigation and collision avoidance decisions.

(ii) Establishing an Open Architecture SSA Data Repository. Accurate and timely tracking of objects orbiting Earth is essential to preserving the safety of space activities for all. Consistent with section 2274 of title 10, United States Code, a basic level of SSA data in the form of the publicly releasable portion of the DoD catalog is and should continue to be provided free of direct user fees. As additional sources of space tracking data become available, the United States has the opportunity to incorporate civil, commercial, international, and other available data to allow users to enhance and refine this service. To facilitate greater data sharing with satellite operators and enable the commercial development of enhanced space safety services, the United States must develop the standards and protocols for creation of an open architecture data repository. The essential features of this repository would include:

- Data integrity measures to ensure data accuracy and availability;
- Data standards to ensure sufficient quality from diverse sources;
- Measures to safeguard proprietary or sensitive data, including national security information;
- The inclusion of satellite owner-operator ephemerides to inform orbital location and planned maneuvers; and
- Standardized formats to enable development of applications to leverage the data.

To facilitate this enhanced data sharing, and in recognition of the need for DoD to focus on maintaining access to and freedom of action in space, a civil agency should, consistent with applicable law, be responsible for the publicly releasable portion of the DoD catalog and for administering an open architecture data repository. The Department of Commerce should be that civil agency.

(iii) Mitigating Orbital Debris. It is in the interest of all space operators to minimize the creation of new orbital debris. Rapid international expansion of space operations and greater diversity of missions have rendered the current U.S. Government Orbital Debris Mitigation Standard Practices (ODMSP) inadequate to control the growth of orbital debris. These standard practices should be updated to address current and future space operating environments. The United States should develop a new protocol of standard practices to set broader expectations of safe space operations in the 21st century. This protocol should begin with updated ODMSP, but also incorporate sections to address operating practices for large constellations, rendezvous and proximity operations, small satellites, and other classes of space operations. These overarching practices will provide an avenue to promote efficient and effective space safety practices with U.S. industry and internationally.

The United States should pursue active debris removal as a necessary long-term approach to ensure the safety of flight operations in key orbital regimes. This effort should not detract from continuing to advance international protocols for debris mitigation associated with current programs.

(b) *Operating in a Congested Space Environment.*

(i) Minimum Safety Standards and Best Practices. The creation of minimum standards for safe operation and debris mitigation derived in part from the U.S. Government ODMSP, but incorporating other standards and best practices, will best ensure the safe operation of U.S. space activities. These safety guidelines should consider maneuverability, tracking, reliability, and disposal.

The United States should eventually incorporate appropriate standards and best practices into Federal law and regulation through appropriate rulemaking

or licensing actions. These guidelines should encompass protocols for all stages of satellite operation from design through end-of-life.

Satellite and constellation owners should participate in a pre-launch certification process that should, at a minimum, consider the following factors:

- Coordination of orbit utilization to prevent conjunctions;
- Constellation owner-operators' management of self-conjunctions;
- Owner-operator notification of planned maneuvers and sharing of satellite orbital location data;
- On-orbit tracking aids, including beacons or sensing enhancements, if such systems are needed;
- Encryption of satellite command and control links and data protection measures for ground site operations;
- Appropriate minimum reliability based on type of mission and phase of operations;
- Effect on the national security or foreign policy interests of the United States, or international obligations; and
- Self-disposal upon the conclusion of operational lifetime, or owner-operator provision for disposal using active debris removal methods.

(ii) On-Orbit Collision Avoidance Support Service. Timely warning of potential collisions is essential to preserving the safety of space activities for all. Basic collision avoidance information services are and should continue to be provided free of direct user fees. The imminent activation of more sensitive tracking sensors is expected to reveal a significantly greater population of the existing orbital debris background as well as provide an improved ability to track currently catalogued objects. Current and future satellites, including large constellations of satellites, will operate in a debris environment much denser than presently tracked. Preventing on-orbit collisions in this environment requires an information service that shares catalog data, predicts close approaches, and provides actionable warnings to satellite operators. The service should provide data to allow operators to assess proposed maneuvers to reduce risk. To provide on-orbit collision avoidance, the United States should:

- Provide services based on a continuously updated catalog of satellite tracking data;
- Utilize automated processes for collision avoidance;
- Provide actionable and timely conjunction assessments; and
- Provide data to operators to enable assessment of maneuver plans.

To ensure safe coordination of space traffic in this future operating environment, and in recognition of the need for DoD to focus on maintaining access to and freedom of action in space, a civil agency should be the focal point for this collision avoidance support service. The Department of Commerce should be that civil agency.

(c) *Strategies for Space Traffic Management in a Global Context.*

(i) Protocols to Prevent Orbital Conjunctions. As increased satellite operations make lower Earth orbits more congested, the United States should develop a set of standard techniques for mitigating the collision risk of increasingly congested orbits, particularly for large constellations. Appropriate methods, which may include licensing assigned volumes for constellation operation and establishing processes for satellites passing through the volumes, are needed. The United States should explore strategies that will lead to the establishment of common global best practices, including:

- A common process addressing the volume of space used by a large constellation, particularly in close proximity to an existing constellation;
- A common process by which individual spacecraft may transit volumes used by existing satellites or constellations; and

• A set of best practices for the owner-operators of utilized volumes to minimize the long-term effects of constellation operations on the space environment (including the proper disposal of satellites, reliability standards, and effective collision avoidance).

(ii) Radio Frequency Spectrum and Interference Protection. Space traffic and RF spectrum use have traditionally been independently managed processes. Increased congestion in key orbital regimes creates a need for improved and increasingly dynamic methods to coordinate activities in both the physical and spectral domains, and may introduce new interdependencies. U.S. Government efforts in STM should address the following spectrum management considerations:

• Where appropriate, verify consistency between policy and existing national and international regulations and goals regarding global access to, and operation in, the RF spectrum for space services;

• Investigate the advantages of addressing spectrum in conjunction with the development of STM systems, standards, and best practices;

• Promote flexible spectrum use and investigate emerging technologies for potential use by space systems; and

• Ensure spectrum-dependent STM components, such as inter-satellite safety communications and active debris removal systems, can successfully access the required spectrum necessary to their missions.

(iii) Global Engagement. In its role as a major spacefaring nation, the United States should continue to develop and promote a range of norms of behavior, best practices, and standards for safe operations in space to minimize the space debris environment and promote data sharing and coordination of space activities. It is essential that other spacefaring nations also adopt best practices for the common good of all spacefaring states. The United States should encourage the adoption of new norms of behavior and best practices for space operations by the international community through bilateral and multilateral discussions with other spacefaring nations, and through U.S. participation in various organizations such as the Inter-Agency Space Debris Coordination Committee, International Standards Organization, Consultative Committee for Space Data Systems, and UN Committee on the Peaceful Uses of Outer Space.

Sec. 6. *Roles and Responsibilities.* In furtherance of the goals described in section 4 and the guidelines described in section 5 of this memorandum, agencies shall carry out the following roles and responsibilities:

(a) Advance SSA and STM S&T. Members of the National Space Council, or their delegees, shall coordinate, prioritize, and advocate for S&T, SSA, and STM, as appropriate, as it relates to their respective missions. They should seek opportunities to engage with the commercial sector and academia in pursuit of this goal.

(b) Mitigate the Effect of Orbital Debris on Space Activities.

(i) The Administrator of the National Aeronautics and Space Administration (NASA Administrator), in coordination with the Secretaries of State, Defense, Commerce, and Transportation, and the Director of National Intelligence, and in consultation with the Chairman of the Federal Communications Commission (FCC), shall lead efforts to update the U.S. Orbital Debris Mitigation Standard Practices and establish new guidelines for satellite design and operation, as appropriate and consistent with applicable law.

(ii) The Secretaries of Commerce and Transportation, in consultation with the Chairman of the FCC, will assess the suitability of incorporating these updated standards and best practices into their respective licensing processes, as appropriate and consistent with applicable law.

(c) Encourage and Facilitate U.S. Commercial Leadership in S&T, SSA, and STM. The Secretary of Commerce, in coordination with the Secretaries of Defense and Transportation, and the NASA Administrator, shall lead

efforts to encourage and facilitate continued U.S. commercial leadership in SSA, STM, and related S&T.

(d) Provide U.S. Government-Derived Basic SSA Data and Basic STM Services to the Public.

(i) The Secretaries of Defense and Commerce, in coordination with the Secretaries of State and Transportation, the NASA Administrator, and the Director of National Intelligence, should cooperatively develop a plan for providing basic SSA data and basic STM services either directly or through a partnership with industry or academia, consistent with the guidelines of sections 5(a)(ii) and 5(b)(ii) of this memorandum.

(ii) The Secretary of Defense shall maintain the authoritative catalog of space objects.

(iii) The Secretaries of Defense and Commerce shall assess whether statutory and regulatory changes are necessary to effect the plan developed under subsection (d)(i) of this section, and shall pursue such changes, along with any other needed changes, as appropriate.

(e) Improve SSA Data Interoperability and Enable Greater SSA Data Sharing.

(i) The Secretary of Commerce, in coordination with the Secretaries of State, Defense, and Transportation, the NASA Administrator, and the Director of National Intelligence, shall develop standards and protocols for creation of an open architecture data repository to improve SSA data interoperability and enable greater SSA data sharing.

(ii) The Secretary of Commerce shall develop options, either in-house or through partnerships with industry or academia, assessing both the technical and economic feasibility of establishing such a repository.

(iii) The Secretary of Defense shall ensure that release of data regarding national security activities to any person or entity with access to the repository is consistent with national security interests.

(f) Develop Space Traffic Standards and Best Practices. The Secretaries of Defense, Commerce, and Transportation, in coordination with the Secretary of State, the NASA Administrator, and the Director of National Intelligence, and in consultation with the Chairman of the FCC, shall develop space traffic standards and best practices, including technical guidelines, minimum safety standards, behavioral norms, and orbital conjunction prevention protocols related to pre-launch risk assessment and on-orbit collision avoidance support services.

(g) Prevent Unintentional Radio Frequency Interference. The Secretaries of Commerce and Transportation, in coordination with the Secretaries of State and Defense, the NASA Administrator, and the Director of National Intelligence, and in consultation with the Chairman of the FCC, shall coordinate to mitigate the risk of harmful interference and promptly address any harmful interference that may occur.

(h) Improve the U.S. Domestic Space Object Registry. The Secretary of State, in coordination with the Secretaries of Defense, Commerce, and Transportation, the NASA Administrator, and the Director of National Intelligence, and in consultation with the Chairman of the FCC, shall lead U.S. Government efforts on international engagement related to international transparency and space object registry on SSA and STM issues.

(i) Develop Policies and Regulations for Future U.S. Orbital Operations. The Secretaries of Defense, Commerce, and Transportation, in coordination with the Secretary of State, the NASA Administrator, and the Director of National Intelligence, shall regularly evaluate emerging trends in space missions to recommend revisions, as appropriate and necessary, to existing SSA and STM policies and regulations.

Sec. 7. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

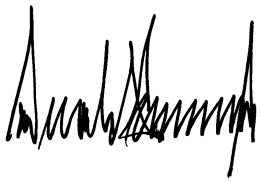
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Commerce is authorized and directed to publish this memorandum in the *Federal Register.*



THE WHITE HOUSE,
Washington, June 18, 2018

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