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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 41

RIN 3038–AE61

Position Limits and Position Accountability for Security Futures Products

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is issuing a final rule to amend the position limit rules applicable to security futures products (''SFP'') by increasing the default maximum level of equity SFP position limits that designated contract markets (''DCMs'') may set; modifying the criteria for setting a higher position limit and position accountability level by relying primarily on estimated deliverable supply; and adjusting the time during which position limits or position accountability must be in effect. In addition, the final rule will provide DCMs discretion to apply limits to either a person's net position or a person's position on the same side of the market. The rule also includes position limit requirements and related guidance and acceptable practices for DCMs to apply in adopting position limits for SFPs based on products other than an equity security.

DATES: Effective November 26, 2019.

FOR FURTHER INFORMATION CONTACT: Thomas Leahy, Associate Director, Division of Market Oversight (''DMO'') at 202–418–5278 or *tleahy@cftc.gov* or Aaron Brodsky, Senior Special Counsel, DMO at 202–418–5349 or *abrodsky@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, the Commodity Futures Modernization Act (''CFMA'') became law and amended the Commodity Exchange Act (''CEA'') and the Securities Exchange Act of 1934 (''Exchange Act'').[1] The CFMA removed a long-standing ban on trading futures on single securities and narrow-based security indexes [2] in the United States.[3] Under the CEA as amended by the CFMA, in order for a DCM to list an SFP,[4] the SFP and the securities underlying the SFP must meet a number of criteria.[5] One of the criteria requires that trading in the SFP is not readily susceptible to manipulation of the price of the SFP, nor to causing or being used in the manipulation of the price of any underlying security, option on such a security, or option on a group or index including such securities.[6]

As the Commission noted when it proposed to adopt criteria for trading of SFPs:

> It is important that the listing standards and conditions in the CEA and the Exchange Act be easily understood and applied by [DCMs]. The rules proposed today address issues related to these standards and establish uniform requirements related to position limits, as well as provisions to minimize the potential for manipulation and disruption to the futures markets and underlying securities markets.[7]

Among those provisions is current Commission regulation 41.25(a)(3), which requires a DCM that lists SFPs to establish position limits or position accountability standards.[8] The Commission's existing SFP position limits were set at levels that, when adopted, were generally comparable, but not identical, to the limits that applied to options on individual securities at that time.[9] The CFMA sought comparable regulation of security options and SFPs.

Under existing § 41.25(a)(3), a DCM is required to establish for each SFP a position limit, applicable to positions held during the last five trading days of an expiring contract month, of no greater than 13,500 (100-share) contracts, except under specific conditions.[10] If a security underlying an SFP has either: (i) An average daily trading volume that exceeds 20 million shares; or (ii) an average daily trading volume that exceeds 15 million shares and more than 40 million shares outstanding, then the DCM may establish a position limit for the SFP of no more than 22,500 contracts.[11]

As an alternative to an applicable position limit requirement, existing

[1] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000). The CFMA created a joint jurisdictional framework under which the CFTC is the primary regulator for DCMs that list SFPs, and the Securities and Exchange Commission (''SEC'') is the primary regulator for national security exchanges (''NSE''), national securities associations, and alternative trading systems that list SFPs. The other regulator is the secondary regulator. A DCM that elects to list SFPs must first notice register with the SEC (*see* section 252(a) of the CFMA), and an NSE that elects to list SFPs must first notice register with the CFTC (*see* section 202(a) of the CFMA). *See also* Designated Contract Markets in Security Futures Products: Notice-Designation Requirements, Continuing Obligations, Applications for Exemptive Orders, and Exempt Provisions, 66 FR 44960 (Aug. 27, 2001). In that final rule, the Commission adopted new regulations that provide notice registration procedures for a NSE, a national securities association, or an alternative trading system to become a DCM in SFPs. By registering with the Commission, a national securities exchange, a national securities association, or an alternative trading system is, by definition, a DCM for purposes of trading SFPs. SFPs may be listed for trading only on DCMs that are notice-registered as NSEs, including NSEs that are notice-registered with the Commission as DCMs. Security-based swaps are equivalent contracts under the exclusive jurisdiction of the SEC that may be traded over-the-counter or on SEC-regulated security-based swap execution facilities.

[2] *See* 7 U.S.C. 1a(35) for the definition of ''narrow-based security index.''

[3] *See* Section 251(a) of the CFMA. This trading previously was prohibited by 7 U.S.C. 2(a)(1)(B)(v).

[4] The term ''security futures product'' is defined in section 1a(45) of the CEA, 7 U.S.C. 1a(45), and section 3(a)(56) of the Exchange Act, 15 U.S.C. 78c(a)(56), to mean a security future or any put, call, straddle, option, or privilege on any security future. The term ''security future'' is defined in section 1a(44) of the CEA, 7 U.S.C. 1a(44), and section 3(a)(55)(A) of the Exchange Act, 15 U.S.C. 78c(a)(55)(A), to include futures contracts on individual securities and on narrow-based security indexes. The term ''narrow-based security index'' is defined in section 1a(35) of the CEA, 7 U.S.C. 1a(35), and section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B).

[5] 7 U.S.C. 2(a)(1)(D)(i).

[6] *See* 7 U.S.C. 2(a)(1)(D)(i)(VII).

[7] *See* Listing Standards and Conditions for Trading Security Futures Products, proposed rules, 66 FR 37932, 37933 (Jul. 20, 2001) (''2001 Proposed SFP Rules''). The Commission further noted, ''The speculative position limit level adopted by a [DCM] should be consistent with the obligation in section 2(a)(1)(D)(i)(VII) of the CEA that the [DCM] maintain procedures to prevent manipulation of the price of the [SFP] and the underlying security or securities.'' *Id.* at 37935.

[8] 17 CFR 41.25(a)(3).

[9] *See* Listing Standards and Conditions for Trading Security Futures Products, 66 FR 55078, 55082 (Nov. 1, 2001) (''2001 Final SFP Rules'').

[10] 17 CFR 41.25(a)(3)(i).

[11] 17 CFR 41.25(a)(3)(i)(A).

rules permit a DCM to adopt a position accountability rule for an SFP on a security that has: (i) An average daily trading volume that exceeds 20 million shares; and (ii) more than 40 million shares outstanding.[12] Under any position accountability regime, upon a request from a DCM, traders holding a position of greater than 22,500 contracts, or such lower threshold as specified by the DCM, must provide information to the exchange regarding the nature of the position.[13] Under position accountability, traders must also consent to halt increases in the size of their positions upon the direction of the DCM.[14]

Since adoption of the 2001 Final SFP Rules, the Commission's SFP position limit regulations have not been substantively amended to account for SFPs on securities other than common stock, although CEA section 2(a)(1)(D)(i) authorizes DCMs to list for trading SFPs based upon common stock and such other equity securities as the Commission and the Securities and Exchange Commission jointly determine appropriate.[15] The CFMA further authorized the Commission and the SEC (collectively ''Commissions'') to allow SFPs to be ''based on securities other than equity securities.'' [16] The Commissions used their authority to allow SFPs on Depositary Receipts; [17] Exchange Traded Funds, Trust Issued Receipts, and Closed End Funds; [18] and debt securities.[19] Since the Commission's initial adoption of SFP position limits, the SEC has granted approval to increase position limits for equity options listed on NSEs, but the Commission has not amended its SFP regulations to reflect those changes, or to take into account the characteristics of other types of SFPs, such as an SFP on one or more debt securities.

II. The Proposal

On July 31, 2018, the Commission published a Notice of Proposed Rulemaking to amend Commission regulation 41.25 to update the position limit rules for SFPs to provide regulatory comparability with equity options, foster innovation by providing a framework for position limits on SFPs that are not covered under the existing rules, and provide flexibility to DCMs in setting position limits for such products (''Proposal'').[20]

Notably, the Commission proposed changes to the default position limit level and the criteria for DCMs adopting position limits and accountability levels for SFPs, relying primarily on estimated deliverable supply, as defined in the rule. For equity SFPs, the Proposal would increase the default position limit level from 13,500 (100-share) contracts to 25,000 (100-share) contracts and would permit a DCM to establish a position limit level higher than 25,000 (100-share) contracts based on the estimated deliverable supply of the underlying security.[21] The Proposal provided guidance on estimating delivery supply, and in connection with this change, would require a DCM to estimate deliverable supply at least semi-annually, rather than calculating the six-month average daily trading volume at least monthly.[22]

Also for equity SFPs, the Proposal would change the criteria that permit a DCM to adopt an exchange rule for position accountability in lieu of position limits. Under the Proposal, for a DCM to adopt an exchange rule for position accountability in lieu of position limits, the underlying security must have an estimated deliverable supply of more than 40 million shares and a total trading volume of more than 2.5 billion shares over a six-month period.[23]

The Proposal also provided that the DCM could have the discretion to adopt limits and accountability levels on either a net basis or gross basis (''on the same side of the market'') and included specific position limit requirements and guidance for a physically-delivered basket of equities SFP, a cash-settled equity index SFP, and an SFP on one or more debt securities.[24] The Proposal further included requirements for recalculating position limits and accountability levels based on updated estimated deliverable supply and trading volume calculations, and it provided guidance to DCMs on granting SFP position limit exemptions.[25]

When adopted, the Commission's existing SFP position limits were set at levels that were generally comparable, but not identical, to the limits that applied to options on individual securities at that time.[26] However, over time, a competitive disparity emerged between the Commission's SFP position limits and security options limits despite both serving economically similar functions.[27] Position limits for security options have increased to higher levels while the Commission's SFP position limits have remained unchanged. To address this disparity, the Commission drafted the Proposal with the goal of providing a level regulatory playing field.

Noting the differences in the position limit rules applicable to SFPs and security options,[28] the Commission determined certain approaches were necessary to effectively oversee the markets, consistent with the obligation

[12] 17 CFR 41.25(a)(3)(i)(B).

[13] *Id.*

[14] *Id.*

[15] 7 U.S.C. 2(a)(1)(D)(i)(III).

[16] 7 U.S.C. 2(a)(1)(D)(v)(I).

[17] *See* Joint Order Granting the Modification of Listing Standards Requirements under Section 6(h) of the Securities Exchange Act of 1934 and the Criteria under Section 2(a)(1) of the Commodity Exchange Act, (Aug. 20, 2001), *https://www.sec.gov/rules/other/34–44725.htm.*

[18] *See* Joint Order Granting the Modification of Listing Standards Requirements Under Section 6(h) of the Securities Exchange Act of 1934 and the Criteria Under Section 2(a)(1) of the Commodity Exchange Act, 67 FR 42760 (Jun. 25, 2002).

[19] *See* 17 CFR 41.21(a)(2)(iii) (providing that the underlying security of an SFP may include ''a note, bond, debenture, or evidence of indebtedness''); *see also* Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities, 71 FR 39534 (Jul. 13, 2006) (describing debt securities to include ''notes, bonds, debentures, or evidences of indebtedness'').

[20] *See* Position Limits and Position Accountability for Security Futures Products, 83 FR 36799 (Jul. 31, 2018) (''Proposal'').

[21] Proposal at 36803–05.

[22] Proposal at 36806–07.

[23] Proposal at 36805.

[24] The SFP definition permits the listing of SFPs on debt securities (other than exempted securities). 17 CFR 41.21(a)(2)(iii). While an SFP may not be listed on a debt security that is an exempted security, futures contracts may be listed on an exempted security. 7 U.S.C. 2(a)(1)(C)(iv).

[25] Proposal at 36806–07, 08, and 13–14.

[26] Section 2(a)(1)(D)(i) of the CEA lists eleven criteria that a DCM must meet to list SFPs. 7 U.S.C. 2(a)(1)(D)(i). The Exchange Act lists twelve listing standards and conditions for trading that an NSE must meet to list SFPs, eleven of which are common to those in the CEA. Among the common criteria that make reference directly or indirectly to security options are: (i) Coordinated surveillance across security, security futures, and security option markets; (ii) coordinated trading halts across security, security futures, and security option markets; and (iii) margin levels for security futures and security options. The Exchange Act requires that listing standards filed by an NSE ''be no less restrictive than comparable listing standards for options traded on a national securities exchange.'' 15 U.S.C. 78f(h)(3)(C). Notably, the CEA lacks such a criterion.

[27] For example, the price of a long call option with a strike price well below the prevailing market price of the underlying security is expected to move almost in lock step with the price of a long SFP on the same underlying security. Similarly, the price of a long put option with a strike price well above the prevailing market price of the underlying security is expected to move almost in lock step with the price of a short SFP on the same underlying security. Such deep-in-the-money call or put options behave this way, with a delta at or near one, because there is a high probability that such options will expire in-the-money.

[28] Specifically, these differences were: (1) The specification that position limits for SFPs are on a net, rather than a gross basis; (2) the numerical limits on SFPs differ from those on security options; and (3) the position limits for SFPs are applicable only during the last five trading days prior to expiration, rather than at any time in the lifespan of a security option contract. *See* 2001 Final SFP Rules at 55081.

of a DCM to prevent manipulation of the price of an SFP and its underlying security or securities.[29] In light of its experience since the first adoption of a position limits regime for SFPs in 2001,[30] the Commission believes it is appropriate to update Commission regulation 41.25 to permit DCMs to set position limits above a default level in appropriate circumstances based on an estimate of deliverable supply.[31]

In addition to requesting comments on the Proposal, the Commission solicited comments on, among other things, the impact of the Proposal on small entities, the Commission's cost-benefit considerations, and any anti-competitive effects of the Proposal. The comment period for the Proposal closed on October 1, 2018. The Commission received one substantive comment letter on the Proposal, from OneChicago, LLC (''OneChicago'' or the ''Exchange'').[32] OneChicago, a DCM that is notice registered with the SEC, is the only domestic exchange listing SFPs.[33] The Commission addresses OneChicago's comments on the Proposal within the discussion of each section of the final rule.

III. Final Rule

The Commission has considered the comments received in response to the Proposal and is adopting it as proposed but with a few modifications.

A. General Comments

OneChicago challenged what it viewed as the Commission's assumption that SFPs and security options are economically equivalent.[34] Focusing its comment letter on single stock futures (''SSFs''), a subset of SFPs, the Exchange stated that the Commission should not treat SSFs the same as security options, because the market views them differently.[35] The Exchange opined that options are exercised for two reasons: (i) To harvest dividends; and (ii) to invest the proceeds from selling stock through exercise of deep in-the-money puts.[36] The Exchange contrasted these reasons with the use of SSFs to transfer securities through the clearing process at the Options Clearing Corporation (''OCC'') and National Securities Clearing Corporation.[37] OneChicago believes that while the price of a deep in-the-money put would, in theory, move in tandem with the price of a short SFP, in practice deep in-the-money puts are exercised early by their holders to collect and invest proceeds from the sale of the stock and to get the benefit of re-investment.[38]

OneChicago commented that SSF contracts do not contain any optionality and, accordingly, have a delta of one, where delta means the rate of change in the price of a derivative relative to the rate of change in price of the underlying instrument.[39] The Exchange noted such an instrument is called a Delta One derivative and that exchange-traded SSFs and OTC Total Return Swaps, such as Master Securities Lending Agreements (''MSLA'') and Master Securities Repurchase Agreements (''MSRP''), are all Delta One derivatives.[40] The Exchange noted further that the OCC clears securities lending agreements in the same risk pools as OneChicago's contracts, and that those securities lending agreements have no position limits and receive risk-based margining treatment.[41]

According to OneChicago, because only a Delta One derivative can avoid a tax event (from the transfer of a security), no other derivative is equivalent to a Delta One derivative.[42] The Exchange noted that no option, or combination of options, can be used without triggering a tax event.[43]

The Exchange recommended regulating Delta One derivatives, whether traded OTC or on an exchange, comparably.[44] The Exchange opined that different regulation of Delta One derivatives creates an uneven playing field, and disagreed with trying to achieve regulatory parity between Delta One derivatives and security options, which are non-Delta One derivatives.[45] The Exchange noted Delta One derivatives are used primarily in financing transactions, where a financing counterparty provides a customer with synthetic (long) exposure to a notional amount of a security and pre-hedges that exposure by accumulating an identical notional value in the underlying shares.[46] Furthermore, the Exchange noted that securities lending rebate rates are decided in the OTC market and have a direct effect on listed equity derivatives.[47] The Exchange believes that entities who determine the rebate rate do so in relative secrecy and may front run the equity derivatives market prior to disclosure of a change in the rebate rate.[48] OneChicago requested that the Commission and the SEC update the Risk Disclosure Documents for options and SFPs to discuss this risk.[49]

OneChicago noted that, in its experience, its market participants hedge a short SFP position with a long stock position and hedge a long SFP position with a short sale of stock (with a stock borrow).[50] According to the Exchange, when such parties extend financing, they do so in order to take the position through expiration.[51] They use the stock held to satisfy the short SFP obligation, without the need for another transaction to unwind the positions, as the best way to extinguish a hedged position.[52] The Exchange noted that in the last four years (since 2015), at least 53 percent of open interest, as of the first of the month, goes through delivery.[53] The Exchange contrasted this percentage with Options Industry

[29] In 2001, the Commission noted:

The differences mainly reflect certain provisions adopted for commodity futures contracts that reflect the special characteristics of those markets. In this regard, the proposed position limit requirements for security futures differ from individual security option position limit rules in that the limits would apply only to net positions in an expiring security futures contract during its five last trading days. The Commission believes that this provision is appropriate since, consistent with its experience in conducting surveillance of other futures markets, it is during the time period near contract expiration that the potential for manipulation based on an extraordinarily large net futures position would most likely occur.

See 2001 Final SFP Rules at 55082. The approach NSEs may use to set an equity option's position limit is not consistent with existing Commission policy and may, in the Commission's opinion, as noted below, render position limits ineffective.

[30] The Commission observed the experience of NSEs over several years with higher position limit levels on security options. Absent apparent significant issues, the Commission believes that it is reasonable to establish default SFP position limits that closely resemble existing contract limits for equity options at NSEs.

[31] To allow DCMs to adapt as NSE position limits change, the proposal was designed to provide a formula for a DCM to set a level above a default in cases where estimated deliverable supply exceeds a certain threshold, rather than setting a default that does not change as deliverable supply changes.

[32] OneChicago Comment Letter No. 61824 (''OneChicago Letter''), dated Oct. 1, 2018, *available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2899.* The Commission also received another comment letter, which was not substantive and appears to have been posted in error.

[33] OneChicago Letter at 1.

[34] OneChicago Letter at 3.

[35] OneChicago Letter at 5–6.

[36] *Id.*

[37] *Id.*

[38] OneChicago Letter at 4.

[39] OneChicago Letter at 2.

[40] *Id.*

[41] OneChicago Letter at 5.

[42] OneChicago Letter at 3.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] OneChicago Letter at 2.

[47] OneChicago Letter at 4.

[48] *Id.*

[49] OneChicago's request regarding Risk Disclosure Documents for options and SFPs is beyond the scope this rule and is not addressed here.

[50] OneChicago Letter at 5.

[51] *Id.*

[52] *Id.*

[53] *Id.*

Council data that shows only 7 percent of options get exercised.[54]

The Commission's regulations distinguish between cash market transactions, such as securities lending agreements, and derivative market transactions. Delta One derivatives, as defined by the Exchange, include certain cash market forward transactions. The Commission notes that it does not directly regulate cash market transactions but has certain anti-fraud and anti-manipulation authority over cash markets.[55]

The CFMA lifted the ban on security futures and sought to ensure comparable regulation of SFPs and security options on NSEs. The Commission appreciates that SFPs may not be identical to equity options. The Commission also notes that use of SFPs as lending transactions is not the only way in which SFPs may be used. As such, the Commission's approach reflects the concept of economic equivalence of SFPs and security options contained in the CFMA.[56]

B. Definitions—Commission Regulation 41.25(a)[57]

To facilitate implementation of its proposed changes to its SFP rules, the Commission proposed definitions for two new terms: ''estimated deliverable supply'' and ''same side of the market.'' The Commission also proposed guidance on estimating deliverable supply.

1. ''Estimated Deliverable Supply''

The Commission proposed to define ''estimated deliverable supply'' as the quantity of the security underlying a SFP that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels during the specified delivery period.

The Proposal also included guidance for estimating deliverable supply in proposed appendix A to Commission regulation 41.25.[58] Specifically, the proposed guidance provided that deliverable supply for an equity security should be no greater than the free float of the security, while deliverable supply should not include securities that are committed for long-term agreements (*e.g.,* closed-end investment companies, structured products, or similar securities).[59] Free float of the security would generally mean issued and outstanding shares less restricted shares. Restricted shares would include restricted and control securities, which are not registered with the SEC to sell in a public marketplace. The Commission suggested that the estimate of deliverable supply in an exchange traded fund (''ETF'') should be equal to the existing shares of the ETF.[60] The Commission requested comment on whether there are any other adjustments that should be made in estimating deliverable supply for equities and whether an estimate of deliverable supply for an ETF should include an allowance for the creation of ETF shares.[61]

OneChicago opined that the Commission's proposed guidance for estimating deliverable supply is inadequate. In this respect, OneChicago noted that cash market participants going through settlement are more likely to borrow shares rather than purchase shares.[62] The Exchange noted that to find out how much of the float of shares is available for lending, one would need to inquire with the ''Securities Lending world'' [sic]. The Exchange is not concerned with this issue because it believes that ''Broker-Dealers . . . are well positioned to determine supply, and will not allow themselves to be put into a position where they cannot deliver.'' [63]

The Commission is adopting the definition of ''estimated deliverable supply,'' and the associated guidance for calculating it, as proposed. The Commission notes that the deliverable supply of equity securities in the cash market may be estimated in many ways. A maximum estimate of deliverable supply could be the total number of shares that could be authorized by a corporation. However, there may be a significant time lag before a corporation actually issues additional shares. Accordingly, a more conservative estimate of deliverable supply is based on the number of shares issued and outstanding. The Commission proposed to estimate deliverable supply based on free float, that is, shares issued and outstanding, excluding shares that either: (i) Are restricted from transfer (*e.g.,* restricted stock units) or (ii) have been repurchased by the issuing corporation (*i.e.,* treasury shares). Such free float shares should be more readily available for delivery than shares that are: (i) Authorized but not issued; (ii) issued but held in treasury; or (iii) subject to transfer restriction.

The Commission notes that a short position holder in an SFP may obtain shares for delivery either through purchase of shares or through a securities lending or securities repurchase agreement. The Commission further notes that, at a particular point in time, there can be no more shares available for lending than there are shares outstanding. The Commission acknowledges that, when certain shares are on loan, the borrower of such shares may enter a subsequent transaction to lend such security. However, subsequent lending transactions (resulting in repetitive re-lending of the same shares) should not be used as a basis to increase an estimate of deliverable supply. Once shares are obtained by a market participant, either to deliver on a short SFP position, or in an attempt to corner the readily available supply of such security, then such shares presumably would not be made available for lending during the SFP delivery period. Further, at the termination of a securities lending agreement, the borrower must return securities to the lender. A borrower who has re-sold securities would need to purchase shares (or borrow such shares again) to close out the securities lending agreement.

By way of example, when estimating the deliverable supply of wheat, the Commission does not count both the wheat in a warehouse and a warehouse receipt representing ownership of that same wheat; a warehouse receipt is simply the ownership of the commodity, and is not an increase in the amount of the commodity. Likewise, a forward purchase of wheat would not increase the estimated deliverable supply. Similarly, a single share of stock and a securities lending agreement that transfers ownership of that single share

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[54] *Id.*

[55] The CEA includes various prohibitions against the manipulation of the price of commodities, including in cash market transactions. 7 U.S.C. 9(1), 9(3) and 13(a)(2).

[56] The concept of economic equivalence of SFPs and security options evident in the CFMA includes among the listing standards for SFPs in the Exchange Act (but not the CEA) the requirement that listing standards for SFPs ''be no less restrictive than comparable listing standards for options traded on a national securities exchange or national securities association. . . .'' 15 U.S.C. 78f(h)(3)(C). If a security is not eligible to underlie an option, then it may not underlie an SFP. This is consistent with the view that SFPs and security options have some degree of economic equivalence.

[57] The insertion of new paragraph (a) necessitates re-designating existing paragraph (a) as (b), existing paragraph (b) as (c), existing paragraph (c) as (d), and existing paragraph (d) as (e). With the exception of the amended re-designated paragraph (b)(3), the Commission is not amending these paragraphs except for the cross references contained in the text of these paragraphs.

[58] Proposal at 36807 and 13.

[59] Further guidance on estimating deliverable supply, including consideration of whether the underlying security is readily available, is found in appendix C to part 38 of this chapter. *See* appendix C to part 38 of the Commission's regulations. 17 CFR part 38.

[60] *See* Proposal at 36807.

[61] *Id.*

[62] OneChicago Letter at 8.

[63] *Id.*

of stock, do not result in two shares of stock.

2. ''Same Side of the Market''

The Proposal defined ''same side of the market'' to mean long positions in physically-delivered security futures contracts and cash-settled security futures contracts, in the same security, and, separately, short positions in physically-delivered security futures contracts and cash-settled security futures contracts, in the same security.[64] The Commission invited comment on whether it should also include options on security futures contracts in this definition, although options on SFPs are not currently permitted to be listed.[65] The Commission received no comment on its definition of ''same side of the market'' and is adopting it as proposed.[66]

C. Position Limits or Accountability Rules Required—Commission Regulation 41.25(b)(3)

The Commission proposed to continue to require DCMs to establish position limits or position accountability rules in each SFP for the expiring futures contract month. OneChicago argued that position limits for SSFs are not significant to the market in light of margin requirements.[67] The Commission notes that margin levels currently applicable to SFPs, which are generally set equivalent to margin levels on security options, are outside the scope of this rulemaking.[68]

1. Limits for Equity SFPs—Commission Regulation 41.25(b)(3)(i)

The Commission proposed in § 41.25(b)(3)(i) to increase the default level of a DCM's position limits in an equity SFP from no greater than 13,500 100-share contracts on a net basis to no greater than 25,000 100-share contracts (or the equivalent if the contract size is different than 100 shares per contract), either on a net basis or on the same side of the market.[69] The Proposal would include, in the requirements for limits for equity SFPs, securities such as ETFs and other securities that represent ownership in a group of underlying securities.[70] The Commission invited comment on the appropriateness of both the proposed default limit level and the inclusion of ETFs.[71]

OneChicago believes that increasing the default position limit level to 25,000 contracts is an improvement over the status quo but commented that the proposal did not level the playing field between SFPs and OTC Delta One products.[72]

The Commission is adopting Commission regulation 41.25(b)(3)(i) as proposed. The default level of 25,000 100-share contracts is equal to 2,500,000 shares. The Commission notes that 12.5 percent of 20 million shares equals 2,500,000 shares.[73] Thus, for an equity security with less than 20 million shares of estimated deliverable supply, the default position limit level for the equity SFP would be larger than 12.5 percent of estimated deliverable supply. Accordingly, for SFPs in equity securities with less than 20 million shares of estimated deliverable supply, the Commission would expect a DCM to assess the liquidity of trading in the underlying security to determine whether the DCM should set a lower position limit level, as appropriate to ensure compliance with DCM Core Principles 3 and 5,[74] as discussed further below.

The Commission notes that the lowest position limits adopted for equity option positions on NSEs are 25,000 100-share option contracts on the same side of the market.[75] Thus, the final rule allows a DCM to harmonize the default position limit level for SFPs to that of equity options traded on an NSE. Accordingly, this default level for SFP limits would closely resemble existing minimum limit levels on security options.

As noted above, SFPs and security options may serve economically equivalent or similar functions. However, under current Commission regulation 41.25(a)(3), as previously detailed, the default level for position limits for SFPs must be set no greater than 13,500 (100-share) contracts, while security options on the same security may be, and currently are, set at a much higher default level of 25,000 contracts, which may place SFPs at a competitive disadvantage. Comparability of limit levels is intended to provide a more level regulatory playing field.

Because limit levels would not apply to a market participant's combined position between SFPs and security options, the Commission did not propose a default limit level for an SFP higher than 12.5 percent of estimated deliverable supply. That is, under the final rule, a market participant with positions at the limits in each of an SFP and a security option on the same underlying security might be equivalent to about 25 percent of estimated deliverable supply, which is at the outer bound of where the Commission has historically permitted spot month limit levels.[76]

2. Higher Position Limits in Equity SFPs—Commission Regulation 41.25(b)(3)(i)(A)

The Proposal would change the criteria that DCMs use to set equity SFP speculative position limit levels above the default level. Under the existing rules, a DCM may establish a position limit for an equity SFP of no more than 22,500 contracts (rather than the default level of no greater than 13,500 (100-share) contracts) if the security underlying the SFP has either (i) an average daily trading volume of at least 20 million shares; or (ii) an average daily trading volume of at least 15 million shares and at least 40 million shares outstanding.[77] Under the Proposal, a DCM would be able to establish a position limit for an equity SFP of no more than 12.5 percent of the estimated deliverable supply of the relevant underlying security (rather than the default level of no greater than 25,000 100-share contracts) if the estimated deliverable supply of the underlying security exceeds 20 million shares and the limit would be ''appropriate in light of the liquidity of

[64] Proposal at 36812.

[65] 7 U.S.C. 2(a)(1)(D)(iii). Generally, under existing industry practice, a long call and a short put, on a futures-equivalent basis, would be aggregated with a long futures contract; and a short call and a long put, on a futures equivalent basis, would be aggregated with a short futures contract.

[66] The defined terms are added to Commission regulation 41.25 in a new paragraph (a). In connection with adding the definitions into a new paragraph (a), paragraphs (a) through (d) would be re-designated as paragraphs (b) through (e).

[67] OneChicago Letter at 1 (''OneChicago does not have strong feelings one way or the other about the Commission's proposal because it will not significantly impact our market so long as margins remain at punitive levels.''). OneChicago previously submitted a petition for joint rulemaking for margin relief. *Id.*

[68] *See* Customer Margin Rules Relating to Security Futures, 84 FR 36434 (Jul. 26, 2019).

[69] Proposal at 36803.

[70] *Id.*

[71] *Id.*

[72] OneChicago Letter at 7.

[73] As discussed below, for an SFP on a single equity security where the estimated deliverable supply of the underlying security exceeds 20 million shares, a DCM may adopt a higher position limit. Furthermore, as discussed below, given that SFPs and security options may serve economically equivalent or similar functions, 12.5 percent of estimated deliverable supply is half the level for DCM-set spot month speculative position limits for physical delivery contracts in current Commission regulation 150.5(c).

[74] 7 U.S.C. 7(d)(3) and 7 U.S.C. 7(d)(5).

[75] *See, e.g.,* the Cboe Exchange, Inc. (''CBOE'') rule 4.11, Nasdaq ISE, LLC (''ISE'') rule 412, NYSE American LLC (''NYSE'') rule 904, and Nasdaq PHLX LLC (''PHLX'') rule 1001.

[76] *See* appendix C to 17 CFR part 38, noting the guidance of 17 CFR 150.5.

[77] 17 CFR 41.25(a)(3)(i)(A).

trading'' in that security.[78] The Commission invited comment on whether providing a DCM with discretion in its assessment of liquidity in the underlying security, rather than the Commission imposing a volume requirement, would be appropriate and on whether estimated deliverable supply alone serves as an adequate proxy for market impact.[79]

OneChicago recommended using 25 percent of estimated deliverable supply, as opposed to the 12.5 percent proposed by the Commission, to set the level of the position limit, because, in the Exchange's view, there is no justification for a lower level, other than the misconception that SFPs and security options compete.[80] The Exchange believes the 25 percent level is justified for two reasons: (i) To reduce the regulatory disparity between OTC and SSF markets; and (ii) SSFs are almost exclusively used for riskless financing and transfer transactions.[81] OneChicago agreed that it is appropriate to use a linear approach to set position limit levels based on estimated deliverable supply.[82] That is, a doubling of estimated deliverable supply of a security would result in the doubling of the level of the position limit on an SFP based on that security.

OneChicago supported the proposal to give DCMs the discretion to determine if the liquidity in an SFP justifies setting the position limit lower than the default level. OneChicago stated that DCMs are flexible and can adjust to changing market conditions quickly.[83] Moreover, OneChicago believes the Commission's approach may not accurately take account of borrowable shares.[84]

For underlying securities with more than 20 million shares of estimated deliverable supply, the Commission is adopting as proposed the rule that permits DCMs to set the position limit equivalent to no more than 12.5 percent of estimated deliverable supply. By way of example, if the estimated deliverable supply were 40 million shares, then the rule would permit a DCM to set a limit level of no greater than 50,000 100-share contracts; computed as 40 million shares times 12.5 percent divided by 100 shares per contract. This level of 50,000 100-share contracts is the same as permitted under current rules of NSEs for an underlying security with 40 million shares outstanding, although an NSE would also require the most recent six-month trading volume of the underlying security to have totaled at least 15 million shares.[85]

While this provision for SFP position limits more closely resembles existing limits on security options, the final rule permits a DCM to use its discretion in assessing the liquidity of trading in the underlying security, rather than imposing a prescriptive trading volume requirement.[86] The Commission does not believe that trading volume alone is an appropriate indicator of liquidity. Thus, the rule permits a DCM to set a position limit at a level lower than 12.5 percent of estimated deliverable supply.

The Commission expects a DCM to conduct a reasoned analysis as to whether setting a level for a limit based on such criterion is appropriate. In this regard, for example, assume security QRS and security XYZ have equal free float of shares. Assume, however, that trading in QRS is not as liquid as trading in XYZ. Under these assumptions, it may be appropriate for a DCM to adopt a position limit for XYZ equivalent to 12.5 percent of deliverable supply, but to adopt a lower limit for QRS because a lesser number of shares would be readily available for shorts to acquire to make delivery.

Under the current SFP-listing practices of DCMs (with OneChicago being the only domestic DCM that lists SFPs), SFPs require delivery of the underlying shares. Relatedly, NSEs also may list equity options that require delivery of the underlying shares. Given this situation, the Commission believes that in adopting the SFP position limit rule the Commission should take into consideration the impact on deliverable supply of both an option on a particular security being listed for trading on an NSE and an SFP on that same security being listed for trading on a DCM.[87]

The Commission notes that the criterion of 12.5 percent of estimated deliverable supply is half the level for DCM-set spot month speculative position limits for physical delivery contracts in current Commission regulation 150.5(c).[88] That provision requires that for spot month limit levels of no greater than one-quarter of the estimated spot month deliverable supply.[89] The Commission is adopting a lower percent of estimated deliverable supply for SFPs in light of current limits on equity options listed at NSEs. In this regard, the final rule results in SFP position limits that closely resemble the existing 25,000 and 50,000 contract limits for equity options at NSEs, set when certain trading volume or a combination of trading volume and shares currently outstanding have been met. For example, a position at a 50,000 (100-share) option contract limit is equivalent to five million shares. Twelve and one-half percent of 40 million shares equals five million shares; that is, the criterion for a DCM to set a limit is similar to that of the criteria for an NSE to set such a limit. Under this final rule, a similar 50,000 contract position limit on an SFP on such a security is an increase from the 22,500 contract limit currently permitted for such an SFP. The Commission believes this incremental approach to increasing SFP limits is a measured response to changes in the SFP markets, while retaining consistency with the existing requirements for equity options listed by NSEs.

Moreover, as noted above, SFPs and equity options in the same underlying security are not subject to a combined position limit across DCMs and NSEs. Accordingly, the SFP limit level is half the level for DCM-set spot month futures contract limits applicable to physical delivery contracts of 25 percent of estimated deliverable supply.

Further, the Commission notes that limits for equity options at NSEs do not increase in a linear manner for all increases in shares outstanding.[90] For example, upon a tripling of shares outstanding from 40 million shares to 120 million shares, the 100-share equity option contract limit increases only to 75,000 contracts from 50,000 contracts,[91] while, under similar circumstances of a doubling of estimated deliverable supply, the Commission proposes to permit a linear

[78] Proposal at 36804–05 and 12.

[79] Core Principle 5 requires DCMs to adopt, as is necessary and appropriate, position limits to reduce the potential threat of market manipulation or congestion. 7 U.S.C. 7(d)(5).

[80] OneChicago Letter at 8.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *See, e.g.,* CBOE rule 4.11, ISE rule 412, NYSE rule 904, and PHLX rule 1001.

[86] Generally, under CEA section 5(d)(1)(B), unless otherwise restricted by a Commission regulation, a DCM has reasonable discretion in establishing the manner in which it complies with core principles, including Core Principle 5 regarding position limits or position accountability. *See* 7 U.S.C. 7(d)(1) and (5).

[87] It should be noted that the SEC, as the secondary regulator of OneChicago, has the authority to abrogate a rule change proposed by OneChicago if it appears to the SEC that such proposed rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. *See* Section 202(b) of the CFMA, which added section 19(b)(7)(C) to the Exchange Act. Public Law 106–554, 114 Stat. 2763 (2000).

[88] 17 CFR 150.5(c).

[89] 17 CFR 150.5(c)(1).

[90] Proposal at 36801.

[91] In this example using shares outstanding, in order to increase the equity option position limit, the total six-month trading volume also would have had to increase to at least 30 million shares from at least 15 million shares.

increase for a SFP limit to 100,000 contracts from 50,000 contracts.

The Commission will continue to monitor trading activity and positions in the SFP market to assess whether the levels of position limits unduly restrict trading.

3. Alternative Criteria for Setting Levels of Limits

As an alternative to the proposed criteria for setting position limit levels based on estimated deliverable supply, the Commission invited comments on whether the Commission should permit a DCM to mirror the position limit level set by an NSE in a security option with the same underlying security or securities as that of the DCM's SFP.[92] OneChicago opposed this proposed alternative because, according to OneChicago, it perpetuates the myth that the two products are equivalent.[93]

The Commission is not adopting this proposed alternative. NSEs may set an equity option's position limit by the use of trading volume as a sole criterion.[94] That approach is not consistent with existing Commission policy regarding use of estimated deliverable supply to support position limits in an expiring contract month, as stated in part 150 of the Commission's regulations.[95] Use of trading volume as a sole criterion for setting the level of a position limit could result in a position limit that exceeds the number of outstanding shares when the underlying security exhibits a very high degree of turnover and a relatively low number of shares outstanding.[96] Such a resulting high limit level would render position limits ineffective.

4. Position Accountability in Lieu of Limits—Commission Regulation 41.25(b)(3)(i)(B)

The Commission proposed to change the criteria for when a DCM would be permitted to substitute position accountability for a position limit in an equity SFP.[97] Specifically, under the Proposal, a DCM would be permitted to adopt a position accountability rule where the underlying security has an estimated deliverable supply of more than 40 million shares and a six-month total trading volume that exceeds 2.5 billion shares,[98] instead of the existing criteria that the underlying security has an average daily trading volume that exceeds 20 million shares and more than 40 million shares outstanding.[99] In addition, the Proposal stated that the maximum accountability level would be increased from 22,500 contracts to 25,000 contracts.[100]

OneChicago recommended that the Commission authorize position accountability for all SFPs based on ETFs at a level of 25,000 contracts, or perhaps at a lower level for ETFs with low liquidity.[101] Because authorized participants may increase or decrease the number of outstanding shares to keep the price of the ETF in line with the value of the underlying assets, the Exchange believes that estimated deliverable supply of an ETF and trading volume of an ETF are unsuitable for assessing an ETF's liquidity.[102] The Exchange suggested setting a lower position accountability level, in lieu of position limits, for an ETF with lower estimated deliverable supply of the ETF's underlying components.[103] The Exchange believes that a DCM could assess whether a participant had the ability to deliver, and whether a participant was attempting to manipulate the market, under a position accountability regime.[104]

The Commission is adopting, as proposed, the amended position accountability provisions in Commission regulation 41.25(b)(3)(i)(B).[105] Under this provision, a DCM could substitute position accountability for position limits when six-month total trading volume in the underlying security exceeds 2.5 billion shares and there are more than 40 million shares of estimated deliverable supply. This provision is roughly equivalent to the existing criteria of more than 20 million shares of six-month average daily trading volume in the underlying security and of more than 40 million outstanding shares of the underlying security.[106]

Rather than the existing requirement that the underlying security have more than 40 million shares outstanding, the rule requires the underlying security to have more than 40 million shares of estimated deliverable supply, which generally would be smaller than shares outstanding. This change conforms to the use of estimated deliverable supply of underlying shares in setting a position limit as discussed above. The Commission believes an appropriate refinement to its criterion for position accountability is to quantify those equity shares that are readily available in the market, rather than all shares outstanding. Generally, a short position holder may expect to obtain at or close to fair value shares that are readily available in the market and a long position holder may expect to be able to sell such shares at or close to fair value. However, in contrast, shares that are issued and outstanding by a corporation may not be readily available in a timely manner, such as shares held by the corporation as treasury stock. Therefore, to ensure that short position holders generally will be able to obtain equity shares at or close to fair value, the DCM should consider whether the shares are readily available in the market when estimating deliverable supply.[107]

In addition, the Commission is increasing the maximum position accountability level to 25,000 contracts from the current level of 22,500 contracts. The Commission notes a DCM would be able to set a lower accountability level, should it desire. The Commission believes it is appropriate to set a position accountability level no higher than 25,000 contracts because the Commission believes a DCM should have the authority, but not the obligation, to inquire with very large position holders as to the nature of the position and to order such position holders not to increase positions.[108] As stated in the Proposal, the Commission believes a maximum position accountability level of 25,000 contracts is at the outer bounds for purposes of

[92] Proposal at 36805.

[93] OneChicago Letter at 8.

[94] *See, e.g.,* the CBOE rule 4.11, ISE rule 412, NYSE rule 904, and PHLX rule 1001.

[95] For example, Cboe rules also permit a 50,000 contract position limit based on the total most recent six-month trading volume of 20 million shares, without regard to shares outstanding. *See, e.g.,* the CBOE rule 4.11, and 17 CFR 150.5(c)(1).

[96] For example, suppose a company has issued 21 million shares which are so frequently traded that the trading volume for those shares over a six month period is 275 million shares. Under the rules of an NSE, the position limit for an option on that security could be 250,000 100-share contracts, which is equivalent to 25 million shares, which is greater than the number of shares outstanding.

[97] Proposal at 36805 and 12–13.

[98] *Id.*

[99] *See* 17 CFR 41.25(a)(3)(i)(B).

[100] Proposal at 36805 and 12–13.

[101] OneChicago Letter at 7.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] The Commission has added clarifying language to Commission regulation 41.25(b)(3)(i)(B) articulating that a position accountability level is in lieu of a position limit level, as set forth in Commission regulation 41.25(b)(3)(i)(A).

[106] Twenty million shares times 125 trading days in a typical six-month period equals 2.5 billion shares. In regards to total trading volume rather than average daily trading volume, the Commission notes that use of total trading volume is consistent with the rules of NSEs.

[107] *See* appendix C to part 38, paragraph (b)(1)(i).

[108] By way of comparison, under 17 CFR 15.03, the Commission's reporting level for large traders (''reportable position'') is 1,000 contracts for individual equity SFPs and 200 contracts for narrow-based SFPs. Under 17 CFR 18.05, the Commission may request any pertinent information concerning such a reportable position.

providing a DCM with authority to obtain information from position holders.[109]

The Commission is not adopting a position accountability rule as the default for all SFPs based on ETFs. The Commission notes that ETFs are structured such that pre-approved groups of institutional firms, known as authorized participants, are the only set of persons permitted to create or redeem shares in an ETF. Moreover, to create ETF shares, the authorized participant must have the requisite shares in the securities underlying the ETF. It is not clear that the process to create new shares in an ETF could be accomplished quickly enough during the period leading to delivery to ensure that the ETF's price remains in line with the prices in the underlying shares. Therefore, the Commission will require in Commission regulation 41.25(b)(3)(i)(A) position limits on ETFs as appropriate.

In addition, the Commission is adopting its proposed guidance, including paragraph (d) to appendix A, which provides that a DCM may adopt a position accountability rule for any SFP, *in addition* to a position limit rule required or adopted under this section.[110] Consistent with the requirements of the amended Commission regulation 41.25(b)(3)(i)(B), the DCM's position accountability rule must provide, at a minimum, that the DCM have authority to obtain any information it would need from a market participant with a position at or above the accountability level and that the DCM have authority, in its discretion, to order such a market participant to halt increasing their position. Position accountability can work in tandem with a position limit rule, particularly where the accountability level is set below the level of the position limit. Further, the DCM may adopt a position accountability rule to provide authority to the DCM to order market participants to reduce position sizes, for example, to maintain orderly trading or to ensure an orderly delivery.

D. Limits for Other SFPs—Commission Regulation 41.25(b)(3)(ii)–(iv)

The Proposal also included specific position limits requirements and guidance directed at SFPs based on products other than a single equity security: A physically-delivered basket equity SFP, a cash-settled equity index SFP, and an SFP on one or more debt securities.

1. Limits for SFPs on More Than One Equity Security—Commission Regulation 41.25(b)(3)(ii) and (iii)

The existing SFP rule provides that, for an SFP comprised of more than one equity security, the DCM must apply the position limit or position accountability level applicable to the security in the index with the lowest average daily trading volume.[111] The Proposal distinguished between physically-delivered basket equity SFPs and cash-settled equity index SFPs, though the Commission notes that neither currently is listed for trading on a DCM.

OneChicago believes the current general framework is sufficient and recommended that the Commission not finalize regulations for types of SFPs that currently are not listed for trading, unless there is interest in listing such SFPs.[112] OneChicago expressed concern that issuing these regulations would risk stifling innovation.[113] Rather, OneChicago believes the Commission should have a regulatory scheme that can quickly adapt to market developments.[114]

The Commission is adopting the changes to the general framework for types of SFPs not currently listed for trading, as proposed. The Commission is concerned that the existing general framework applicable to SFPs, as noted in the Proposal, does not take into account the characteristics of other types of SFPs, such as an SFP on one or more debt securities, SFPs based on physically-delivered baskets of equities, and cash-settled SFPs based on equity indexes. Absent revisions, the Commission is concerned that the existing general framework could impede innovation because a DCM may not be able to tailor a product's terms to comply with the framework.[115]

a. Physically-Delivered Basket Equity SFPs—Commission Regulation 41.25(b)(3)(ii)

With respect to a physically-delivered SFP on more than one equity security, the Proposal provided that the DCM must adopt the position limit for the SFP based on the underlying security with the lowest estimated deliverable supply and that the position accountability level would only be allowable if each of the underlying equity securities in the basket of deliverable securities is eligible for a position accountability level.[116] The Commission proposed the existing position limits and position accountability provisions for a physically-delivered SFP comprised of more than one equity security[117] by basing the criteria on the underlying equity security with the lowest estimated deliverable supply, rather than the lowest average daily trading volume.[118]

The Commission is adopting Commission regulation 41.25(b)(3)(ii) as proposed. The rule is based on the premise that the limit on a physically-delivered equity basket SFP should be consistent with the most restrictive limit applicable to SFPs based on each component of such basket of deliverable securities. This restricts a person from obtaining a larger exposure to a particular component security through a physically-delivered basket equity SFP than could be obtained directly in a single equity SFP. However, the rule does not aggregate positions in single equity SFPs with positions in basket deliverable SFPs.

b. Cash-Settled Equity Index SFPs—Commission Regulation 41.25(b)(3)(iii)

With respect to a cash-settled SFP based on a narrow-based security index of equity securities, the Proposal simply provided that the DCM must adopt a position limit level and offered relevant guidance and acceptable practices.[119] Under the proposed guidance a DCM could set the position limit for a cash-settled SFP on a narrow-based equity security index equal to that of a similar narrow-based equity security index option listed on an NSE.[120] As an alternative for setting the level based on that of a similar equity index option, the proposal provided guidance and acceptable practices that would allow a DCM, in setting a limit, to consider the deliverable supply of securities underlying the equity index, and the

[109] Proposal at 36805.

[110] Proposal at 36814.

[111] 17 CFR 41.25(a)(3)(ii).

[112] OneChicago Letter at 9.

[113] *Id.*

[114] *Id.*

[115] *See* Proposal at 36807.

[116] Proposal at 36805–06 and 13.

[117] The Commission notes that there is not a limit *per se* on the maximum number of securities in a narrow-based security index. Rather, under CEA section 1a(35), a narrow-based security index generally means an index that has nine or fewer component securities; a component security comprises more than 30 percent of the index's weighting; the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weight; or the lowest weighted component securities, comprising no more than 25 percent of the index's weight, have an aggregate dollar value of average daily trading volume of less than $50 million. 7 U.S.C. 1a(35).

[118] This means that, under proposed 17 CFR 41.25(b)(3)(i), the default level position limit would be no greater than the equivalent of 25,000 100-share contracts in the security with the lowest estimated deliverable supply, unless that underlying equity security supports a higher level.

[119] Proposal at 36806, 13, and 14.

[120] Proposal at 36814.

equity index weighting and SFP contract multiplier.[121]

As an example of an acceptable practice in paragraph (b)(2) of appendix A, for a cash-settled equity index SFP on an equity security index weighted by the number of shares outstanding, a DCM could set a position limit as follows: First, compute the limit on an SFP on each underlying security under proposed regulation (b)(3)(i)(A) (currently designated as (a)(3)(i)(A)); second, multiply each such limit by the ratio of the 100-share contract size and the shares of the security in the index; and third, determine the minimum level from step two and set the limit to that level, given a contract size of one dollar times the index, or for a larger contract size, reduce the level proportionately.[122] As with physically-delivered basket equity SFPs, the Proposal is based on the premise that the limit on a cash-settled SFP on a narrow-based security index of equity securities should be as restrictive as the limit for an SFP based on the underlying security with the most restrictive limit.

The Commission is adopting Commission regulation 41.25(b)(3)(iii) and its associated guidance and acceptable practices as proposed. For setting levels of limits on an SFP comprised of more than one security, existing Commission regulation 41.25(a)(3)(ii) specifies certain criteria for trading volume and shares outstanding that must be applied to the security in the index with the lowest average daily trading volume. However, the Commission did not propose to retain those criteria for setting levels of limits for cash-settled equity index SFPs. For an equity index that is price weighted, it appears that use of shares outstanding or trading volume may result in an inappropriately restrictive level for a position limit. For an equity index that is value weighted, it also appears that such use may result in an inappropriately restrictive level for a position limit. For example, suppose a price weighted index has a component with a high price and a large number of shares outstanding, but a low trading volume. Specifically, this stock has the lowest trading volume in this index. If trading volume is used to establish the position limit for an SFP based on this index, then the position limit would be excessively restrictive because this specific component with a high index weight and low trading volume would force such a tight position limit to ensure that a trader could not attain a notional position in this stock that is in excess of a position limit that would apply to an SFP on that stock. The Commission observes that while trading volume, as an indicator of liquidity, may be an appropriate factor for a DCM to consider in setting position limits, trading volume is not generally used in construction of equity indexes.

2. Debt SFPs—Commission Regulation 41.25(b)(3)(iv)

Although no DCM currently lists for trading SFPs based on one or more debt securities, the Proposal provided that if a DCM listed such SFPs, the DCM must adopt a position limit level and offered relevant guidance.[123] The Proposal provided guidance that an appropriate level for limits on debt SFPs generally would be no greater than the equivalent of 12.5 percent of the par value of the estimated deliverable supply of the underlying debt security.[124] Similarly, the Proposal provided guidance that an appropriate level for limits on an index composed of debt securities generally should be set based on the component debt security with the lowest estimated deliverable supply.[125] The Commission invited comment on whether a level based on par value is appropriate, or whether some other metric would be appropriate.[126] The Commission received no comments on this question.

The Commission is adopting Commission regulation 41.25(b)(3)(iv) and the associated guidance as proposed. Although no DCM currently lists an SFP based on a debt security, the Commission believes a framework for position limits may reduce uncertainty regarding acceptable practices for listing such contracts on non-exempted securities and, thereby, may facilitate listing of such contracts. The Commission notes that futures contracts in exempted securities, such as U.S. Treasury notes, have been listed for many years.

The Commission is adopting this approach as guidance because there may be other reasonable bases for setting position limits for debt SFPs, and the Commission does not want to foreclose those bases. For example, a coupon stripped from an interest-bearing corporate bond does not have a par value in terms of such corporate bond, but instead such coupon is the amount of interest due at the time the corporate issuer is scheduled to pay such coupon under the corporate bond indenture. The Commission elected not to apply the criteria of trading volume and shares outstanding for setting levels of limits for debt SFPs because debt securities generally are neither issued in terms of shares nor trading volume measured in terms of shares.

E. General Requirements

1. Time Period During Which Position Limits Must Be Effective

The Commission proposed to maintain the requirement that position limits and position accountability levels be applied during a period of time no shorter than the last five trading days in an expiring contract month.[127] The Commission also proposed a new requirement that position limits become effective no later than the first day that long position holders may be assigned delivery notices in the event that the terms of an SFP provided for delivery prior to the last five trading days.[128]

OneChicago believes positions limits should only be in effect on the expiration day, because its experience has been that the short side is always pre-hedged and prepared to go through delivery, and the long side simply needs money to pay for delivery at its brokerage firm. The Exchange stated, ''All FCM customers roll their positions forward or extinguish the positions prior to expiration as taking delivery of securities, while theoretically possible, is not practical and the FCM [sic] make the process uneconomical for the customers.'' [129]

The Commission is amending the existing provision in Commission regulation 41.25(a)(3) that requires position limits to be applied in an expiring contract month for at least the last five trading days of the contract month. Specifically, the Commission is decreasing the time during which position limits must be in effect to at least the last three trading days of the contract month. However, Commission regulation 41.25(b)(3) of the final rule nevertheless requires position limits be in effect for a period longer than three trading days in the event that the terms of an SFP provide for delivery prior to

[121] *Id.*

[122] *Id.*

[123] The requirements for a security underlying an SFP permit the listing of SFPs on debt securities (other than exempted securities). *See* 17 CFR 41.21(a)(2)(iii) (providing that the underlying security of an SFP may include ''a note, bond, debenture, or evidence of indebtedness''); *see also* 71 FR 39534 (Jul. 13, 2006) (describing debt securities to include ''notes, bonds, debentures, or evidences of indebtedness''). While an SFP may not be listed on a debt security that is an exempted security, futures contracts may be listed on an exempted security.

[124] Proposal at 36807–08 and 14.

[125] Proposal at 36814.

[126] Proposal at 36808.

[127] Proposal at 36806 and 13.

[128] *Id.*

[129] OneChicago Letter at 6.

the last three trading days.[130] For example, if a DCM's rules provide for delivery notices to be assigned to long traders beginning on the first day of the contract month, then a position limit would have to be in effect no later than the trading day prior to the first day of the delivery month.

The Commission notes that other DCMs have experience in applying spot month position limits to the last few days of trading, where delivery occurs after the close of trading on the last trading day.[131] The Commission has noted that in its experience with surveillance of futures markets, the potential for manipulation and price distortion based on extraordinarily large positions is highest during the time period near contract expirations.[132] The Commission required position limits on SFPs during the last five trading days when settlement of security transactions was on a T+3 basis. This provided a two day buffer during which short hedgers could acquire shares in the underlying market to make delivery. Currently, settlement of security transactions in the underlying market occurs on a T+2 basis. The Commission notes that the two-day buffer may be longer than is necessary to prevent market distortions caused by extraordinarily large positions and believes that a one-day buffer is adequate. Therefore, the Commission believes that positions limits that are in effect during the last three days of trading should be sufficient to minimize potential distortion if traders need to acquire securities in order to deliver on an expiring SFP.

The time period during which position limits are in effect for SFPs need not be consistent with that of position limits on security options, which are in effect at all times, because security options typically have American-style exercise provisions and can be exercised at any time prior to expiration. The unanticipated need to acquire securities to make delivery on an exercised security option, therefore, does not exist with SFPs. For the reasons noted above, the Commission is decreasing to three days from five days the period during which SFP position limits will be in effect.

[130] Currently, there are no SFPs that allow delivery prior to the last trading day.

[131] For example, position limits for NYMEX's WTI Crude Oil and Natural Gas futures contracts are in effect during the last three days of trading. Delivery on those contracts occurs after expiration.

[132] *See* 2001 Final SFP Rules at 55082.

2. Applying Position Limits and Accountability Levels on a Net and Gross Basis

The Proposal generally allowed DCMs the discretion to apply position limits and position accountability levels on either a net, as under existing regulations, or a gross (''same side of the market'') basis.[133] If a DCM imposes limits on the same side of the market, then the DCM could not net positions in SFPs in the same security on opposite sides of the market. The Proposal provided, however, that if a DCM lists both physically-delivered contracts and cash-settled contracts in the same security, it may not permit netting of positions in the physically-delivered contract with that of the cash-settled contract for purposes of determining compliance with position limits.[134]

OneChicago did not support the use of gross position limits for SSFs. The Exchange noted that it does not permit a customer to hold both a long and short SSF with the same symbol and expiration, making the application of this proposed rule meaningless under the Exchange's rules.[135]

The Exchange believes cash-settled and physically-delivered SFPs on the same underlying security should be combined for the same expiration date for purposes of position limits.[136] The Exchange agrees with the proposal to expand the limits for physically-delivered contracts, but believes that cash-settled contracts pose a greater danger of manipulation on the closing price of the underlying security and should be constrained at the position limit levels that are currently in force.[137] The Exchange noted that with physical settlement, a long position holder taking delivery, in an attempt to manipulate the underlying security price upwards, would take delivery at an artificial price ''which should correct the next day.'' [138] The Exchange noted that with cash settlement, a long holder attempting to manipulate the underlying security price, does not take delivery at an artificial price, but collects profits through variation margin based on a higher artificial price.[139] According to the Exchange, this difference between physical delivery and cash settlement produces an incentive to attempt a distortion in the price of the underlying market.[140]

[133] Proposal at 36803 and 12.

[134] Proposal at 36802, 03–04, and 13.

[135] OneChicago Letter at 8.

[136] OneChicago Letter at 5.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

The Commission is adopting its proposal to give a DCM discretion to apply position limits or position accountability levels either on a net basis, as under current regulations, or on the same side of the market.[141] Under Commission regulation 41.25(b)(3)(vii), if a DCM imposes limits based upon positions on the same side of the market, then the DCM could not net positions in SFPs in the same security on opposite sides of the market.

For example, if there were a physically-delivered SFP on equity XYZ, a dividend-adjusted SFP on equity XYZ, and a cash-settled SFP on equity XYZ, then a DCM's rules could provide that long positions held by the same person across each of these classes of SFP based on equity XYZ would be aggregated for the purpose of determining compliance with the position limit. A gross position in a futures contract is larger than a net position in the event a person holds positions on opposite sides of the market. That is, a net basis is computed by subtracting a person's short futures position from that person's long futures position, and, under current regulations, a single position limit applies on a net basis to that net long or net short position. Under the final rule, at the discretion of a DCM, a person's long futures position is subject to the position limit and, separately, a person's short futures position also is subject to the position limit.

Adding this gross basis approach (in addition to net basis) to SFP limits more closely resembles existing limits on security options that apply on the same side of the market per the rules of the NSEs.[142] A DCM that elects to implement limits on a gross basis would be providing its market participants with the same metric for position limit compliance as is currently the case on NSEs, which may reduce compliance costs and encourage cross-market participation. However, limits on a gross basis may be more restrictive than limits

[141] The Commission notes that, although it did not propose or adopt an aggregation rule to define ''person'' for purposes of SFP position limits, current 17 CFR 150.5(g) addresses aggregation standards for exchange-set position limits. The Commission believes a DCM should have reasonable discretion to set aggregation standards based on a person's control or ownership of SFP positions, including using any aggregation standards used by an NSE in connection with equity options.

[142] For example, Cboe applies limits to an aggregate position in an option contract ''of the put type and call type on the same side of the market.'' Cboe rule 4.11. For this purpose, under the rule, long positions in put options are combined with short positions in call options; and short positions in put options are combined with long position in call options.

on a net basis, which could reduce the position sizes that may be held without an applicable exemption.

The Commission notes that a DCM need not use this alternative approach. The Commission continues to permit DCMs to apply SFP limits on a net basis at the DCM's discretion. In this regard, the Commission believes it is possible for a DCM's application of limits to further the goals of the CEA whether applied on a net or a gross basis.[143] This is true, for example, if a DCM applied limits on a net basis and did not permit netting of physically-delivered contracts with cash-settled contracts. But if, instead, the DCM permitted netting of physically-delivered contracts and cash-settled contracts in the same security, it would render position limits ineffective.[144] For example, a person should not be permitted to avoid limits by obtaining a large long position in a physically-delivered contract (which could be used to corner or squeeze) and a similarly large short position in a cash-settled contract that would net to zero.

3. Requirements for Resetting Position Limit Levels—Commission Regulation 41.25(b)(3)(vi)

The Commission proposed to require a DCM to consider, on at least a semi-annual basis, whether SFP position limits were set at appropriate levels, through consideration of estimated deliverable supply.[145] Under the Proposal, DCMs would be required to calculate estimated deliverable supply and six-month total trading volume no less frequently than semi-annually, rather than the existing requirement to calculate average daily trading volume on a monthly basis.[146] In the event that estimated deliverable supply has decreased, then a DCM would be required to lower the level of a position limit in light of that decreased deliverable supply. In the event that estimated deliverable supply has increased, then a DCM would have discretion to increase the level of a position limit for that contract. In addition, a DCM that has substituted a position accountability rule for a position limit would be required to consider whether estimated deliverable supply and total six-month trading volume continue to justify that position accountability rule.[147]

OneChicago supported the proposal to allow DCMs to recalculate levels of position limits on a semiannual basis, instead of a monthly basis. In this regard, OneChicago noted that in its experience resetting levels monthly provides very little value.[148]

The Commission is adopting Commission regulation 41.25(b)(3)(vi) as proposed. The Commission believes that review of position limit levels and position accountability rules on at least a semi-annual basis rather than a monthly basis generally should be adequate to ensure appropriate levels because deliverable supply generally does not change to a great degree from month to month. For example, the number of shares outstanding may increase through periodic issuance of additional shares, and may decrease through stock repurchase programs, but, as a general observation, such issuance or repurchases are not a large percentage of free float. Of course, there could be situations where deliverable supply changes to a great degree before the semi-annual period and the rule does not prevent a DCM from considering those changes before such period.

4. Proposed Guidance on Exemptions for Limits

Under the existing SFP rule in Commission regulation 41.25(a)(3)(iii), DCMs are authorized to approve exemptions from SFP position limits, provided the exemptions are consistent with Commission regulation 150.3, which addresses exemptions from Commission-set position limits set forth in Commission regulation 150.2.[149] The Proposal would have deleted Commission regulation 41.25(a)(3)(iii) and created guidance that DCMs may approve exemptions provided they are consistent with either Commission regulations 150.5(d), (e), and (f), which addresses exemptions from exchange-set position limits, or the exemptions of an NSE.[150]

OneChicago did not comment on the Commission's proposed guidance regarding exemptions from SFP position limits, but requested that the Commission give DCMs the authority to exempt spread transactions designed to facilitate the transfer and return of securities as a pure financing trade. On OneChicago, such transactions are called Securities Transfer and Return Spreads (''STARS'').[151] In a OneChicago STARS transaction, the front leg in the spread expires on the date of the OneChicago STARS transaction and the deferred leg in the spread will expire at a distant date. The Exchange noted the expiration of the front leg triggers the transfer of securities for cash on T+1, that is, on the next business day following the trade date. According to the Exchange, the spread transactions are similar to an exchange for physical transaction that results in the transfer of the underlying commodity in exchange for a futures transaction on the other side of the market, but the two parties transfer the underlying security via the SFP rather than crossing the stock themselves.

The Exchange stated that it sees no value in requiring market participants to seek a hedge exemption for the expiring nearby contract in the OneChicago STARS transaction. The Exchange noted its rules allow customers to request an exemption for a position that was established the day before, which, for a OneChicago STARS transaction, would be for a nearby leg that no longer exists. Since the market participant can seek an exemption the day after the OneChicago STARS transaction when the nearby leg would no longer exist, the Exchange views such an exemption request as unnecessary paperwork. OneChicago, therefore, requests that the Commission give DCMs the authority to exempt transactions such as OneChicago STARS transactions from SFP position limits.

The Commission is deleting existing Commission regulation 41.25(a)(3)(iii) and adopting the guidance in paragraph (e) to appendix A as proposed. The Commission also believes that OneChicago's recommendation regarding the OneChicago STARS

[143] CEA section 2(a)(1)(D)(i)(VII) requires that trading in SFPs is not readily susceptible to manipulation of the price of the SFP, the SFP's underlying security, or an option on the SFP's underlying security. 7 U.S.C. 2(a)(1)(D)(i)(VII).

[144] Although no DCM currently lists both physically-delivered SFP contracts and cash-settled SFP contracts for the same underlying security, and this concern may be theoretical, the Commission believes that providing clarity reduces uncertainty regarding netting in such circumstances, which may facilitate listing of such contracts in the future. Therefore, 17 CFR 41.25(b)(3)(vii) of the final rule provides that, for a DCM applying limits on a net basis, netting of physically-delivered contracts and cash-settled contracts in the same security is not permitted as it would render position limits ineffective. This concern is not applicable to a DCM applying limits on the same side of the market, as limits are applied separately to long positions and to short positions.

[145] Proposal at 36806–07 and 13.

[146] *Id.*

[147] The Commission also proposed a non-substantive change to the filing requirement whenever a DCM makes such changes to limit levels. While the Proposal provided that changes to limit levels be filed pursuant to the requirements of Commission regulation 41.24, it removed the superfluous provision in the current regulation that provides that the change be effective no earlier than the day after the DCM has provided notification to the Commission and to the public. Instead, the regulation simply cites to Commission regulation 41.24.

[148] OneChicago Letter at 8.

[149] Commission regulation 150.2 sets forth speculative position limits for nine agricultural commodities. 17 CFR 150.2.

[150] NSEs permit certain exemptions, including for qualified hedging transactions and for facilitation of orders with customers.

[151] OneChicago Letter at 6.

transactions has merit. In this regard, the nearby short position is a hedged (covered) position that would not require a subsequent acquisition of shares to make delivery. Thus, there is no concern regarding a distortion in the underlying cash market caused by acquiring a large number of shares in a short period of time. Therefore, as long as the DCM is aware that nearby short positions created by transactions such as OneChicago STARS transactions are covered, DCMs may adopt rules that exempt positions created through such transactions from position limits. Moreover, a DCM could exempt positions or portions of a total position created by transactions such as OneChicago STARS transactions while enforcing limits on positions created through outright transactions.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') [152] requires federal agencies, in promulgating regulations, to consider whether the rules they issue will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis of the impact on those entities. The final rule generally applies to exchange-set position limits. The final rule permits a DCM to increase the level of position limits for SFPs and may change the application of those limits from a trader's net position to a trader's gross position. The final rule will affect DCMs. The Commission has previously established certain definitions of ''small entities'' to be used in evaluating the impact of its rules on small entities in accordance with the RFA, and has previously determined that DCMs are not small entities for purposes of the RFA.[153] The Commission requested comments with respect to the Proposal's RFA discussion and received no comments.

For all these reasons, the Commission believes that the amendments to the SFP position limits regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the final rule will not have a significant economic impact on a substantial number of small entities.

[152] 5 U.S.C. 601 *et seq.*

[153] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619 (Apr. 30, 1982).

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'') [154] provides that a federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). The collection of information related to the amended rule is OMB control number 3038–0059—Security Futures Products.[155] As a general matter, the final rule: (i) Permits a DCM to increase the level of limits; (ii) allows a DCM to change the application of exchange-set limits from a net basis to a gross basis; and (iii) reduces the time during which the position limits are in effect from the last five days of the contract month to the last three days of the contract month. The Commission believes that the final rule will not impose any new information collection requirements that require approval of OMB under the PRA. As such, these final rule amendments do not impose any new burden or any new information collection requirements in addition to those that already exist in connection with filings to list SFPs under Commission regulation 41.23 or to amend exchange rules for SFPs under Commission regulation 41.24.[156]

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[157] CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The CFTC considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors below.

Where reasonably feasible, the CFTC has endeavored to estimate quantifiable costs and benefits. Where quantification is not feasible, the CFTC identifies and describes costs and benefits qualitatively.

The CFTC requested comments on the costs and benefits associated with the proposed rule amendments. In particular, the CFTC requested that commenters provide data and any other information or statistics that the commenters relied on to reach any conclusions regarding the CFTC's proposed considerations of costs and benefits. The Commission received comments that indirectly address the costs and benefits of the Proposal. These comments are discussed as relevant below.

2. Economic Baseline

The CFTC's economic baseline for this analysis of the final rule is the SFP position limits rule requirement that was adopted in 2001 and exists today in Commission regulation 41.25(a)(3). In the 2001 Final SFP Rules, the Commission adopted an SFP position limits rule that is consistent with the statutory requirements of CEA section 2(a)(1)(D). In particular, CEA section 2(a)(1)(D)(i)(VII) requires generally that trading in an SFP not be readily susceptible to manipulation of the price of that SFP or its underlying security. In this connection, Commission regulation 41.25(a)(3) currently states that the DCM shall have rules in place establishing position limits or position accountability procedures for the expiring futures contract month.[158] The 2001 Final SFP Rules also provide criteria for a default level of position limits and criteria that permit a DCM to adopt an exchange rule for position accountability in lieu of position limits.[159] In addition, the 2001 Final SFP Rules permit a DCM to approve exemptions from position limits pursuant to exchange rules that are consistent with Commission regulation 150.3.

The CFTC analyzed the costs and benefits of the final rule against the current default net position limit level of 13,500 (100-share) contracts; or a higher net position limit level of 22,500 (100-share) contracts for equity SFPs meeting either: (i) A criterion of at least 20 million shares of average daily trading volume, or (ii) criteria of at least 15 million shares of average daily trading volume and more than 40

[154] 44 U.S.C. 3501 *et seq.*

[155] Regarding Security Futures Products (OMB Control No. 3038–0059), the Commission recently published a notice of a request for extension of the currently approved information collection. *See* 82 FR 48496 (Oct. 18, 2017).

[156] Similarly, the Commission previously determined that a rule expanding the listing standards for security futures did not require a new collection of information on the part of any entities. *See* 71 FR 39534 at 39539 (Jul. 13, 2006) (adopting a rule to permit security futures to be based on individual debt securities or a narrow-based security index comprised of such securities).

[157] 7 U.S.C. 19(a).

[158] 17 CFR 41.25(a)(3).

[159] 17 CFR 41.25(a)(3).

million shares of the underlying security outstanding. The current regulation permits (but does not require) a DCM to adopt an exchange rule for position accountability in lieu of position limits, provided that average daily trading volume in the underlying security exceeds 20 million shares and there are more than 40 million shares of the underlying security outstanding. The current regulation specifies that the six-month average daily trading volume in the underlying security be calculated at least monthly and applies limits to positions held during the last five trading days of an expiring contract month.

3. Summary of the Final Rule

For equity SFPs, the final rule increases the default position limit level from 13,500 (100-share) contracts to 25,000 (100-share) contracts and permits a DCM to establish a position limit level higher than 25,000 (100-share) contracts based on the estimated deliverable supply of the underlying security. The final rule provides guidance on estimating delivery supply, and in connection with this change, requires a DCM to estimate deliverable supply at least semi-annually, rather than calculating the six-month average daily trading volume at least monthly.

Also for equity SFPs, the final rule changes the criteria that permit a DCM to adopt an exchange rule for position accountability in lieu of position limits. Under the final rule, for a DCM to adopt an exchange rule for position accountability in lieu of position limits, the underlying security must have an estimated deliverable supply of more than 40 million shares and a total trading volume of more than 2.5 billion shares over a six-month period.

For physically-delivered basket equity SFPs, the final rule, in addition to requiring a position limit, specifies that the position limit be based on the underlying security in the index with the lowest estimated deliverable supply. The final rule also clarifies that an appropriate adjustment must be made to the level of the limit for a contract size different than 100 shares per underlying security.

For SFPs that are cash settled to a narrow-based security index of equity securities, the final rule requires a position limit and provides guidance that a DCM may set the limit level to that of a similar narrow-based security index equity option. The final rule also provides guidance and an acceptable practice, which sets forth a safe harbor whereby a DCM itself may establish such a limit level.

For SFPs in debt securities, the final rule establishes a requirement that a DCM must adopt a position limit either net or on the same side of the market, and provides guidance that the level of such limit generally should be set no greater than the equivalent of 12.5 percent of the par value of the estimated deliverable supply of the underlying debt security.

The final rule shortens the time period during which position limits must be in effect from the last five trading days to the last three trading days. The final rule also establishes a required minimum position limit time period beginning no later than the first day that a holder of a long position may be assigned a delivery notice, if such period is longer than the last three trading days, where the SFP permits delivery notices to be sent to long traders before the termination of trading.

The final rule provides DCMs with the discretion to alter the basis for applying a position limit from a net position to a gross position on the same side of the market.[160]

The final rule establishes guidance that a DCM may adopt an exchange rule for position accountability in addition to an exchange rule for a position limit.

The final rule amends the guidance for exemptions from SFP position limits by changing the reference to CFTC regulation 150.3, regarding exemptions to federal position limits, to CFTC regulation 150.5, regarding exchange-set limits. The final rule also adds guidance for exemptions from SFP position limits to permit a DCM to provide exemptions consistent with those of an NSE regarding securities options position limits or exercise limits.

The final rule amends the requirements for resetting levels of SFP position limits by changing the required review period from monthly to semi-annually; and imposing a requirement that a DCM must lower the position limit for an SFP if the data no longer justify a higher limit level. The final rule also makes clear that a DCM must adopt a position limit for an SFP if data no longer justify an exchange rule for position accountability in lieu of a position limit. The final rule continues to permit a DCM to use discretion as to whether to increase the level of a position limit for an SFP if the data justify a higher level.

The final rule establishes a general definition of estimated deliverable supply, consistent with the guidance on estimating deliverable supply in appendix C to part 38 of the Commission's regulations, and provides guidance on estimating deliverable supply that is specific to an SFP.

Lastly, the final rule establishes a definition of ''estimated deliverable supply,'' which reflects the general definition of deliverable supply in the Commission's appendix C to part 38, paragraph (b)(1)(i),[161] and ''same side of the market,'' for clarity regarding the application of the final rule's limit levels on a gross basis. This definition of ''same side of the market'' distinguishes long positions for an SFP in the same security from short positions in an SFP in the same security.[162]

4. Costs

As a general matter, the Commission believes that the final rule will reduce costs relative to existing Commission regulation 41.25(a)(3),[163] since the final rule will likely reduce the need for and number of hedge exemption requests (as discussed in the benefits section, below) and the frequency of required DCM reviews of SFP position limits from monthly to semi-annually. Under the final rule, DCMs that list SFPs for trading will continue to be required to adopt position limits or position accountability, but the final rule is expected to generally increase the levels of any such position limits. The Commission recognizes that the final rule will impose certain compliance, monitoring and implementation costs on such DCMs in connection with establishing new position limits or position accountability trigger levels based on deliverable supply and such additional criteria that the listing DCM determines to be appropriate. Such costs might include those related to the monitoring of positions in the SFP and related underlying security; related filing, reporting, and recordkeeping requirements; and the costs of changes to information technology systems. The Commission believes that these costs will be incremental and are mitigated because DCMs currently are required to comply with comparable requirements such as calculating average daily trading volume.

However, the Commission notes that these costs will now be incurred only on a semi-annual basis rather than monthly

[160] In this regard, OneChicago permits the holding of concurrent long and short positions. *See* OneChicago exchange rule 424, *available at https://www.onechicago.com/wp-content/uploads/content/OneChicago_Current_Rulebook.pdf.*

[161] *See* 17 CFR part 38 appendix C.

[162] These two definitions would be added into a new paragraph (a) of 17 CFR 41.25; in conjunction with the addition of the new paragraph (a), current paragraphs (a) through (d) would be re-designated as paragraphs (b) through (e).

[163] Re-designated under the proposal as 17 CFR 41.25(b)(3).

as is the case under current regulations. The Commission believes that DCMs will be able to exercise a certain degree of control over the extent of these costs depending on the amount of standardization such DCMs use to determine position limits and accountability. For example, a DCM could, consistent with the final rule, adopt a simple rule for equity SFPs based on the number of free-float outstanding shares of the underlying security. For equity securities, free-float information is readily available on certain publicly-available market websites and on Bloomberg terminals and similar services to which DCMs are likely to have access for other business reasons. Reducing the frequency with which DCMs are required to review position limits and accountability to semi-annually from monthly will reduce costs to DCMs. Thus, the Commission anticipates that estimating deliverable supply will not be more costly, and likely will be less costly, than estimating average daily trading volume as required under current regulations.

The Commission notes that under the final rule, DCMs have the discretion to implement the default position limit of 25,000 contracts, and that this may result in position limit levels in some contracts greater than 12.5 percent of deliverable supply. However, this discretion is limited by Core Principle 5 (which requires DCMs to set position limits at necessary and appropriate levels to deter manipulation) and by Core Principle 3 (which requires that DCMs only list contracts that are not readily susceptible to manipulation). To the extent that DCMs comply with these core principles, any such discretion regarding the setting of position limits should not impair the protection of market participants and the public or otherwise impose significant costs on the markets for SFPs or related securities.

To the extent that a DCM lists equity SFPs on deliverable baskets, the costs of implementing the amended position limit provisions for such SFPs would be similar to the costs of the analogous provisions for single stock SFPs. As compared to the existing rule, there is likely to be a small incremental cost to DCMs because a DCM would be required to apply a position limit or position accountability rule based on the security in the basket with the lowest estimated deliverable supply rather than the existing lowest average daily trading volume. The determination of estimated deliverable supply is expected to take more time and effort since it is not merely a formulaic number like ''average daily trading volume'' but instead may require additional subjective analysis. However, since DCMs do not currently list and trade any equity SFPs on deliverable baskets there will be no additional costs associated with the final rule at this time.

For a DCM that may list SFPs on debt securities, the final rule is expected to provide an incremental increase in costs as compared to the existing regulation. Under the current regulation, a DCM is permitted to list an SFP based on a debt security, however, the existing regulation does not specify the position limit or position accountability requirements for SFPs on debt securities largely due to the focus in the existing requirements on equity securities. As a result, a DCM could under the final rule set position limits or position accountability rules for SFPs on a single debt security based on the guideline of 12.5 percent of the par value of the estimated deliverable supply or for a basket of debt securities based on 12.5 percent of the par value of the debt security with the lowest estimated deliverable supply. However, a DCM could, if it has a reasonable basis, adopt a different approach for SFPs based on debt securities. The cost for DCMs applying this position limit framework will be mitigated by the systems currently in place for equity securities and the fact that DCMs do not currently list any SFPs on a single debt security or basket of debt securities.

To the extent that there is less publicly-available information related to the deliverable supply of debt securities, estimating deliverable supply may be more costly for debt securities than for equity securities. However, these costs will only be incurred in the event that a DCM begins listing SFPs on non-exempted debt securities. Moreover, these deliverable supply provisions are set out as guidance so that DCMs are free to implement less costly methods to comply with the rule, which provides only that SFPs on debt securities must have position limits. Although DCMs have not listed debt security SFPs to date, absent the changes to the regulation, it is theoretically possible that the costs associated with estimating deliverable supply or otherwise determining position limit levels may affect future decisions regarding whether or not to list such SFPs. The costs of the final rule for SFPs on debt securities would be otherwise similar to the costs of the final rule for equity SFPs.

The rule permitting DCMs to implement position limits on a net basis or on positions on the same side of the market (*e.g.,* on physically-delivered and cash-settled contracts on the same security, should a DCM ever list both types of contracts) will not require DCMs to change their current practice, and therefore will not impose new costs on DCMs. Any change that imposes new costs on market participants would be made at the discretion of the DCM (as constrained by DCM Core Principles).

The reduction in the time period during which position limits must be in effect from five to three days imposes no additional costs on DCMs, and the Commission believes the implementation costs for DCMs will be low. This change merely delays by two days the need for a hedger to apply for a hedge exemption and the DCM to process that hedge exemption request, if necessary. The establishment in the final rule of a required minimum position limit time period beginning no later than the first day that a holder of a long position may be assigned a delivery notice, if such period is longer than the last three trading days, in instances where the SFP permits delivery before the close of trading, currently imposes no costs since contracts of this nature are not currently listed for trading. If a DCM listed such contracts, the final rule would require market participants to incur the costs of complying with position limits or applying for hedge exemptions (and would require DCMs to incur the costs of reviewing such applications) earlier in the life of the contract than absent this rule.

The Commission does not believe that the final rule will impose any significant additional costs or burdens to the market or to market participants. The final rule is likely to impose incremental additional costs on market participants related to compliance, monitoring, and implementation. As noted above for DCMs, these costs may include the monitoring of positions in the SFP and related underlying security; related filing, reporting, and recordkeeping requirements; and the costs of changes to information technology systems. It is likely that these additional costs of the rule will be significantly mitigated because market participants that currently engage in the SFP market are required to comply with existing comparable requirements.

DCMs that list SFPs may adopt position limits that are either equivalent to the default level for security options (*i.e.,* 25,000 100-share contracts) or proportional to estimated deliverable supply. Although the final rule likely will result in position limits for SFPs that are higher than current limits and only require those limits during fewer days of the contract period, the

Commission does not believe these changes will lead to excessive speculation or have an adverse effect on market integrity because the Commission's reporting requirements will provide the Commission with sufficient visibility of positions that are larger than the reporting levels. In this respect, the Commission's large trader reporting rules require FCMs to report to the Commission all positions greater than 1,000 contracts for SFPs based on a single equity and 200 contracts for SFPs based on a narrow-based security index.[164]

5. Benefits

The Commission from time-to-time reviews its regulations to help ensure they keep pace with technological developments and industry trends, and to reduce regulatory burden where needed. The final rule will provide to DCMs greater flexibility to adopt SFP position limits that they deem to be appropriate while not having an adverse effect on market integrity. In this respect, the Commission believes that DCMs will adopt position limits that are large enough not to significantly inhibit liquidity, but also appropriate to mitigate potential manipulations and other concerns that may be associated with overly large positions in SFPs in line with the Core Principles. Moreover, to the extent that the final rule would lead to position limits that are higher than current position limits, the final rule could alleviate the costs to hedgers of filing hedge exemption requests for positions that are larger than a current position limit, but lower than a new position limit under the final rule. The Commission notes, however, that, based on an analysis by Commission staff, there do not appear to have been any positions in SFPs during calendar year 2018 that exceeded current position limits, although there were some SFP positions in 2017 that did exceed current position limits.[165] The Commission also notes that higher limits could lead to increased trading activity that could improve liquidity in the SFP markets.

The Commission believes that the provision requiring DCMs to set position limits and accountability based on deliverable supply estimates calculated no less frequently than semi-annually should help ensure on an ongoing basis that position limits and accountability are set at levels that are necessary and appropriate to deter manipulation consistent with DCM Core Principles 3 and 5. OneChicago supported this aspect of the proposal, noting that resetting position limits on a monthly basis as required by current rules provides very little value.[166]

The final rule permits DCMs to implement position limits on a net basis or on positions on the same side of the market (such as physically-delivered or cash-settled contracts on the same security, should a DCM ever list both types of contracts) and gives DCMs the discretion to choose the alternative they deem appropriate as constrained by DCM core principles, meaning DCMs are unlikely to alter their position limit rules in this regard unless they determine doing so would be beneficial.

The final rule establishes a required minimum position limit time period beginning no later than the first day that a holder of a long position may be assigned a delivery notice, if such period is longer than the last three trading days, where the SFP permits delivery before the close of trading. This provision will ensure that such contracts are subject to appropriate position limits or position accountability during the entire delivery period. Although DCMs do not currently list for trading SFPs of this nature, any future listings would benefit from this change. Reducing the minimum position time limit period from the last five trading days to the last three trading days, while also likely raising limits levels for SFPs, may also reduce monitoring and compliance costs for traders.

6. CEA Section 15(a) Factors

i. Protection of Market Participants and the Public

The Commission believes that the final rule maintains the protection of market participants and the public provided by the current regulation. The final rule will continue to protect market participants and the public by maintaining the requirement that DCMs that list SFPs adopt and enforce appropriate position limits or position accountability consistent with DCM Core Principle 5 and implementing for SFPs the longstanding Commission policy that spot-month position limits should be set based on estimates of deliverable supply. Linking the levels of position limits and position accountability to deliverable supply for equity securities that have an estimated deliverable supply of more than 20 million shares protects market participants and the public by helping prevent congestion, manipulation, or other problems that can be associated with speculative positions in expiring contracts that are overly large relative to deliverable supply. While DCMs will have the discretion to implement the default position limit of 25,000 contracts regardless of deliverable supply, and this may result in position limit levels in some contracts greater than 12.5 percent of deliverable supply, DCMs continue to be required to comply with core principle 3, which states that DCMs shall only list contracts for trading that are not readily susceptible to manipulation, and core principle 5, which requires that positon limits and accountability be set at levels that reduce the threat of manipulation or congestion.

As noted above, DCMs that list other commodity futures contracts providing for delivery after the termination of trading have adopted position limits during the last few days of trading. These DCMs have demonstrated that the underlying cash market and market participants can be protected from congestion and squeezes entering the delivery period for these contracts. Likewise, the Commission believes that the underlying equities market and market participants also can continue to be protected from market manipulation and other distortions after decreasing to three days the time period during which position limits are in effect prior to the termination of trading.

ii. Efficiency, Competitiveness, and Financial Integrity of Markets

As discussed above, it is reasonable to anticipate that many or most SFPs will be subject to higher position limits under the final rule compared to the current position limits. Therefore, hedgers may be able to take larger positions without the need to apply for hedge exemptions. This also could alleviate a DCM's need to review hedge exemptions, improving resource allocation efficiency for exchanges and certain market participants. Moreover, with less restrictive position limits, it is theoretically possible that more traders could be enticed into the market and

[164] *See* 17 CFR 15.03. The Commission did not propose to amend, and is not amending, the reporting levels.

[165] As noted in the NPRM, Commission staff reviewed the largest positions in SFPs that were held during the calendar year 2017 and found that there were 16 positions held during the last five trading days of expiring SFP contract months across all listed SFPs on OneChicago that exceeded current position limits (and which appear to have been eligible for a hedge exemption). If the new default position limit of 25,000 contracts had been in effect in 2017, most of these positions would have been below the default position limit. For this adopting release, Commission staff reviewed the largest positions in SFPs that were held during the calendar year 2018 and found no positions during that year that exceeded current position limits during the last five trading days of a contract month.

[166] OneChicago Letter at 8.

thus improve the liquidity and pricing efficiency of the SFP market.

The current position limit regulation for SFPs (a default of 13,500 contracts) often leads to position limits that are tighter than analogous position limits for security options (a default of 25,000 contracts). The final rule raises the default limit level in equity SFPs to match that for security options. More closely aligning the position limits in SFPs to those in securities options may help to enhance the competitiveness of the SFP market relative to the security options market.

iii. Price Discovery

The Commission believes that price discovery occurs in the liquid and transparent security markets underlying existing SFPs rather than the relatively low-volume SFPs themselves. Nevertheless, as noted above, to the extent that trading activity in SFP markets increases due to less restrictive position limits, the price discovery function of SFPs could be enhanced by reducing liquidity risk and thereby facilitating arbitrage between the underlying security and SFP markets.

iv. Sound Risk Management Practices

The current position limit regulation often leads to position limits that are tighter than analogous position limits for security options. It is conceivable that this could encourage potential hedgers or other risk managers to use security options rather than SFPs because of burdens associated with the SFP's hedge exemption process. Risk managers might also find that the liquidity risk in the current SFP market is too high, due to a lack of speculators in the SFP market (among other causes). In this regard, it is possible that the current position limits might be too tight for speculators to perform adequately their role of providing liquidity in a futures market. Because the final rule raises the default limit to 25,000 contracts to match the default in security options, and thus would likely lead to higher position limits for many SFPs, it is possible that both risk managers and speculators enter or increase trading in the SFP market.

v. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations associated with the final rule.

7. Consideration of Alternatives

The Commission considered the various alternatives put forth in comments. These considerations are discussed in this section. The Commission notes as a general matter that while SFPs are commonly used for securities lending transactions that are eligible for hedge exemptions, SFPs could be used for speculation in the future and that Core Principle 5 requires speculative position limits or accountability as appropriate.

OneChicago stated that position limits should only be in effect on expiration day rather than the last five trading days as under current rules and under the proposed rules.[167] OneChicago argued that position limits before expiration are not necessary because OneChicago's traders are pre-hedged and prepared to go to delivery or have rolled over positions. The Commission notes that the transactions described by OneChicago would be eligible for hedge exemptions. The Commission believes that any speculative positions that may arise in SFP markets should be subject to speculative position limits before expiration because such limits would provide the benefit of ensuring that large speculative positions can be wound down in an orderly manner. Additionally, the Commission is reducing in the final rule the applicability of speculative position limits to the last three days of trading rather than the last five days, which may reduce compliance costs for traders.

OneChicago also stated that the Commission should authorize position accountability for all SFPs on ETFs and stated that estimated deliverable supply and trading volume are unsuitable metrics for ETFs because authorized participants can increase or decrease the number of shares.[168] The Commission believes that there likely are benefits in certain instances to implementing position limits on ETF SFPs and that authorized participants may not be able to adjust the number of shares quickly enough to affect the susceptibility of an ETF SFP to manipulation. The Commission notes that exchanges can implement position accountability on ETFs where the underlying security meets the volume and deliverable supply requirements discussed above.

OneChicago also recommended that position limits be set based on 25 percent of estimated deliverable supply, as opposed to the 12.5 percent proposed by the Commission because, in the Exchange's view, there is no justification for a lower level, other than the misconception that SFPs and security options compete.[169] While the Commission understands from OneChicago that SFPs are commonly used for securities lending agreements and security options are not, both security options and SFPs could be used for speculation. Thus, a combined position limit of about 25 percent of deliverable supply for SFPs and security options on the same security may provide a similar benefit of protecting against manipulation as is provided in futures contracts on other commodities.

The Commission invited comment on whether to adopt a rule that would permit DCMs to adopt position limits equivalent to the level of corresponding security option position limits on the same security.[170] OneChicago objected to this proposal because OneChicago believes that SFPs and security options should not be regulated similarly.[171] Although the Commission believes that this alternative method for setting position limits would provide DCMs flexibility in setting position limits and would be easier and less costly than estimating deliverable supply, the Commission is not adopting this proposal. In this regard, the only DCM that currently lists SFPs objected to this alternative, and as noted in the Proposal, the Commission views position limits on security options that are based on trading volume as inconsistent with existing Commission policy regarding use of estimated deliverable supply to support position limits in an expiring contract month.[172]

OneChicago opined that the current position limit framework is ''sufficient to give innovators a clear view of regulation in the SSF marketplace,'' and that issuing regulations for SFPs that currently are not listed for trading ''would risk stifling innovation.'' [173] The Commission believes that the frameworks for position limits in SFPs on deliverable equity baskets and debt securities (all based on deliverable supply estimates) in the final rule will help ensure that such products, if they are listed for trading, are reasonably protected from manipulation. Further, the Commission believes that the final rule may help foster position limits consistent with those in analogous securities options (where applicable).

D. Anti-Trust Considerations

CEA section 15(b) requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives, polices, and

[167] OneChicago Letter at 6.

[168] OneChicago Letter at 7.

[169] OneChicago Letter at 8.

[170] Proposal at 36805.

[171] OneChicago Letter at 8.

[172] Proposal at 36805.

[173] OneChicago Letter at 9.

purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to CEA section 17.[174]

The Commission has determined that the final rule is not anticompetitive and has no anticompetitive effects. In the Proposal, the Commission requested comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would further the objective of the Proposal, such as leveling the regulatory playing field between SFPs and security options listed on NSEs. As noted above, OneChicago argued that it is not appropriate to regulate derivatives containing optionality similarly to derivatives not containing optionality. The Exchange noted different regulation of Delta One derivatives traded on a DCM and Delta One derivatives traded overseas or OTC creates an uneven playing field. The Commission notes, however, that given the statutory constraints that require similar regulation of SFPs and security options, discussed above, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 41

Brokers, Position accountability, Position limits, Reporting and recordkeeping requirements, Securities, Security futures products.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 41 as follows:

PART 41—SECURITY FUTURES PRODUCTS

■ 1. The authority citation for part 41 continues to read as follows:

Authority: Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

■ 2. Amend § 41.25 as follows:

■ a. Redesignate paragraphs (a) through (d) as paragraphs (b) through (e);

■ b. Add a new paragraph (a); and

■ c. Revise redesignated paragraphs (b)(3), (c)(2) and (3), and (e).

The addition and revisions read as follows:

[174] 7 U.S.C. 19(b).

§ 41.25 Additional conditions for trading for security futures products.

(a) *Definitions.* For purposes of this section:

Estimated deliverable supply means the quantity of the security underlying a security futures product that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels during the specified delivery period. For guidance on estimating deliverable supply, designated contract markets may refer to appendix A of this subpart.

Same side of the market means the aggregate of long positions in physically-delivered security futures products and cash-settled security futures products, in the same security, and, separately, the aggregate of short positions in physically-delivered security futures products and cash-settled security futures products, in the same security.

(b) * * *

(3) *Speculative position limits.* A designated contract market shall have rules in place establishing position limits or position accountability procedures for the expiring futures contract month as specified in this paragraph (b)(3).

(i) *Limits for equity security futures products.* For a security futures product on a single equity security, including a security futures product on an underlying security that represents ownership in a group of securities, *e.g.,* an exchange traded fund, a designated contract market shall adopt a position limit no greater than 25,000 100-share contracts (or the equivalent if the contract size is different than 100 shares), either net or on the same side of the market, applicable to positions held during the last three trading days of an expiring contract month; except where:

(A) For a security futures product on a single equity security where the estimated deliverable supply of the underlying security exceeds 20 million shares, a designated contract market may adopt, if appropriate in light of the liquidity of trading in the underlying security, a position limit no greater than the equivalent of 12.5 percent of the estimated deliverable supply of the underlying security, either net or on the same side of the market, applicable to positions held during the last three trading days of an expiring contract month; or

(B) For a security futures product on a single equity security where the six-month total trading volume in the underlying security exceeds 2.5 billion shares and there are more than 40 million shares of estimated deliverable supply, a designated contract market may adopt a position accountability rule in lieu of a position limit, either net or on the same side of the market, applicable to positions held during the last three trading days of an expiring contract month. Upon request by a designated contract market, traders who hold positions greater than 25,000 100-share contracts (or the equivalent if the contract size is different than 100 shares), or such lower level specified pursuant to the rules of the designated contract market, must provide information to the designated contract market and consent to halt increasing their positions when so ordered by the designated contract market.

(ii) *Limits for physically-delivered basket equity security futures products.* For a physically-delivered security futures product on more than one equity security, *e.g.,* a basket of deliverable securities, a designated contract market shall adopt a position limit, either net or on the same side of the market, applicable to positions held during the last three trading days of an expiring contract month and the criteria in paragraph (b)(3)(i) of this section must apply to the underlying security with the lowest estimated deliverable supply. For a physically-delivered security futures product on more than one equity security with a contract size different than 100 shares per underlying security, an appropriate adjustment to the limit must be made. If each of the underlying equity securities in the basket of deliverable securities is eligible for a position accountability level under paragraph (b)(3)(i)(B) of this section, then the security futures product is eligible for a position accountability level in lieu of position limits.

(iii) *Limits for cash-settled equity index security futures products.* For a security futures product cash settled to a narrow-based security index of equity securities, a designated contract market shall adopt a position limit, either net or on the same side of the market, applicable to positions held during the last three trading days of an expiring contract month. For guidance on setting limits for a cash-settled equity index security futures product, designated contract markets may refer to paragraph (b) of appendix A to this subpart.

(iv) *Limits for debt security futures products.* For a security futures product on one or more debt securities, a designated contract market shall adopt a position limit, either net or on the same side of the market, applicable to positions held during the last three trading days of an expiring contract month. For guidance on setting limits

for a debt security futures product, designated contract markets may refer to paragraph (c) of appendix A to this subpart.

(v) *Required minimum position limit time period.* For position limits required under this section where the security futures product permits delivery before the termination of trading, a designated contract market shall apply such position limits for a period beginning no later than the first day that long position holders may be assigned delivery notices, if such period is longer than the last three trading days of an expiring contract month.

(vi) *Requirements for resetting levels of position limits.* A designated contract market shall calculate estimated deliverable supply and six-month total trading volume no less frequently than semi-annually.

(A) If the estimated deliverable supply data supports a lower speculative limit for a security futures product, then the designated contract market shall lower the position limit for that security futures product pursuant to the submission requirements of § 41.24. If the data require imposition of a reduced position limit for a security futures product, the designated contract market may permit any trader holding a position in compliance with the previous position limit, but in excess of the reduced limit, to maintain such position through the expiration of the security futures contract; provided, that the designated contract market does not find that the position poses a threat to the orderly expiration of such contract.

(B) If the estimated deliverable supply or six-month total trading volume data no longer supports a position accountability rule in lieu of a position limit for a security futures product, then the designated contract market shall establish a position limit for that security futures product pursuant to the submission requirements of § 41.24.

(C) If the estimated deliverable supply data supports a higher speculative limit for a security futures product, as provided under paragraph (b)(3)(i)(A) of this section, then the designated contract market may raise the position limit for that security futures product pursuant to the submission requirements of § 41.24.

(vii) *Restriction on netting of positions.* If the designated contract market lists both physically-delivered contracts and cash-settled contracts in the same security, it shall not permit netting of positions in the physically-delivered contract with that of the cash-settled contract for purposes of determining applicability of position limits.

(c) * * *

(2) Notwithstanding paragraph (c)(1) of this section, if an opening price for one or more securities underlying a security futures product is not readily available, the final settlement price of the security futures product shall fairly reflect:

(i) The price of the underlying security or securities during the most recent regular trading session for such security or securities; or

(ii) The next available opening price of the underlying security or securities.

(3) Notwithstanding paragraph (c)(1) or (2) of this section, if a derivatives clearing organization registered under section 5b of the Act or a clearing agency exempt from registration pursuant to section 5b(a)(2) of the Act, to which the final settlement price of a security futures product is or would be reported determines, pursuant to its rules, that such final settlement price is not consistent with the protection of customers and the public interest, taking into account such factors as fairness to buyers and sellers of the affected security futures product, the maintenance of a fair and orderly market in such security futures product, and consistency of interpretation and practice, the clearing organization shall have the authority to determine, under its rules, a final settlement price for such security futures product.

* * * * *

(e) *Exemptions.* The Commission may exempt a designated contract market from the provisions of paragraphs (b)(2) and (c) of this section, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the public interest and the protection of customers. An exemption granted pursuant to this paragraph (e) shall not operate as an exemption from any Securities and Exchange Commission rule. Any exemption that may be required from such rules must be obtained separately from the Securities and Exchange Commission.

■ 3. Add appendix A to subpart C to read as follows:

Appendix A to Subpart C of Part 41—Guidance on and Acceptable Practices for Position Limits and Position Accountability for Security Futures Products

(a) *Guidance for estimating deliverable supply.* (1) For an equity security, deliverable supply should be no greater than the free float of the security.

(2) For a debt security, deliverable supply should not include securities that are committed for long-term agreements (*e.g.,* closed-end investment companies, structured products, or similar securities).

(3) Further guidance on estimating deliverable supply, including consideration of whether the underlying security is readily available, is found in appendix C to part 38 of this chapter.

(b) *Guidance and acceptable practices for setting limits on cash-settled equity index security futures products*—(1) *Guidance for setting limits on cash-settled equity index security futures products.* For a security futures product cash settled to a narrow-based security index of equity securities, a designated contract market:

(i) May set the level of a position limit to that of a similar narrow-based equity index option listed on a national security exchange or association; or

(ii) Should consider the deliverable supply of equity securities underlying the index, and should consider the index weighting and contract multiplier.

(2) *Acceptable practices for setting limits on cash-settled equity index security futures products.* For a security futures product cash settled to a narrow-based security index of equity securities weighted by the number of shares outstanding, a designated contract market may set a position limit as follows: First, determine the limit on a security futures product on each underlying equity security pursuant to § 41.25(b)(3)(i); second, multiply each such limit by the ratio of the 100-share contract size and the shares of the equity securities in the index; and third, determine the minimum level from step two and set the limit to that level, given a contract size of one U.S. dollar times the index, or for a larger contract size, reduce the level proportionately. If under these procedures each of the equity securities underlying the index is determined to be eligible for position accountability levels, the security futures product on the index itself is eligible for a position accountability level.

(c) *Guidance and acceptable practices for setting limits on debt security futures products*—(1) *Guidance for setting limits on debt security futures products.* A designated contract market should set the level of a position limit to no greater than the equivalent of 12.5 percent of the par value of the estimated deliverable supply of the underlying debt security. For a security futures product on more than one debt security, the limit should be based on the underlying debt security with the lowest estimated deliverable supply.

(2) *Acceptable practices for setting limits on debt security futures products.* [Reserved]

(d) *Guidance on position accountability.* A designated contract market may adopt a position accountability rule for any security futures product, in addition to a position limit rule required or adopted under § 41.25. Upon request by the designated contract market, traders who hold positions, either net or on the same side of the market, greater than such level specified pursuant to the rules of the designated contract market must provide information to the designated contract market and consent to halt increasing their positions when so ordered by the designated contract market.

(e) *Guidance on exemptions from position limits.* A designated contract market may

approve exemptions from these position limits pursuant to rules that are consistent with § 150.5 of this chapter, or to rules that are consistent with rules of a national securities exchange or association regarding exemptions to securities option position limits or exercise limits.

Issued in Washington, DC, on September 17, 2019, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Position Limits and Position Accountability for Security Futures Products—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2019–20476 Filed 9–26–19; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 635

[FHWA Docket No. FHWA–2018–0036]

RIN 2125–AF84

Construction and Maintenance—Promoting Innovation in Use of Patented and Proprietary Products

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulations to provide greater flexibility for States to use proprietary or patented materials in Federal-aid highway projects. This final rule rescinds the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes specified in project plans and specifications, thus encouraging innovation in transportation technology and methods.

DATES: This final rule is effective October 28, 2019.

FOR FURTHER INFORMATION CONTACT: Mr. John Huyer, Office of Preconstruction, Construction, and Pavements, (720) 437–0515, or Mr. William Winne, Office of the Chief Counsel, (202) 366–1397, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), supporting materials, and all comments received may be viewed online through the Federal eRulemaking portal at *http://www.regulations.gov.* An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: *http://www.archives.gov/federal-register* and the Government Publishing Office's web page at: *http://www.gpo.gov/fdsys.*

Executive Summary

The FHWA is revising its regulations at 23 CFR 635.411 to provide greater flexibility for States to use patented or proprietary materials in Federal-aid highway projects. Based on a century-old Federal requirement, the outdated requirements in 23 CFR 635.411(a)–(e) are being rescinded to encourage innovation in the development of highway transportation technology and methods. As a result, State Departments of Transportation (State DOTs) will no longer be required to provide certifications, make public interest findings, or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects. Federal funds participation will no longer be restricted when State DOTs specify a trade name for approval in Federal-aid contracts. In addition, Federal-aid participation will no longer be restricted when a State DOT specifies patented or proprietary materials in design-build Request-for-Proposal documents.

Background

The FHWA published an NPRM titled ''Construction and Maintenance—Promoting Innovation in Use of Patented and Proprietary Products'' at 83 FR 56758 on November 14, 2018. The NPRM offered two alternative deregulatory options relating to the use of patented and proprietary products. The use of these products has been limited by regulation for over a century (since 1916), and FHWA undertook this rulemaking in an effort to increase innovation and reduce regulatory burdens. The first option (Option 1) proposed removing the requirements of 23 CFR 635.411(a)–(e) and replacing them with a general certification requirement ensuring competition in the selection of materials and products. Alternatively, the second option (Option 2) proposed to rescind the patented and proprietary materials requirements of 23 CFR 635.411(a)–(e) and change the title of section 635.411 to ''Culvert and Storm Sewer Materials Types.'' Under its new title, the former paragraph (f) of section 635.411 would be retained to fulfill the mandate of section 1525 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405, July 6, 2012) for States to retain autonomy for the selection of storm sewer material types.

The NPRM solicited comments regarding this deregulatory initiative. The FHWA received 107 comments to the docket, including comments from 16 State DOTs, 14 associations, 22 manufacturers or suppliers, 4 construction companies, and numerous individuals. The FHWA considered all comments received before the close of business on the comment closing date, and the comments are available for examination in the docket (FHWA–2018–0036) at *http://www.regulations.gov.* The FHWA also considered comments received after the comment closing date and filed in the docket prior to this final rule.

Discussion of Comments

After consideration of the comments, FHWA selected Option 2 for the reasons summarized below. Option 2 reduces the regulatory burden on the States, fosters innovation in highway transportation technology, and provides greater flexibility for State DOTs in making materials and product selections in planning Federal-aid highway projects.

Reducing Regulatory Burdens

Commenters argued Option 2 (rescinding the patented and proprietary materials requirements) better serves the purpose of decreasing unnecessary regulatory burdens on the States. These commenters argue Option 2 eliminates unnecessary regulatory and administrative burdens imposed by the existing regulations. Commenters who support Option 2 further argued that if an objective of the NPRM is to reduce regulatory and administrative burdens imposed on the States by the existing regulation, those burdens should not be replaced by new ones as proposed under Option 1 (replacing existing regulations with a general certification requirement). For example, the American Association of State Highway and Transportation Officials (AASHTO) commented that about half of its member State DOTs consider the paperwork required under the current regulation to be difficult and lengthy. Several State DOTs reported difficulty in: (1) Proving to FHWA Division Offices the availability or non-availability of competitive products; (2) providing the benefit of using one

product over another; and (3) performing a reasonable cost analysis.

Commenters also reported that at least some State DOTs are reluctant to request Public Interest Findings (PIF) or develop experimental product work plans (hereinafter: Proprietary product approval process) to use patented and proprietary materials in Federal-aid projects because they see it as time consuming, cumbersome, and believe it increases overhead costs. One State DOT commented that the proprietary product approval process causes delays by adding layers of approval between the State DOTs and FHWA. The same State DOT further commented it is difficult to determine the availability of equally suitable products under the existing regulation.

Commenters expressed concerns that the existing regulation imposes undue administrative burdens on the States relating to documenting and justifying the use of patented and proprietary products under the current proprietary product approval process. Rescinding the current regulation, FHWA believes, is consistent with reducing the time—consuming and cumbersome process that commenters believe increases overhead costs.

The FHWA agrees Option 2 best reduces unnecessary regulatory and administrative burdens on the States. State DOTs are responsible for the effective and efficient use of Federal-aid funds, subject to the requirements of Federal law. The FHWA believes, absent the existing regulation governing patented and proprietary products, State DOTs may implement material selection procedures that ensure fair and open competition while allowing for, and encouraging, innovation. The statutory requirements of 23 U.S.C. 112 for competition and competitive bidding continue to apply to federally assisted projects.

In addition, this proposal could generate cost savings resulting from reduced administrative burden associated with the efforts by the States and FHWA related to the existing methods for approving patented and proprietary materials. These cost savings, measured in 2018 dollars, are expected to be $313,848 per year.

After reviewing the comments received, FHWA is persuaded that rescinding the existing regulation would achieve the goal of reducing an unnecessary regulatory or administrative burden on the States, where such regulations or burdens are outdated or no longer serve an important public purpose. The FHWA is further persuaded that rescinding the existing regulation's requirement to identify equally suitable alternatives may reduce project planning delays.

Fostering Innovation

Commenters who supported Option 2 also cited four primary reasons related to promoting innovation: (1) Option 2 would eliminate the existing regulation, which is a barrier to innovation; (2) Option 2 would best foster and accelerate innovation in the future; (3) Option 2 encourages innovation that may improve transportation systems relating to: (a) Safety; (b) quality, resilience, performance, durability, and service life of transportation facilities; (c) efficiency and cost-effectiveness of repairs, treatment, maintenance, preservation, rehabilitation, reconstruction, or replacement of highway facilities; (d) minimizing congestion; and (e) implementing autonomous vehicle (AV) technology; and (4) Option 2 would best fulfill the Federal Government's important role in supporting research and development leading to improvements in highway transportation technology.

Some commenters argued that the existing regulation is a barrier to innovation in highway technology. For example, one State DOT commented that the current regulation has created an industry perception that certain innovative products are excluded from federally funded highway projects. Commenters supporting Option 2 generally argued that FHWA should promote, encourage, and accelerate innovation and the improvements that may follow.

One commenter argued that fostering a competitive market for these products may lead to lower prices on old products as new ones become available. Another commenter argued that innovative products can lower the overall project cost or future maintenance costs. For example, by increasing the useful life of transportation facilities, the commenter argues, innovative products may both reduce the cost of maintenance and increase safety.

The AASHTO commented that a regulatory change would provide greater flexibility in approving connected and AV components that are certain to incorporate more proprietary and patented components than traditional highway products. One commenter suggested Option 2 may encourage development of AV technology, and suggested the proprietary product approval process under the existing regulation is not suitable for accelerated development of AV technology.

The FHWA agrees Option 2 best provides State DOTs greater flexibility to use innovative technologies in highway transportation. The Agency is persuaded by comments that rescinding the regulation may accelerate innovation in planning Federal-aid projects by removing a requirement that may have been a ''barrier'' to innovation in highway transportation technology. Moreover, FHWA believes that the specification of innovative, higher-performing products will encourage others in the industry to develop and market products with comparable performance. This will ultimately result in a lower cost for the higher performing product due to the greater availability in the market.

Providing Flexibility for the States Relating to Materials Selection

Commenters who supported Option 2 also cited two primary reasons related to its ability to provide flexibility for States. First, commenters argued that the existing regulation limits their flexibility on materials selection. Next, commenters also argued that, considering the uncertainty regarding how Option 1 would be administered by FHWA, it could also limit the flexibility of State DOTs.

Multiple commenters argued the existing regulation lacks flexibility. Multiple commenters observed that the existing regulation is too restrictive, complicated, unclear, time-consuming, and not consistently implemented by State DOTs and FHWA. For example, certain State members of AASHTO that support Option 2 commented about difficulties they encountered under the current regulation. Some of these State DOTs cited difficulties in completing the paperwork for use of patented or proprietary products to the satisfaction of the relevant FHWA Division Office. Those States also cited related difficulties in successfully obtaining Federal participation after the paperwork was submitted.

The AASHTO commented that some of its member State DOTs have experienced variability in dealing with FHWA Division Offices. Certain State DOTs believe that division offices interpret the existing regulation inconsistently among States. The AASHTO maintains that, while some division offices provide more leeway, others do not recognize the State's prerogative to certify patented and proprietary products and, in some instances, have discouraged them from doing so. Some commenters also argued that some State DOTs are reluctant to use the proprietary product approval process because they perceive it as too cumbersome and time consuming.

Commenters also argued that Option 2 would provide the most flexibility to the States. Multiple State DOTs commented that Option 1 may not adequately unburden States from current regulatory restrictions in this area—and thus may not increase flexibility, or at least not in a way comparable to Option 2. Several State DOTs, including Oregon, Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming, expressed support for Option 2 as providing the most flexibility. One commenter argued that Option 2 would provide State DOTs with the most flexibility to determine which products are the best fit for their own unique transportation needs.

The FHWA agrees Option 2 best provides flexibility to State DOTs in selecting materials for use in Federal-aid highway projects. A common theme among the comments indicated that the level of effort necessary to comply with the existing regulation is time consuming, cumbersome, and imposes undue administrative ''paperwork'' burdens on the States.

The added flexibility provided to States by this rescission may also provide State DOTs an advantage by potentially obtaining highway materials or products at a lower price. Specifying a patented article in the solicitation materials would not, by itself, limit competition.

The FHWA believes State DOTs utilize new product evaluation processes and approved product lists that provide fair and transparent procedures for the evaluation, selection, and use of materials, including patented and proprietary products.

The FHWA is persuaded that rescinding the existing regulation provides needed flexibility to the States to manage Federal financial assistance under 23 U.S.C. 145.

Comments Relating to Option 1

Under Option 1 of the NPRM, the existing regulatory requirements of 23 CFR 635.411(a)–(e) were proposed for removal. The FHWA proposed replacing them with general certification requirements in new paragraphs 23 CFR 635.411(a) and 23 CFR 630.112(c)(6) to ensure competition in the selection of materials and products. This change would have required a State DOT to: (1) Implement procedures and specifications that provide for fair, open, and transparent competition awarded only by contract to the lowest responsive bid submitted by a responsible bidder pursuant to 23 U.S.C. 112; and (2) certify adherence to those procedures and specifications.

Commenters who supported Option 1, including some State DOT members of AASHTO, argued that one of its benefits is that FHWA would create regulations establishing a general framework for the State processes and would provide for greater consistency across the country as compared to Option 2. Those commenters expressed a preference for consistency that would promote competition and provide more transparency regarding Federal-aid decisionmaking compared to Option 2. The commenters expressed the belief that manufacturers might better understand the protocols for the use of patented and proprietary materials under a national framework. One State DOT compared the patented and proprietary rules to the design exception process. It argued that process is well defined and it could be used as a model if FHWA adopts Option 1.

Another commenter argued the existing regulation is misunderstood with respect to competition requirements. The commenter believes that arguments that the existing regulation stifles innovation and patented and proprietary products cannot be used in Federal-aid projects are incorrect. The commenter further stated that patented and proprietary materials can be used in Federal-aid projects based on a proper justification, those justifications provide a critical oversight function, and they guard against the imposition of sole-source specifications that restrict competition. The same commenter further argued the existing regulation provides a safeguard that when data is obtained through independent experimentation of new transportation technology, better and more objective evidence about its effectiveness is available as compared to a vendor's sales or promotional material.

Commenters opposing Option 1 suggested, among other things: (1) Existing requirements discourage State DOTs from using patented and proprietary products to improve highway transportation technology, and this may continue under new requirements established by Option 1; (2) State DOTs are confused by the current requirements for certifications to obtain approval for the use of patented and proprietary products and similar confusion may continue under the as-yet-undefined certification process for Option 1; (3) the existing process for certification is unduly complicated and time consuming, and there is no indication Option 1 would resolve this; and (4) the term ''fair, open, and transparent competition'' lacks clarity and would require new regulation to define the term. Commenters also expressed the belief that the existing regulations are outdated, unclear, and not applied uniformly.

Comments about Option 1 lacking clarity with respect to the definition of the term ''fair, open, and transparent competition'' were not considered by FHWA as they were speculative in nature. However, after considering comments submitted to the docket, FHWA agrees Option 1 is not the appropriate regulatory alternative to finalize as part of this rulemaking. The FHWA notes that rescinding the existing regulations without replacing them with a new certification process better reduces regulatory burdens on the States, fosters greater innovation in highway transportation technology, affords greater flexibility to the States for materials selection in Federal-aid highway projects, and is consistent with the statutory authority provided under 23 U.S.C. 106(c). In addition, rescinding the existing regulation affords deference to the States to determine which projects are subject to Federal financial assistance pursuant to 23 U.S.C. 145.

Competition

Commenters who supported either Option 1 or the existing regulation cited two primary reasons why they believed that Option 2 constitutes a harm to competition. First, commenters argued that under Option 2 suppliers of patented products may control prices. Next, commenters also argued that the bidding process may be manipulated under Option 2 by limiting access to certain proprietary products or offering inconsistent pricing.

Similarly, some commenters who supported either Option 1 or the existing regulation also argued that Option 2 would eliminate nationwide consistency on requirements for competition. Some commenters argued that Option 1 would provide adequate nationwide consistency while others preferred the existing regulation and argued that it should be maintained. Some commenters argued that a uniform standard under Option 1 would also benefit product manufacturers that operate in multiple States.

In contrast to commenters raising concerns about competition, many commenters supporting Option 2 argued that it is improper to speculate about competition problems in advance of the regulatory change. There is no basis, they argued, for FHWA to simply presume that Option 2 would create a problem. These commenters either argued that no problem was likely to arise or suggested that FHWA should first remove the existing regulation and

then monitor whether any problem arises that should be addressed.

Commenters supporting Option 2 also pointed to the standards found in the Office of Management and Budget's (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. These commenters argued that reliance on OMB's regulations would adequately ensure that a State's specification of a patented or proprietary product complies with the competition mandate in 23 U.S.C. 112.

The FHWA acknowledges the commenters who argued that, under Option 2, suppliers of patented products may control prices, but these concerns are speculative. Some commenters attempted to compare the Federal-aid highway program to the prescription drug industry in this regard, but these markets are inherently different. The FHWA believes that States, as responsible stewards of the limited amount of Federal funding apportioned to them, have an incentive not to waste limited resources on proprietary products that would have costs exceeding demonstrated benefits. It is important to note that this final rule does not require States to use proprietary products, and FHWA believes that States would not choose to do so unless there are benefits that exceed the costs associated with the use of such products. States, as rational market actors, are best situated to make this determination on a case-by-case basis as they consider whether a proprietary product would fit a specific programmatic need.

In response to comments regarding competition, many States already have procedures established under State law or regulation relating to competition for federally assisted contracts, and the use of patented and proprietary materials in Federal-aid projects. Nevertheless, ensuring competition and requiring awards to the lowest responsive bidder in the Federal-aid highway program remain statutory duties of the Secretary and the statutory requirements of 23 U.S.C. 112 continue to apply to Federal-aid assisted State contracts. As long as the contract specifications are clear in terms of what materials the State DOT requires, it remains the responsibility of any prospective bidder to find materials that are responsive to the applicable contract specification. Concerns relating to potential prosecution of anticompetitive legal actions is speculative and outside the scope of FHWA's authority.

Additional Comments

Some commenters supported retaining the existing regulation and expressed support for the current process for using patented and proprietary materials in Federal-aid projects. Those commenters included five State DOTs, one industry association, and three manufacturers. The commenters expressed the belief that the regulation should not be changed and existing procedures allow State DOTs to justify the use of innovative, patented, or proprietary products. They went on to express the belief the existing regulation works well and strikes an appropriate balance between ensuring competition while allowing the use of patented and proprietary products based on a documented proprietary product approval.

As noted above, FHWA believes that cost savings would result if the requirements at 23 CFR 635.411(a) through (e) are rescinded by this rulemaking. In addition, State DOTs remain responsible for the effective and efficient use of Federal-aid funds, and continue to be subject to the statutory requirements of 23 U.S.C. 112 for competition and competitive bidding.

RULEMAKING ANALYSES AND NOTICES

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), and DOT Policies and Procedures for Rulemaking

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order (E.O.) 12866, and within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that the economic impact of this rulemaking would be minimal. The FHWA anticipates that the rule would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Although FHWA has determined that this action would not be a significant regulatory action, this action is considered an E.O. 13771 deregulatory action. This action could generate cost savings that are applicable to offsetting the costs associated with other regulatory actions as required by E.O. 13771. These cost savings, measured in 2018 dollars, are expected to be $313,848 per year.

The cost savings resulting from this action result from reduced administrative burden associated with the efforts by the States and FHWA related to the existing methods for approving patented and proprietary materials.

Currently, there are three methods available to approve specific patented and proprietary products for use on Federal-aid highway construction projects: [1]

1. Certification: A certification is the written and signed statement of an appropriate contracting agency official certifying that a particular patented or proprietary product is either:

a. Necessary for synchronization with existing facilities; or

b. A unique product for which there is no equally suitable alternative.

2. Experimental Products: If a contracting agency requests to use a proprietary product for research or for a distinctive type of construction on a relatively short section of road for experimental purposes, it must submit an experimental product work plan for review and approval. The work plan should provide for the evaluation of the proprietary product, and where appropriate, a comparison with current technology.

3. Public Interest Finding: A PIF is an approval by the FHWA Division Administrator, based on a request from a contracting agency that it is in the public interest to allow the contracting agency to require the use of a specific material or product even though other equally acceptable materials or products are available.

To estimate the cost savings from removing the need for the above categories of approvals, FHWA estimated the number of new approvals that would be generated in the future in the above categories if the rule does not change as a baseline scenario and compared it to the scenario in the final rule. The estimated number of new approvals per year is multiplied by the estimated number of hours required to process the documentation for that specific type of approval (including conducting analysis and documenting methods and results) by the appropriate labor cost (wage rate multiplied by a factor to account for employer provided benefits). Currently, the work related to

[1] *https://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm#_Hlk307505978.*

approvals is conducted by both FHWA and State agencies because, in some cases, FHWA has delegated authority to States via stewardship and oversight agreements for such issues. In addition to the time required to process the approvals, time is also required by FHWA to review the resulting documentation. Finally, both of those activities require a minimal time allowance for management of the process.

Under the final rule, the costs associated with approvals for patented and proprietary materials may not be completely removed. This is because twelve States are believed (according to information from FHWA Division offices) to have their own laws or policies that are similar to existing FHWA requirements. Absent other information, this analysis assumes those State laws or policies would remain in place even after an FHWA rule change. For those States, this analysis assumes that the total number of hours associated with processing and managing approvals would remain unchanged but that the work would be conducted solely by State agency staff (rather than a mix of State and FHWA staff as is assumed in the baseline calculations) and that time spent on FHWA review would no longer be needed.

In addition to the cost savings that have been quantified here, there may be additional positive impacts from the rulemaking related to supporting the adoption of patented and proprietary products. Although FHWA has undertaken various efforts to grant States the flexibility to use such products, to the extent that the current rules and guidance discourage their use, the final rule removes those barriers. Since patented and proprietary products are/may be more expensive than non-proprietary alternatives, this could lead to States paying more for proprietary and patented products if certain products are specified in Federal-aid contracts. However, ARTBA, in its petition for repeal, states that such products could ''save lives, minimize congestion, and otherwise improve the quality of our Nation's highways.'' [2] Thus, there may be benefits associated with greater adoption of existing products. An increase in the willingness to adopt patented and proprietary products may have secondary impacts and spur additional innovation if product developers perceive there to be a larger market for new products. Those potential benefits from additional innovation have not been quantified in this analysis.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601- 612), FHWA has evaluated the effects of this action on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The amendment addresses obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, Tribal governments, in the aggregate, or by the private sector, of $155 million or more in any 1 year (2 U.S.C. 1532 *et seq.*). In addition, the definition of ''Federal mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in E.O. 13132 dated August 4, 1999, and FHWA has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et. seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the rule does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has determined that this action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under E.O. 12630.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

We have analyzed this rule under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under E.O. 13175, dated November 6, 2000, and believes that the action would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. The rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose

[2] ARTBA, ''Petition for Rulemaking to Repeal the Proprietary and Patented Products Rule 23 CFR 635.411'', March 27, 2018.

any direct compliance requirements on Indian Tribal governments. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this action under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this is not a significant energy action under that order since it is not a significant regulatory action under E.O. 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 630

Grant programs, transportation, highways and roads.

23 CFR Part 635

Construction materials, Design-build, Grant programs, transportation, highways and roads.

Issued on September 23, 2019.

Nicole R. Nason,

Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA amends 23 CFR part 635 as follows:

PART 635—CONSTRUCTION AND MAINTENANCE

■ 1. The authority citation for part 635 continues to read as follows:

Authority: Sections 1525 and 1303 of Pub. L. 112–141, Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.;* Sec. 1041(a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

■ 2. Revise § 635.411 to read as follows:

§ 635.411 Culvert and Storm Sewer Material Types.

State Departments of Transportation (State DOTs) shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway.

[FR Doc. 2019–20933 Filed 9–26–19; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2019–0508]

RIN 1625–AA08

Special Local Regulation; Battle of the Bridges, Intracoastal Waterway; Venice, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary special local regulation for certain waters of the Intracoastal Waterway. This action is necessary to provide for the safety of life on these navigable waters in Venice, FL, during the Battle of the Bridges event. This rulemaking would prohibit persons and vessels from being in the race area unless authorized by the Captain of the Port St. Petersburg (COTP) or a designated representative.

DATES: This rule is effective from 7:30 a.m. until 4 p.m. on September 28, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0508 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, call or email Marine Science Technician First Class Michael Shackleford, U.S. Coast Guard; telephone 813–228–2191, email *Michael.D.Shackleford@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
ICW Intracoastal Waterway

II. Background Information and Regulatory History

On February 2, 2019, the Sarasota Scullers Youth Rowing Program notified the Coast Guard that it would be conducting the Battle of the Bridges sculler race from 6 a.m. to 6 p.m. on September 28, 2019. The race will take place on portions of the Intracoastal Waterway (ICW) in Venice, FL. In response, on August 2, 2019, the Coast Guard published a notice of proposed rulemaking (NPRM) titled, ''Special Local Regulation; Battle of the Bridges, Intracoastal Waterway; Venice, FL'' (84 FR 37808). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this fireworks display. During the comment period that ended September 3, 2019, we received eighty-five comments.

III. Legal Authority and Need for the Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port St. Petersburg (COTP) has determined that potential hazards associated with the rowing event on September 28, 2019 will be a safety concern for anyone within the special local regulation area. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after the scheduled event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the rowing event.

IV. Discussion of Comments and Changes to the Rule

A. Discussion of Comments

The Coast Guard received eighty-five submissions from private citizens in response to the proposed rule. Forty-two commenters endorsed the Coast Guard's proposal. Forty-three commenters were opposed to the proposed rule for various reasons, discussed below.

Twenty-two comments expressed concerns about the monetary loss of several businesses and their employees that fall within the boundaries of this temporary special local regulation. The commenters stated businesses would lose customers due to the 12 hours the ICW would be closed as proposed in the regulatory text.

Twenty comments expressed concerns about not having access to the ICW during this event. The commenters stated that the ICW, and the public boat ramps along the ICW, would be closed for the duration of the event and the proposed regulatory text would not

allow for any other boating traffic in the ICW while the event was underway.

Seven comments expressed concerns about not being able to access the Marine Max Marina located along the ICW during this event. The commenters stated that the marina would be inaccessible while the ICW was closed for the event.

Nine comments expressed concern regarding the event being too long. The commenters stated that the proposed twelve hour closure of the ICW for the event was too long and that event should be shortened.

Five comments expressed concern regarding there being no alternative routes around the closed section of the ICW. The commenters stated that the regulatory text did not provide another route for vessel traffic to take around the event.

Twelve comments expressed concern regarding the safety of boaters who may choose to transit into the Gulf of Mexico in order to get around the closed section of the ICW. These commenters expressed concerns about general boating and boating safety knowledge as well as the potential for adverse weather affecting the gulf waters. The Coast Guard has taken these concerns into consideration and has determined to only close the ICW when the event is actively taking place. The closure times of the ICW are being modified to accommodate the opening of the ICW to allow for morning, midday, and afternoon vessel transits. This modification, while not providing an alternate route, does allow for times when vessels can transit the ICW. This modification will reduce the effective closure time of the ICW by approximately 4 and a half hours, which will allow businesses an opportunity to remain open the day of the event. These openings will allow for vessels to transit to and from the marina while the ICW remains open. This modification allows for times when vessels can transit the ICW instead of navigating into the Gulf of Mexico. The Venice Police Department confirmed that there are 4 other boats ramps in the area of the event that can be used as alternate boat ramps during this event. In the event of inclement weather, a Coast Guard designated representative reserves the right to cancel the event, which would open the ICW up to normal vessel traffic.

Twenty-two comments expressed concern regarding the ICW not being a suitable location to hold this event. The commenters stated that there was a nearby rowing venue that was constructed for such rowing events. These comments are outside of the scope of this rulemaking as the Coast Guard is not involved in the process of selecting a venue for a sponsor's proposed event.

Seven comments expressed concern regarding the event taking place on a bad day of the week. The commenters stated that a Saturday is not a suitable day to host an event in the ICW and that it should have been on a weekday instead. These comments are outside of the scope of this rulemaking as the Coast Guard is not involved in the process of selecting a day to hold a sponsor's proposed event.

One comment was expressed regarding the event being hazardous to the marine environment. The commenter expressed concerns that a proper environmental review was not performed and that the use of mooring balls and lane markers for the event would endanger manatees and sea turtles. The National Environmental Policy Act requires federal agencies to consider the impacts to the human environment for events such as these. A Record of Environmental Consideration was completed for this event after the Coast Guard consulted with numerous environmental agencies, including U.S. Fish and Wildlife Service, Florida Department of Environmental Protection, Army Corps of Engineers, and the Florida Fish and Wildlife Conservation Commission. This is addressed in section V. F. ''Environment'' below.

We received seventeen comments that were generally negative towards the event, and while noted, they are beyond the scope of the rulemaking process.

B. Discussion of Changes

This rule contains one minor change in the regulatory text from the NPRM. In response to public comments, we have revised the regulatory text to mitigate the commenters concerns and to provide for a shorter closing of the ICW and also allow for a scheduled opening of the ICW in the midday. This change will allow boaters to transit the ICW at designated times, under the direction of a designated representative, instead of transiting into the gulf. The change will also allow for impacted businesses to conduct operations as well. Details of this change can be found in the regulatory text at the end of this document.

V. Regulatory Analyses

We developed this 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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule 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 special local regulation. This regulation would impact approximately 3.5 miles of the Intracoastal Waterway in Venice, FL for approximately 4 and a half hours, on one day. The Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the regulation, and the rule would allow vessels to seek permission to enter the race area. Advance notice of the regulation will be provide the local community with ample time to plan around the race event accordingly.

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 received no comments from the Small Business Administration on this rulemaking. 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 the special local regulation area 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 call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please call or email 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 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 Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a special local regulation, which temporarily limits access to the portions of the Intracoastal Waterway in Venice, FL to race participants for approximately 4 and a half hours on one day. It is categorically excluded from further review under paragraph L(61) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email 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 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.35T07–0508 to read as follows:

§ 100.35T07–0508 Special Local Regulation; Battle of the Bridges, Intracoastal Waterway; Venice, FL.

(a) *Regulated area.* A regulated area is established to include a race area located on all waters of the Intracoastal Waterway south of a line made connecting the following points: 27°06′15″ N, 082°26′43″ W, to position 27°06′12″ N, 082°26′43″ W, and all waters of the Intracoastal Waterway north of a line made connecting the following points: 27°03′21″ N, 082°26′17″ W, to position 27°03′19″ N, 082°26′15″ W. All coordinates are North American Datum 1983.

(b) *Definitions.* 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 St. Petersburg in the enforcement of the regulated areas.

''Participant'' means all persons and vessels registered with the event sponsor as a participant in the event.

(c) *Regulations.* (1) All non-participant persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the race area unless authorized by the Captain of the Port (COTP) St. Petersburg or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the race area may contact the COTP St. Petersburg by telephone at (727) 824–7506 or via VHF–FM radio Channel 16 to request authorization.

(3) If authorization to enter, transit through, anchor in, or remain within the race area is granted, all persons and vessels receiving such authorization shall comply with the instructions of the COTP or a designated representative.

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

(d) *Enforcement period.* This rule will be enforced from 7:30 a.m. until 11:30 a.m., and from 12:30 p.m. to 4 p.m. on September 28, 2019.

Dated: September 20, 2019.

Matthew A. Thompson,

Captain, U.S. Coast Guard, Captain of the Port Saint Petersburg.

[FR Doc. 2019–20806 Filed 9–26–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0614]

RIN 1625–AA00

Safety Zone; Neches River, Beaumont, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Neches River extending 500-feet on either side of the Kansas City Southern Railroad Bridge that crosses the Neches River in Beaumont, TX. The safety zone is necessary to protect the bridge as well as persons and property on or near the bridge from potential damage from passing vessels until missing and/or damaged fendering systems are repaired or replaced. Entry of certain vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Marine Safety Unit Port Arthur or a designated representative.

DATES: This rule is effective from October 1, 2019, through January 31, 2020. **ADDRESSES:** To view documents mentioned in this preamble as being in the docket, go to *https://www.regulations.gov,* type USCG–2019–0614 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rulemaking, call or email Mr. Scott Whalen, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409–719–5086, email *Scott.K.Whalen@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

On April 19, 2018, the Coast Guard was notified that the wood fendering systems designed to protect bridge support columns of the Kansas City Southern Railroad Company's bridge (KSC) from strikes by vessels transiting under the bridge had been damaged or destroyed by Hurricane Harvey. The south bank column protection fenders are missing and the north bank column protection fenders are severely damaged. KCS indicated that strikes to the support columns could compromise the bridge structure. In response, on May 7, 2018, the Coast Guard published a temporary final rule; request for comment titled *Safety Zone; Neches River, Beaumont, TX* (83 FR 19965). During the comment period that ended on May 29, 2018, we received no comments. The safety zone was established on May 7, 2018, extended on September 5, 2018, (83 FR 45047) and extended again on January 31, 2019, (84 FR 530) via temporary final rule titled *Safety Zone; Neches River, Beaumont, TX.* The zone is scheduled to expire on September 30, 2019. Repairs are not yet completed leaving the bridge structural columns vulnerable to vessel strikes. The Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Safety Zone; Neches River, Beaumont, TX'' (84 FR 44794). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to the vulnerable bridge. During the comment period that ended on September 11, 2019, we received no comments.

The Captain of the Port Marine Safety Unit Port Arthur (COTP) has determined that potential hazards posed by the unprotected bridge columns are a safety concern to the KCS Bridge and to persons and property on or near the bridge. The purpose of this rule is to provide for the safety of the KCS Bridge and persons and property on or near the bridge.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to continue to respond to potential safety hazards posed by and to passing vessel traffic and to the unprotected bridge columns supporting the KCS Bridge.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 previously 33 U.S.C. 1231. The Captain of the Port Marine Safety Unit Port Arthur (COTP) has determined that potential hazards posed by the unprotected bridge columns are a safety concern to the KCS Bridge and to persons and property on or near the bridge. The purpose of this rule is to provide for the safety of the KCS Bridge and persons and property on or near the bridge.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published August 27, 2019. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a temporary safety zone from October 1, 2019, through January 31, 2020, or until missing or damaged fendering systems are repaired or replaced, whichever occurs first. The safety zone extends 500-feet on either side of the KCS Bridge that crosses the Neches River in Beaumont, TX in approximate location 30°04′54.8″ N 094°05′29.4″ W. The duration of the zone is intended to protect the bridge support columns as well as persons and property on or near the bridge until the bridge fendering is repaired or replaced. Only vessels less than 65 feet in length and not engaged in towing are authorized to enter the zone, unless otherwise permitted by the COTP or a designated representative to enter the safety zone.

Persons and vessels desiring to enter the safety zone must request permission from the COTP or a designated representative. They may be contacted through Vessel Traffic Service (VTS) on channels 65A or 13 VHF–FM, or by telephone at (409) 719–5070.

Permission to transit through the bridge will be based on weather, tide and current conditions, vessel size, horsepower, and availability of assist vessels. All persons and vessels permitted to enter this temporary safety zone shall comply with the lawful orders or directions given to them by COTP or a designated representative.

Intentional or unintentional contact with any part of the bridge or associated structure, including fendering systems, support columns, spans or any other portion of the bridge, is strictly prohibited. Report any contact with the bridge or associated structures immediately to VTS Port Arthur on channels 65A, 13 or 16 VHF–FM or by telephone at (409) 719–5070.

The Coast Guard will inform the public through public of the effective period of this safety zone through VTS Advisories, Broadcast Notices to Mariners (BNMs), Local Notice to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

V. Regulatory Analyses

We developed this 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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule 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 nature of vessel traffic in the area and the location, and duration of the safety zone. This rule will only affect certain vessels transiting the upper reaches of the Neches River in Beaumont, TX, and will terminate once the necessary repairs are completed for the bridge. The Coast Guard will issue a VTS Advisory concerning the zone, and the rule allows vessels to seek permission to enter the zone.

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 received no comments from the Small Business Administration on this rulemaking. 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 the safety zone might 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** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

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 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 rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), 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 rule involves a safety zone that will prohibit entry within 500-feet of either side of the KCS Bridge that crosses the Neches River in Beaumont, TX. It is categorically excluded from further review under paragraph L60(d) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures. A Record of Environmental Consideration supporting this determination is included in the docket with this rule where indicated under **ADDRESSES.**

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 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.T08–0614 to read as follows:

§ 165.T08–0614 Safety Zone; Neches River, Beaumont, TX.

(a) *Location.* The following area is a safety zone: All navigable waters extending 500-feet on either side of the Kansas City Southern Railroad Bridge that crosses the Neches River in Beaumont, TX in approximate location 30° 04′54.8″N 094°05′29.4″W.

(b) *Effective period.* This section is effective from 1 a.m. on October 1, 2019, through midnight on January 31, 2020, or until missing and/or damaged fendering systems are repaired or replaced, whichever occurs first.

(c) *Regulations.* (1) No vessel may enter or remain in the safety zone except:

(i) A vessel less than 65 feet in length and not engaged in towing; or

(ii) A vessel authorized by the Captain of the Port Marine Safety Unit Port Arthur (COTP) or a designated representative.

(2) Persons and vessels desiring to enter the safety zone must request permission from the COTP or a designated representative. They may be contacted through Vessel Traffic Service (VTS) on channels 65A or 13 VHF–FM, or by telephone at (409) 719–5070.

(3) Permission to transit through the bridge will be based on weather, tide and current conditions, vessel size, horsepower, and availability of assist vessels. All persons and vessels permitted to enter this temporary safety zone shall comply with the lawful orders or directions given to them by COTP or a designated representative.

(4) Intentional or unintentional contact with any part of the bridge or associated structure, including fendering systems, support columns, spans or any other portion of the bridge, is strictly prohibited. Report any contact with the bridge or associated structures immediately to VTS Port Arthur on channels 65A, 13 or 16 VHF–FM or by telephone at (409) 719–5070.

(d) *Informational broadcasts.* The Coast Guard will inform the public through public of the effective period of this safety zone through VTS Advisories, Broadcast Notices to Mariners (BNMs), Local Notice to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

Dated: September 18, 2019.

Jacqueline Twomey,

Captain, U.S. Coast Guard, Captain of the Port Marine Safety Unit Port Arthur.

[FR Doc. 2019–20580 Filed 9–26–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0189; FRL–9998–66–Region 6]

Approval and Promulgation of Implementation Plans; Arkansas; Approval of Regional Haze State Implementation Plan Revision for Electric Generating Units in Arkansas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is finalizing an approval of a portion of a revision to the Arkansas State Implementation Plan (SIP) submitted by the State of Arkansas through the Arkansas Department of Environmental Quality (ADEQ) that addresses certain requirements of the CAA and the EPA's regional haze rules for the protection of visibility in mandatory Class I Federal areas (Class I areas) for the first implementation period. The EPA is taking final action to approve, among other things, the state's sulfur dioxide (SO_2) and particulate matter (PM) best available retrofit technology (BART) determinations for electric generating units (EGUs) in Arkansas and the determination that no additional SO_2 and PM controls at any Arkansas sources are necessary under reasonable progress. In conjunction with this final approval of a portion of the SIP revision, we are finalizing in a separate rulemaking, published elsewhere in this issue of the **Federal Register**, our withdrawal of the corresponding Federal implementation plan (FIP) provisions established in a prior action to address regional haze requirements for Arkansas.

DATES: This rule is effective on October 28, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R06–OAR–2015–0189. All documents in the dockets are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270–2102.

FOR FURTHER INFORMATION CONTACT: Dayana Medina, 214–665–7241, *medina.dayana@epa.gov,* EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270–2102.

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

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I. Background

A. The Regional Haze Program

Regional haze is visibility impairment that is produced by a multitude of sources and activities that are located across a broad geographic area and emit fine particulates ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon (OC), elemental carbon (EC), and soil dust), and their precursors (*e.g.,* SO_2, nitrogen oxides (NO_X), and in some cases, ammonia (NH_3) and volatile organic compounds (VOCs)). Fine particle precursors react in the atmosphere to form $PM_{2.5}$, which impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity, color, and visible distance that can be seen. $PM_{2.5}$ can also cause serious adverse health effects and mortality in humans; it also contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE), shows that visibility impairment caused by air pollution occurs virtually all of the time at most national parks and wilderness areas. In 1999, the average visual range [1] in many Class I areas (*i.e.,* national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States was 100–150 kilometers, or about one-half to two-thirds of the visual range that would exist under

[1] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

estimated natural conditions.[2] In most of the eastern Class I areas of the United States, the average visual range was less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. CAA programs have reduced emissions of some haze-causing pollution, lessening some visibility impairment and resulting in partially improved average visual ranges.[3]

In Section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the prevention of any future, and the remedying of any existing, man-made impairment of visibility in 156 national parks and wilderness areas designated as mandatory Class I Federal areas.[4] Congress added section 169B to the CAA in 1990 to address regional haze issues, and the EPA promulgated regulations addressing regional haze in 1999. The Regional Haze Rule[5] revised the existing visibility regulations to add provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in our visibility protection regulations at 40 CFR 51.300–309. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia, and the Virgin Islands. States were required to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.[6]

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often under-controlled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress toward the natural visibility goal, including a requirement that certain categories of existing major stationary sources[7] built between 1962 and 1977 procure, install and operate BART controls. Larger ''fossil-fuel fired steam electric plants'' are one of these source categories. Under the Regional Haze Rule, states are directed to conduct BART determinations for ''BART-eligible'' sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. The evaluation of BART for electric generating units (EGUs) that are located at fossil-fuel fired power plants having a generating capacity in excess of 750 megawatts must follow the ''Guidelines for BART Determinations Under the Regional Haze Rule'' at appendix Y to 40 CFR part 51 (hereinafter referred to as the ''BART Guidelines''). Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides for greater progress towards improving visibility than BART.

B. Our Previous Actions

Arkansas submitted a SIP revision on September 9, 2008, to address the requirements of the first regional haze implementation period. On August 3, 2010, Arkansas submitted a SIP revision with mostly non-substantive revisions to Arkansas Pollution Control and Ecology Commission (APCEC) Regulation 19, Chapter 15.[8] On September 27, 2011, the State submitted supplemental information to address the regional haze requirements. We are hereafter referring to these regional haze submittals collectively as the ''2008 Arkansas Regional Haze SIP.'' On March 12, 2012, we partially approved and partially disapproved the 2008 Arkansas Regional Haze SIP.[9] On September 27, 2016, we promulgated a FIP (the Arkansas Regional Haze FIP) addressing the disapproved portions of the 2008 Arkansas Regional Haze SIP.[10] Among other things, the FIP established SO_2, NO_X, and PM emission limits under the BART requirements for nine units at six facilities: Arkansas Electric Cooperative Corporation (AECC) Bailey Plant Unit 1; AECC McClellan Plant Unit 1; the American Electric Power/Southwestern Electric Power Company (AEP/SWEPCO) Flint Creek Plant Boiler No. 1; Entergy Arkansas, Inc. (Entergy) Lake Catherine Plant Unit 4; Entergy White Bluff Plant Units 1 and 2; Entergy White Bluff Auxiliary Boiler; and the Domtar Ashdown Mill Power Boilers No. 1 and 2. The FIP also established SO_2 and NO_X emission limits under the reasonable progress requirements for Entergy Independence Units 1 and 2.

Following the issuance of the Arkansas Regional Haze FIP, the State of Arkansas and several industry parties filed petitions for reconsideration and an administrative stay of the final rule.[11] On April 14, 2017, we announced our decision to reconsider several elements of the FIP, as follows: Appropriate compliance dates for the NO_X emission limits for Flint Creek Boiler No. 1, White Bluff Units 1 and 2, and Independence Units 1 and 2; the low-load NO_X emission limits applicable to White Bluff Units 1 and 2 and Independence Units 1 and 2 during periods of operation at less than 50 percent of the units' maximum heat input rating; the SO_2 emission limits for White Bluff Units 1 and 2; and the compliance dates for the SO_2 emission limits for Independence Units 1 and 2.[12]

EPA also published a document in the **Federal Register** on April 25, 2017, administratively staying the effectiveness of the NO_X compliance dates in the FIP for the Flint Creek,

[2] 64 FR 35715 (July 1, 1999).

[3] An interactive ''story map'' depicting efforts and recent progress by EPA and states to improve visibility at national parks and wilderness areas may be visited at: *http://arcg.is/29tAbS3*.

[4] Areas designated as mandatory Class I Federal areas consist of National Parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[5] Here and elsewhere in this document, the term ''Regional Haze Rule,'' refers to the 1999 final rule (64 FR 35714), as amended in 2005 (70 FR 39156, July 6, 2005), 2006 (71 FR 60631, October 13, 2006), 2012 (77 FR 33656, June 7, 2012), and January 10, 2017 (82 FR 3078).

[6] See 40 CFR 51.308(b). EPA's regional haze regulations require subsequent updates to the regional haze SIPs. 40 CFR 51.308(g)–(i).

[7] See 42 U.S.C. 7491(g)(7) (listing the set of ''major stationary sources'' potentially subject-to-BART).

[8] The September 9, 2008 SIP submittal included APCEC Regulation 19, Chapter 15, which is the state regulation that identified the BART-eligible and subject-to-BART sources in Arkansas and established BART emission limits for subject-to-BART sources. The August 3, 2010 SIP revision did not revise Arkansas' list of BART-eligible and subject-to-BART sources or revise any of the BART requirements for affected sources. Instead, it included mostly non-substantive revisions to the state regulation.

[9] 77 FR 14604.

[10] 81 FR 66332; *see also* 81 FR 68319 (October 4, 2016) (correction).

[11] See the docket associated with this rulemaking for a copy of the petitions for reconsideration and administrative stay submitted by the State of Arkansas; Entergy Arkansas Inc., Entergy Mississippi Inc., and Entergy Power LLC (collectively ''Entergy''); AECC; and the Energy and Environmental Alliance of Arkansas (EEAA).

[12] Letter from E. Scott Pruitt, Administrator, EPA, to Nicholas Jacob Bronni and Jamie Leigh Ewing, Arkansas Attorney General's Office (April 14, 2017). A copy of this letter is included in the docket, *https://www.regulations.gov/document?D=EPA-R06-OAR-2015-0189-0240*.

White Bluff, and Independence units, as well as the compliance dates for the SO_2 emission limits for the White Bluff and Independence units for a period of 90 days.[13] On July 13, 2017, the EPA published a proposed rule to extend the NO_X compliance dates for Flint Creek Boiler No. 1, White Bluff Units 1 and 2, and Independence Units 1 and 2, by 21 months to January 27, 2020.[14] However, EPA did not take final action on the July 13, 2017 proposed rule because on July 12, 2017, Arkansas submitted a proposed SIP revision with a request for parallel processing, addressing the NO_X BART requirements for Bailey Unit 1, McClellan Unit 1, Flint Creek Boiler No. 1, Lake Catherine Unit 4, White Bluff Units 1 and 2, and White Bluff Auxiliary Boiler, as well as the reasonable progress requirements with respect to NO_X (Arkansas Regional Haze NO_X SIP revision or Arkansas Phase I SIP revision). We proposed to approve the State's proposed SIP revision in parallel with the state's SIP process. Our proposed approval of the Arkansas Regional Haze NO_X SIP revision and withdrawal of the corresponding parts of the Arkansas Regional Haze FIP was published in the **Federal Register** on September 11, 2017.[15] On October 31, 2017, we received ADEQ's final Regional Haze NO_X SIP revision addressing NO_X BART for EGUs and the reasonable progress requirements with respect to NO_X for the first implementation period. On February 12, 2018, we finalized our approval of the Arkansas Regional Haze NO_X SIP revision and our withdrawal of the corresponding parts of the FIP.[16]

On August 8, 2018, Arkansas submitted a SIP revision (Arkansas Regional Haze SO_2 and PM SIP revision or Arkansas Regional Haze Phase II SIP revision) addressing all remaining disapproved parts of the 2008 Regional Haze SIP, with the exception of the BART and associated long-term strategy requirements for the Domtar Ashdown Mill Power Boilers No. 1 and 2. The Phase II SIP revision also included a discussion on Arkansas' interstate visibility transport requirements. In a proposed rule published in the **Federal Register** on November 30, 2018, we proposed approval of a portion of the SIP revision and we also proposed to withdraw the parts of the FIP corresponding to our proposed approvals.[17] We stated in our proposed rule that we intend to propose action on the portion of the SIP revision discussing the interstate visibility transport requirements in a future proposed rulemaking. Since we proposed to withdraw certain portions of the FIP, we also proposed to redesignate the FIP by revising the numbering of certain paragraphs under 40 CFR 52.173 to reflect the removal of language applicable to EGUs and the retention of language applicable to the Domtar Ashdown Mill, the only remaining facility subject to the provisions of the FIP.

II. Summary of Final Action

This action finalizes our proposed approval of a portion of the Arkansas Regional Haze SO_2 and PM SIP revision. We are finalizing our approval of ADEQ's revised identification of the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible and the determination based on the additional information and technical analysis presented in the SIP revision that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART. We are finalizing our approval of the state's BART determinations as follows: SO_2 and PM BART for the AECC Bailey Plant Unit 1; SO_2 and PM BART for the AECC McClellan Plant Unit 1; SO_2 BART for the AEP/SWEPCO Flint Creek Plant Boiler No. 1; SO_2 BART for Entergy White Bluff Units 1 and 2; SO_2, NO_X, and PM BART for the Entergy White Bluff Auxiliary Boiler; and the prohibition on burning of fuel oil at Entergy Lake Catherine Unit 4 until SO_2 and PM BART determinations for the fuel oil firing scenario are approved into the SIP by EPA. These BART requirements have been made enforceable by the state through Administrative Orders and submitted as part of the SIP revision. We are finalizing our approval of these BART Administrative Orders as part of the SIP.

We are finalizing our withdrawal of our prior approval of Arkansas' reliance on participation in the Cross-State Air Pollution Rule (CSAPR) for ozone season NO_X to satisfy the NO_X BART requirement for the White Bluff Auxiliary Boiler. The Arkansas Regional Haze NO_X SIP revision erroneously stated that the Auxiliary Boiler participates in CSAPR for ozone season NO_X and that the state was electing to rely on participation in that trading program to satisfy the Auxiliary Boiler's NO_X BART requirements, and we erroneously approved this determination in a final action published in the **Federal Register** on February 12, 2018.[18] We are finalizing our withdrawal of our approval of that determination for the Auxiliary Boiler and are replacing it with our final approval of a source-specific NO_X BART emission limit contained in the Arkansas Regional Haze SO_2 and PM SIP Revision before us. The NO_X BART requirement has been made enforceable by the state through an Administrative Order and submitted as part of the SIP revision. We are finalizing our approval of the Administrative Order that contains the NO_X BART requirement as part of the SIP.

We are also finalizing our approval of Arkansas' reasonable progress determinations for Independence Units 1 and 2 and determination that no additional controls are necessary for SO_2 or PM under the reasonable progress requirements for the first implementation period and are also agreeing with the state's calculation of revised RPGs for its Class I areas. We are finalizing our determination that, based on the state's currently approved SIP and the analyses and determinations we are approving in this final action, the state's reasonable progress obligations for the first implementation period have been satisfied. At this time, the majority of the BART requirements for the Domtar Ashdown Mill are satisfied by a FIP.[19] The SIP revision explains that, based upon the BART determinations and analysis in that FIP, nothing further is currently needed for reasonable progress at the Domtar Ashdown Mill. EPA agrees with this determination. We do note that ADEQ recently submitted a SIP revision to address the BART requirements for Domtar Power Boilers No. 1 and No. 2 that are currently satisfied by the FIP, and we intend to take action on that SIP revision addressing Domtar in a future rulemaking. At that time, we will evaluate any conclusions ADEQ draws in that SIP submittal about the adequacy of such SIP-based measures for reasonable progress. We will also evaluate any changes in the measures for the Domtar Ashdown Mill in that SIP revision relative to those currently in the FIP to determine whether the calculation of the reasonable progress goals for the first implementation period continues to be sufficient.

We are finalizing our approval of the components of the long-term strategy addressed by the Arkansas Regional

[13] 82 FR 18994.

[14] 82 FR 32284.

[15] 82 FR 42627.

[16] 83 FR 5927 and 83 FR 5915 (February 12, 2018).

[17] 83 FR 62204 (November 30, 2018).

[18] 83 FR 5927.

[19] We note that the only exception to this is the PM determination for Domtar Ashdown Mill Power Boiler No. 1 contained in the 2008 Arkansas Regional Haze SIP. That BART determination was approved in our 2012 rulemaking. 77 FR 14604, March 12, 2012.

Haze Phase II SIP revision and are finding that Arkansas' long-term strategy for reasonable progress with respect to all sources other than Domtar is approved. We are finalizing our approval of the 0.60 lb/MMBtu SO_2 emission limitations for Independence Units 1 and 2, and these measures are now integrated into the State's long-term strategy. The long-term strategy is the compilation of all control measures a state relies on to make reasonable progress towards the goal of natural visibility conditions, including emission limitations corresponding to BART determinations. Because the Arkansas Regional Haze Phase II SIP revision does not address the BART requirements for Domtar, those components of the long-term strategy will remain satisfied by the FIP unless and until EPA has received and approved a SIP revision containing the required analyses and determinations for this facility.[20]

We are also finalizing our determination that Arkansas has satisfied the requirement under 40 CFR 51.308(i) to consult and coordinate with the federal land managers (FLMs).[21] Additionally, we are finalizing our determination that Arkansas has satisfied the requirement under 40 CFR 51.308(d)(3)(i) to coordinate and consult with Missouri, which has Class I areas affected by Arkansas sources.[22]

As we discussed in our proposal, the SIP revision also includes a discussion on interstate visibility transport. We are aware that Arkansas is working on a SIP revision to address the interstate visibility transport requirements for several national ambient air quality standards (NAAQS), and we therefore deferred evaluating and proposing action on the interstate visibility transport portion of the Arkansas Regional Haze Phase II SIP revision until a future proposed rulemaking.

We are finalizing our approval of a portion of the Arkansas Regional Haze Phase II SIP revision as we have found it to meet the applicable provisions of the Act and EPA regulations and is consistent with EPA guidance. We received comments from several commenters on our proposed approval. Our responses to the substantive comments we received are summarized in Section III. We have fully considered all significant comments on our proposed action on the SIP revision submittal and have concluded that no changes to our final determinations are warranted.

We are approving a portion of the Arkansas Regional Haze Phase II SIP revision submitted by ADEQ on August 8, 2018, as we have determined that it meets the regional haze SIP requirements, including the BART requirements in § 51.308(e); the reasonable progress requirements in § 51.308(d); and the long-term strategy requirements in § 51.308(d)(3). In conjunction with this final approval, we are finalizing in a separate rulemaking, published elsewhere in this issue of the **Federal Register**, our withdrawal of FIP provisions corresponding to the portions of the SIP revision we are taking final action to approve in this rulemaking.

III. Response to Comments

The public comments received on our proposed rule are included in the publicly posted docket associated with this action at *www.regulations.gov*.[23] We reviewed all public comments that we received on the proposed action. Below, we provide a summary of substantive comments and our responses. Summaries of all comments and our full responses thereto are contained in a separate document titled the Arkansas Regional Haze Phase II SIP Revision Response to Comments, which can be found in the docket associated with this final rulemaking.

A. White Bluff SO_2 BART Requirements

Comment: EPA proposed to approve ADEQ's determination that low sulfur coal with an emission rate of 0.60 lb/MMBtu on a 30-day rolling average is SO_2 BART for White Bluff Units 1 and 2. However, the cost-effectiveness figures for dry scrubbers at White Bluff Units 1 and 2 are well within the range of what has been found to be cost effective in other regional haze actions. EPA should reverse its position, disapprove ADEQ's White Bluff SO_2 BART determination, and finalize its previous rule that SO_2 emission limits corresponding to dry scrubbers constitute SO_2 BART at White Bluff.

Response: We remind the commenter that each BART determination is dependent on the specific situation of the source and involves the consideration of a number of factors that usually vary on a case by case basis. This includes consideration of the five statutory factors required under the Regional Haze Rule at § 51.308(e)(1)(ii)(A) and CAA section 169A(g)(2). BART determinations are source specific—what is a reasonable determination for one source may not be appropriate given the facts and circumstances applicable to another source. The states also have wide discretion in the evaluation of the five statutory factors and in formulating SIPs, so long as they satisfy the applicable requirements and provide a reasoned and rational basis for their decisions.

While it is true that some SO_2 BART controls required under other regional haze actions have similar cost-effectiveness figures as those for dry scrubbers for White Bluff, we find that ADEQ satisfied the requirements of the CAA and the Regional Haze Rule by fully considering the five statutory factors in the SO_2 BART analysis for White Bluff Units 1 and 2. Taking into account the remaining useful life of White Bluff Units 1 and 2 (based on Entergy's enforceable Administrative Order to cease coal combustion by December 31, 2028), and the resulting cost-effectiveness of controls, as well as the anticipated visibility improvement of the SO_2 control options and the other BART factors, ADEQ determined that SO_2 BART for White Bluff Units 1 and 2 is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal beginning no later than three years from the effective date of the Administrative Order (August 7, 2021) through the end of 2028.

As we explained in our proposal, ADEQ's cost analysis was based on a dry scrubber system assuming an inlet coal sulfur content of 1.2 lb/MMBtu, which is based on Entergy's current coal contract sulfur limit.[24] However, the White Bluff units have historically burned coal with a lower sulfur content. Therefore, we relied on our FIP's cost analysis for dry scrubbers for White Bluff, which was based on a scrubber system designed to burn coal having a sulfur content consistent with what the units have historically burned, and we adjusted for a 7-year as opposed to a 30-year capital cost recovery period to reflect that the units will cease coal combustion by the end of 2028.[25] Based on our revised cost estimates, dry scrubbers are estimated to cost approximately $4,376/ton for Unit 1 and $4,129/ton for Unit 2. The visibility benefit of dry scrubbers at White Bluff Units 1 and 2 is anticipated to be 0.603 dv at Caney Creek and 0.642 dv at Upper Buffalo for Unit 1 and 0.574 dv at Caney Creek and 0.632 dv at Upper Buffalo for Unit 2; Caney Creek and Upper Buffalo are the two Class I areas

[20] As noted above, ADEQ recently submitted a SIP revision to address the BART requirements for Domtar Power Boilers No. 1 and No. 2 that are currently satisfied by the FIP. We intend to evaluate that SIP revision and to take action on it in a future rulemaking.

[21] 83 FR 62234.

[22] 83 FR 62234.

[23] Docket No. EPA–R06–OAR–2015–0189.

[24] 83 FR 62222.

[25] 83 FR 62222.

where White Bluff Units 1 and 2 have the greatest modeled baseline visibility impacts.[26]

In this instance, we believe Arkansas is within its discretion to evaluate the BART factors as it has done, and we find that the state has presented a reasoned basis for its BART determination and has met all CAA and Regional Haze Rule requirements in making the BART determination for White Bluff. Considering all the above, we are finalizing our approval of ADEQ's determination that SO_2 BART for White Bluff Units 1 and 2 is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal, with an enforceable Administrative Order requiring Entergy to cease coal combustion at White Bluff Units 1 and 2 by December 31, 2028.

Comment: EPA's proposed approval of ADEQ's determination that low sulfur coal with an emission rate of 0.60 lb/MMBtu on a 30-day rolling average is SO_2 BART for White Bluff Units 1 and 2 and rejection of dry scrubbers is arbitrary when compared to the Flint Creek SO_2 BART determination. The SO_2 BART determination for Flint Creek Boiler No. 1 was based on very similar cost-effectiveness figures for dry scrubbers, but in that case, EPA required a scrubber as BART. EPA should reverse its position and disapprove ADEQ's SO_2 BART determination for White Bluff Units 1 and 2.

Response: We disagree with the commenter that our proposed approval of ADEQ's SO_2 BART determination for White Bluff Units 1 and 2 is arbitrary when compared to our proposed approval of the Flint Creek SO_2 BART determination. In particular, the commenter contends that it is arbitrary and capricious for EPA to find that White Bluff SO_2 BART is an emission limit based on low-sulfur coal, while also finding that SO_2 BART for Flint Creek is an emission limits based on a dry scrubber. EPA did not make these findings in the context of a FIP, but rather proposed to approve ADEQ's determinations based on our finding that the State reasonably determined that SO_2 BART for White Bluff Units 1 and 2 is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal and that SO_2 BART for Flint Creek Boiler No. 1 is an emission limit of 0.06 lb/MMBtu based on the use of a dry scrubber. The states have wide discretion in the evaluation of the five statutory factors and in formulating SIPs, so long as they satisfy the applicable requirements and provide a reasoned and rational basis for their decisions. Furthermore, BART determinations are source specific—what is a reasonable determination for one source may not be appropriate given the facts and circumstances applicable to another source. In this instance, we believe Arkansas is within its discretion to evaluate the BART factors as it has done, and we find that the state has presented a reasoned basis for its BART determinations and has met all CAA and Regional Haze Rule requirements in making the SO_2 BART determinations for White Bluff and Flint Creek.

We note that the cost-effectiveness figures for dry scrubbers for White Bluff are in fact higher than that for a Novel Integrated Deacidification (NID) system, a type of dry scrubbing technology, for Flint Creek. In our proposed rule, we estimated the cost effectiveness of dry scrubbers for White Bluff Units 1 and 2 to be $4,376/ton for Unit 1 and $4,129/ton for Unit 2. The visibility benefit of dry scrubbers at White Bluff is anticipated to be 0.603 dv at Caney Creek and 0.642 dv at Upper Buffalo for Unit 1 and 0.574 dv at Caney Creek and 0.632 dv at Upper Buffalo for Unit 2; Caney Creek and Upper Buffalo are the two Class I areas where White Bluff Units 1 and 2 have the greatest modeled baseline visibility impacts.[27] The cost-effectiveness of a NID system for Flint Creek is $3,845/ton. We consider the cost of a dry scrubber at Flint Creek to be generally cost effective when also taking into account the level of visibility benefit of the control and the other BART factors. The visibility benefit of a NID system at Flint Creek Boiler No. 1 is anticipated to be 0.615 dv at Caney Creek and 0.464 dv at Upper Buffalo, the two Class I areas where Flint Creek Boiler No. 1 has the greatest modeled baseline visibility impacts.[28] The anticipated level of visibility benefit at Caney Creek and Upper Buffalo due to dry scrubbers at White Bluff Units 1 and 2 is comparable to the anticipated visibility benefit due to NID at Flint Creek Boiler No. 1, but the cost-effectiveness figures for dry scrubbers at White Bluff are higher than that for Flint Creek, and start to go into the higher end of what has been found to be cost effective in other regional haze actions when also taking into account the level of visibility benefit of the controls and other factors.[29] Additionally, the NID system was already installed and operating at Flint Creek Boiler No. 1 at the time that ADEQ finalized and submitted the Reginal Haze SO_2 and PM SIP revision. Thus, we believe it would have been unreasonable for ADEQ to find that SO_2 BART for Flint Creek Boiler No. 1 is not a NID system when those controls are already installed and operational at the facility. In contrast, there is no planned installation of this control equipment at White Bluff Units 1 and 2, which have a shortened remaining useful life based on an enforceable Administrative Order that is part of this SIP revision. Furthermore, since Flint Creek Boiler No. 1 is currently assumed to continue operating for at least another 30 years while White Bluff Units 1 and 2 are required to cease coal combustion by the end of December 2028 based on the enforceable Administrative Order that is part of this SIP revision, we find that it is reasonable for ADEQ to have determined that SO_2 BART for Flint Creek Boiler No. 1 is an emission limit based on the use of dry scrubbers while SO_2 BART for White Bluff Units 1 and 2 is an emission limit based on the use of low sulfur coal. We are taking final action to approve the state's SO_2 BART determinations for these units.

Comment: Although EPA's estimated dry scrubber costs demonstrate that this control technology is not cost-effective for White Bluff Units 1 and 2, the costs of dry scrubbers are actually underestimated by EPA. EPA's cost assessment assumes that White Bluff will combust coal with a sulfur content of 0.68 lb/MMBtu, which was the maximum monthly emission rate from 2009–2013, and its calculation of the equipment costs reflects scrubbers sized to accommodate this sulfur content. However, EPA is incorrect to assume that the sulfur content of coal that will be combusted at the plant in the future will not exceed the maximum monthly average sulfur content from 2009–2013. EPA ignores the fact that the plant can receive coal with a sulfur content up to 1.2 lb/MMBtu pursuant to its coal contracts, and that White Bluff in fact had a maximum 3-hour average emission rate of 1.1 lb/MMBtu from 2014–2016. A dry scrubber must be designed to handle the highest sulfur content that may be combusted at the unit, as an inappropriately designed scrubber would be incapable of addressing SO_2 emissions exceeding the design limit. If the scrubber system at White Bluff were designed to treat flue gas with a SO_2 emission rate of 0.68 lb/MMBtu, the system would be inadequately sized to add sufficient reagent when sulfur levels increase beyond that level, which would result in emissions above the proposed emission rate for that period of operation. The cost analysis in the SIP

[26] See 83 FR 62221–62222.

[27] See 83 FR 62221–62222.

[28] See 83 FR 62218.

[29] 83 FR 62222.

revision appropriately reflected the installation of scrubbers designed to handle the maximum coal sulfur content at the plant. If EPA retains its cost estimate based on the installation of scrubbers that can accommodate only lower sulfur coal, then EPA must account for the fact that Entergy would need to ensure that only lower sulfur coal is purchased in the future. The resulting increase in fuel costs must be accounted for in the scrubber cost analysis. Failure to do so renders EPA's estimates inaccurate and does not allow for a proper evaluation of the costs of dry scrubbers at White Bluff.

Response: We disagree with the commenter's approach for estimating the cost-effectiveness of dry scrubbers for White Bluff Units 1 and 2. The commenter argues that a mismatch between the cost of the scrubber systems and the SO_2 emission baseline against which the cost-effectiveness will be measured can be legitimately introduced. Specifically, the commenter argues that the units could in the future burn coal containing a higher sulfur content than what has been burned in the past, emphasizing that the plant can receive coal with a sulfur content up to 1.2 lb/MMBtu pursuant to its coal contracts. Therefore, the commenter insists on costing the dry scrubbers for White Bluff Units 1 and 2 assuming the units will burn coal with a sulfur content of 1.2 lb/MMBtu, while at the same time basing the calculation of the SO_2 tons reduced in the cost-effectiveness calculations on a lower emissions level of 0.68 lb/MMBtu based on the same 2009–2013 SO_2 baseline period that the commenter objects to for purposes of costing the scrubbers.[30] This cherry-picking of emission rates has ramifications for the scrubber cost effectiveness calculation, in which the annualized cost of the controls are compared to the SO_2 tons reduced from the SO_2 baseline. A scrubber capable of treating a higher sulfur coal is more expensive. While Entergy is free to design a scrubber capable of burning a coal with a higher sulfur content (assuming all regulatory requirements are otherwise met), this expense must be balanced against the greater SO_2 removal capabilities of such a scrubber. Otherwise, the cost effectiveness calculation is unreasonably skewed. In other words, if the Entergy cost analysis on which the SIP revision relies had also based the calculation of the SO_2 tons reduced on an assumed baseline emission rate of 1.2 lb/MMBtu, this would have reflected greater tons of SO_2 removed, which would in turn result in cost estimates more cost-effective than reflected in Entergy's estimates.

Instead of relying on the SIP's cost estimates, which are based on Entergy's estimates for a dry scrubber designed to treat coal with a sulfur content of 1.2 lb/MMBtu, we presented revised cost estimates for dry scrubbers for White Bluff in our proposal. After considering our lower revised cost numbers, we still agree with ADEQ's SO_2 BART determination for White Bluff Units 1 and 2 in the SIP revision. Our revised cost estimates rely on our FIP's cost analysis, which was based on a scrubber system designed to burn coal having a sulfur content of 0.68 lb/MMBtu, which is the units' maximum monthly emission rate from 2009–2013.[31] Assuming a coal sulfur content that reflects the sulfur levels of the coal historically burned at the units is the appropriate basis for our cost estimate, consistent with the BART Guidelines: [32]

> The baseline emissions rate should represent a realistic depiction of anticipated annual emissions for the source. In general, for the existing sources subject to BART, you will estimate the anticipated annual emissions based upon actual emissions from a baseline period. When you project that future operating parameters (*e.g.,* limited hours of operation or capacity utilization, type of fuel, raw materials or product mix or type) will differ from past practice, and if this projection has a deciding effect in the BART determination, then you must make these parameters or assumptions into enforceable limitations. In the absence of enforceable limitations, you calculate baseline emissions based upon continuation of past practice.

Based on the BART Guidelines, the presumption is that the baseline emissions should be based on historical emissions. If future operations are expected to differ from past practices, and this impacts the BART analysis, an enforceable mechanism must be in place. The example in the above reference to the BART Guidelines anticipates that future operations will cause the baseline to be lower, resulting in a correspondingly lower denominator in the $/ton cost effectiveness calculation, thus resulting in the cost effectiveness seeming less attractive (higher) and triggering the need for an enforceable mechanism to ensure the integrity of the cost-effectiveness calculation into the future. The same principle applies to Entergy's situation, in that using a higher scrubber cost for scrubbing a higher sulfur coal, in conjunction with using an unrepresentative (lower) baseline, both act to make the $/ton cost effectiveness of the scrubber seem less attractive (higher). In this instance, we would not require an enforceable mechanism to ensure Entergy burns a higher sulfur coal, but the need to ensure the future integrity of the cost-effectiveness calculation nevertheless remains.

There are two obvious ways to ensure the cost effectiveness calculation accurately reflects the costs and emission reductions of scrubbers for White Bluff: Either (1) the higher cost of a scrubber designed to handle a higher sulfur coal must be balanced against its greater SO_2 reduction potential, or (2) the scrubber system's capability and cost must match the facility's historical emissions. We took the latter approach in estimating the cost of dry scrubbers in our proposal. However, the commenter disagrees with either approach, arguing instead that the higher scrubber cost for scrubbing a higher sulfur coal (which it claims could be representative of future emission rates) should be paired with a historical (lower) baseline.

We also note that the commenter does not appear to argue that basing the cost analysis on a scrubber system designed to burn coal having a sulfur content of 0.68 lb/MMBtu is inconsistent with its historical maximum monthly emission rate, but only suggests that in the future the White Bluff units may be burning coal containing a higher sulfur content. The commenter also points to the units' maximum 3-hour average emission rate of 1.1 lb/MMBtu from 2014–2016 in arguing that the cost analysis must reflect a dry scrubber that is designed to handle the highest sulfur content that may be combusted at the unit. However, we note that this is a maximum 3-hour average, while our cost estimates were based on a scrubber system designed to burn coal having a sulfur content of 0.68 lb/MMBtu, which is the units' maximum monthly emission rate from 2009–2013. This is significant because variations in emissions due to changes in coal quality, reagent quality, or scrubber performance are normally accommodated in permitting by specifying a sufficiently long averaging time, such as a 30-day averaging period, which is specifically designed to average out short term fluctuations. In general, averaging smooths out fluctuations in data.[33] Furthermore, the emission limit evaluated by ADEQ and Entergy in the BART analysis for scrubbers, if selected as BART, would have been on a rolling 30 boiler-

[30] See the Arkansas Regional Haze SO_2 and PM SIP Revision, p. 4–4.

[31] 83 FR 62222.

[32] 70 FR 39167.

[33] Thad Godish, *Air Quality,* Lewis Publishers, 2nd Ed., 1991, p. 216, Figure 7.1; Richard W. Boubel, Donald L. Fox, Bruce Turner, and Arthur C. Stern, *Fundamentals of Air Pollution,* Academic Press, 3rd Ed., 1994, pp. 41—43.

operating-day averaging period; therefore, the cost analysis should reflect the design of a scrubber that would meet the same averaging period. In this context, the maximum 3-hour emission rate does not hold much significance. Therefore, we do not agree with the commenter's argument that since White Bluff had a maximum 3-hour average emission rate of 1.1 lb/MMBtu, it is necessary to install a scrubber designed to treat flue gas with a SO_2 emission rate of 1.2 lb/MMBtu.

Considering the above, we disagree with the commenter that we underestimated the cost of dry scrubbers for White Bluff by basing our cost assessment on the assumption that White Bluff will combust coal with a sulfur content of 0.68 lb/MMBtu. Nevertheless, our disagreement with the commenter on the above issues does not ultimately impact our final action given that even after considering our lower cost estimates, we find that ADEQ reasonably exercised its discretion in concluding that the costs of dry scrubbers are not warranted after also taking into account the level of anticipated visibility benefit at the affected Class I areas due to these controls and the other BART factors, including consideration that an Administrative Order that is part of the SIP revision requires the White Bluff units to cease coal combustion by December 31, 2028. We are finalizing our proposed approval of ADEQ's determination that SO_2 BART for White Bluff Units 1 and 2 is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal.

Comment: The commenter supports EPA's proposed approval of rolling 30-day average BART SO_2 emission limits of 0.60 lb/MMBtu for White Bluff Units 1 and 2 based on combustion of low sulfur coal. While EPA underestimates the costs of dry scrubbers at White Bluff, even its undervalued costs support a determination that add-on SO_2 control technology is not BART for White Bluff. EPA's cost estimates fail to include certain cost items that EPA claims are disallowed pursuant to the Control Cost Manual. These ''disallowed'' costs should be included in the cost analyses, as they reflect the actual costs of planning, installing, and operating controls. Accounting for the disallowed costs makes the control technologies even less cost-effective. However, even EPA's flawed cost estimates demonstrate that dry sorbent injection (DSI), enhanced DSI and dry scrubbers are not cost-effective for White Bluff.

Response: We appreciate the commenter's support of our proposed approval of ADEQ's determination that SO_2 BART for White Bluff Units 1 and 2 are emission limits of 0.60 lb/MMBtu based on combustion of low sulfur coal. However, we disagree with the commenter that we have underestimated the costs of dry scrubbers at White Bluff. In particular, the commenter states that EPA's cost estimates fail to include certain cost items that EPA claims are disallowed pursuant to the Control Cost Manual and that Entergy continues to believe that these ''disallowed'' costs should be included in the cost analyses. The commenter claims these disallowed costs reflect the actual costs of planning, installing, and operating controls. We disagree with the commenter that the disallowed line items should be included in the cost analyses. As we discussed in our proposal, ADEQ's evaluation of controls in the SIP revision is based on Entergy's set of cost numbers that excludes the line items disallowed under the EPA Control Cost Manual,[34] which the BART Guidelines specify should be the basis of cost estimates, where possible.[35] We stated in our proposal that we agree that Allowance for Funds Used During Construction (AFUDC) and certain other cost items are not allowed to be considered in estimating the cost-effectiveness of controls for regional haze purposes under the EPA Control Cost Manual.[36] We explained in our proposal that we, therefore, agree with ADEQ's decision to base its evaluation of controls on Entergy's set of cost numbers that did not include the disallowed line items instead of relying on the set of cost numbers that did include the disallowed line items.[37] However, as we discussed in a previous response, we ultimately presented revised cost estimates for dry scrubbers for White Bluff in our proposal instead of relying on ADEQ's cost estimates from the SIP revision because ADEQ's cost estimates were based on Entergy's estimates for a dry scrubber that was inappropriately designed to treat coal with a sulfur content of 1.2 lb/MMBtu.

As we have noted in a number of other regional haze actions, certain line items such as AFUDC, owner's costs, and escalation during construction are not valid costs under our Control Cost Manual methodology. We incorporate our responses to similar comments we have received in those actions here.[38] The exclusion of these disallowed line items in estimating the cost-effectiveness of controls for BART purposes is consistent with the ''overnight'' methodology outlined in our Control Cost Manual. We note that the Ninth and Tenth Circuits have upheld our use of the overnight cost methodology and our long-standing position in the regional haze program that certain line items such as AFUDC are not allowed under the Control Cost Manual approach of cost estimating.[39]

Despite our disagreement with the commenter on the above issues, we note that our position on these issues does not ultimately impact our final action given that even after considering the set of cost-effectiveness figures that exclude the disallowed line items, we find that ADEQ reasonably determined that the costs of DSI, enhanced DSI, and dry scrubbers are not warranted after also taking into account the level of anticipated visibility benefit at the affected Class I areas due to these controls and the other BART factors, including consideration that an Administrative Order that is part of the SIP revision requires the White Bluff units to cease coal combustion by December 31, 2028. We are therefore finalizing our proposed approval of ADEQ's determination that SO_2 BART for White Bluff Units 1 and 2 is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal.

Comment: ADEQ's SO_2 BART determination for White Bluff Units 1 and 2 is based on a voluntary decision made by Entergy to cease coal combustion at the units by December 31, 2028. White Bluff Units 1 and 2 are co-owned by Entergy, AECC, and several Arkansas municipalities. Entergy and AECC are public utilities subject to the jurisdiction of the Arkansas Public Service Commission (APSC). Since the Administrative Order requires Entergy to comply with applicable law, EPA should acknowledge that Entergy is required to

[34] 83 FR 62220.

[35] 40 CFR part 51, appendix Y, IV.D.4.a.

[36] 83 FR 62222.

[37] 83 FR 62222.

[38] See for instance, our ''Response to Technical Comments for Sections E through H of the **Federal Register** Notice for the Oklahoma Regional Haze and Visibility Transport Federal Implementation Plan,'' Docket No. EPA–R06–OAR–2010–0190, 12/13/2011. See pages 7–10, 12–21, 33–34, 46–47, 63–64, 68, 70–71, 80, 85–86, and 88. This document can also be found in the docket for our final action on the Arkansas Regional Haze Phase II SIP Revision (Docket No. EPA–R06–OAR–2015–0189).

[39] See *Ariz. ex rel. Darwin* v. *EPA,* 815 F.3d 519 (9th Cir. 2016), page 39: ''This argument restates Petitioners' objections to EPA's reliance on the overnight costing methodology when it partially disapproved Arizona's SIP. See supra note 14. EPA's use of such a methodology in its own FIP's cost analysis is, without doubt, reasonable.'' See also *Oklahoma* v. *EPA,* 723 F.3d 1201 (July 19, 2013), *cert. denied* (U.S. May 27, 2014) where EPA disapproved certain BART determinations that did not rely on the overnight cost methodology as well as relied on certain cost items such AFUDC which are not allowed per the EPA Control Cost Manual.

seek APSC approval for the cessation of coal combustion at White Bluff prior to the end of its effective useful life.

Response: The relevant consideration for BART determinations is whether any commitment to change future operations, when such changes impact the outcome of the BART analysis, is enforceable for purposes of the SIP.[40] Under a BART analysis, the remaining useful life of a scrubber is assumed to be 30 years unless a facility has an enforceable agreement in place to shut down or cease coal combustion earlier in order for EPA or the state to rely on it in calculating the remaining useful life as part of the BART determination analysis. Here, Entergy entered into an Administrative Order with ADEQ, which is an enforceable document that ADEQ has incorporated into its SIP revision, to cease coal combustion at Units 1 and 2 at White Bluff by December 31, 2028. It was therefore appropriate for ADEQ to rely on this cease to combust coal date for White Bluff Units 1 and 2 in the calculation of the units' remaining useful life, which is used to determine the cost effectiveness of controls in the BART analysis.

To the extent the commenter is contending that the Administrative Order itself requires Entergy to obtain APSC approval in order to be able to make the changes in operations necessary to comply with the requirements of that Administrative Order (AO), we note that Provision No. 12 provides that ''Nothing contained in this AO shall relieve Entergy Arkansas of any obligations imposed by any other applicable local, state, or federal laws, nor, except as specifically provided herein, shall this AO be deemed in any way to relieve Entergy Arkansas of responsibilities contained in the permit.'' [41] EPA cannot comment on what other local or state laws are applicable including whether Entergy and some of the White Bluff co-owners are public utilities subject to the jurisdiction of the APSC. With regard to the commenter's statement that Entergy will be required to obtain approval from the APSC with respect to the provisions in the Administrative Order, we note that such matter falls under the jurisdiction of Arkansas state law and is outside of the scope of our proposal.

To the extent that the commenter is suggesting that EPA should acknowledge that approval will be required from the APSC because the lack of such approval would prevent Entergy from complying with the voluntary cessation of coal combustion, we note that Entergy has entered into an enforceable Administrative Order, which requires the cessation of coal combustion at White Bluff Units 1 and 2 by December 31, 2028. In this final action, we are approving the Administrative Order as part of the SIP, and it is now therefore federally enforceable as a source-specific requirement. If Entergy does not comply with the terms of the Administrative Order, such as not ceasing coal combustion by December 31, 2028, Entergy will be in violation of the SIP, which is a federal requirement. Under Section 113 of the CAA (42 U.S.C. 7413), which addresses, among other things, federal enforcement of SIPs, EPA has the authority to enforce the terms of the Entergy Administrative Order, such as ceasing coal combustion by December 31, 2028, that are being incorporated into Arkansas' SIP here. In addition, under Section 304 of the CAA (42 U.S.C. 7604), citizens and/or citizens groups have the authority to enforce emission limitations in orders, such as the provisions within the Entergy Administrative Order, or require EPA to do so, through the notice of the CAA citizens' suit process.

Comment: Entergy's five factor analysis for White Bluff does not take into account any electric reliability or energy supply impacts arising from Entergy's voluntary decision to prematurely close White Bluff, which ultimately will require the replacement of White Bluff's firm electric generating capacity, not only for Entergy but also for the other White Bluff co-owners. This factor should have been considered in the five-factor analysis for White Bluff.

Response: The commenter is correct that Entergy's BART analysis for White Bluff, which is part of the SIP revision, and on which ADEQ based its BART determination for White Bluff, did not identify any electric reliability or energy supply impacts arising from Entergy's voluntary decision to cease coal combustion at White Bluff. We note that the energy and nonair quality environmental impacts of compliance is one of the factors that the CAA and the Regional Haze rule require to be considered in the BART analysis.[42] However, neither Entergy in its BART analysis nor ADEQ in the SIP revision identify any adverse energy and nonair quality environmental impacts associated with Entergy's enforceable measure to cease coal combustion at White Bluff prior to the end of the effective useful life of the facility, or with any other BART control option evaluated. EPA is also not aware of any such adverse impacts, and we therefore defer to ADEQ's determination that there are no significant energy impacts to consider in the five-factor BART analysis for White Bluff.

B. Reasonable Progress

Comment: EPA's proposed approval of ADEQ's reasonable progress analysis and conclusions for the Independence facility are arbitrary, capricious, and contrary to law. Dry scrubbers at Independence are highly cost-effective when considering other regional haze actions in Arkansas and elsewhere, and thus EPA's and ADEQ's consideration of cost is arbitrary and unlawful. EPA should revise its proposed rule to find that dry scrubbers at Independence are cost-effective and should be required under reasonable progress.

Response: We disagree with the commenter that our proposed approval of ADEQ's reasonable progress analysis and conclusions for the Independence facility for the first implementation period are arbitrary, capricious, or contrary to law. We do not contest that the cost effectiveness of dry scrubbers at Independence on a dollar per ton reduced ($/ton) basis is within the range of what other states and EPA have found reasonable for reasonable progress controls. However, in this action we evaluated ADEQ's reasonable progress analysis and conclusions and determined that it was not unreasonable for the State to conclude that dry scrubbers for Independence are not necessary to make reasonable progress.

We noted in our proposal that Arkansas considered the capital costs of dry scrubbers and wet scrubbers to be high even though the costs in terms of $/ton of SO_2 emissions reduced for both dry and wet scrubbers at the Independence facility (assuming a 30-year remaining useful life) are within a range that has been found to be cost-effective in other regional haze actions.[43] However, Arkansas' reasonable progress determination was not just based on the consideration of the cost-effectiveness of controls. Arkansas' reasonable progress determination with respect to the Independence facility was appropriately based on its consideration and weighing of the costs of compliance along with the other reasonable progress factors, as

[40] *See* 40 CFR part 51, appendix Y, IV.D.4.d, k.

[41] The Administrative Order for Entergy can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision. See Paragraph 12 of the Order and Agreement Section. *https://www.adeq.state.ar.us/air/planning/sip/pdfs/regional-haze/entergy-ao-executed-8-7-2018.pdf.*

[42] See § 51.308(e)(1)(ii)(A) and CAA section 169A(g)(2).

[43] See 83 FR 62230.

well as visibility, which the state deemed to be a relevant factor for consideration in its analysis. Arkansas discussed its concerns regarding the cost of scrubber controls,[44] noted that the evaluation of the $/dv metric demonstrated a greater difference in cost between dry FGD and low sulfur coal compared to the $/ton metric, and ultimately concluded that all the controls it evaluated would cost millions of dollars for what it considers to be little visibility benefit. We explained in our proposal that we believe that Arkansas' weighing of the four statutory factors and other factors it deemed relevant in its reasonable progress analysis for the Independence facility was reasonable and within the state's discretion.[45] Furthermore, we note that our 2007 Reasonable Progress Guidance allows for the deferral of emission reductions to later planning periods, which ADEQ cites in its SIP,[46] in deciding what amount of emissions reduction is appropriate in setting the RPGs considering that the long-term goal of no manmade impairment encompasses several planning periods.[47] We are finding here that considering all the above, including the state's concerns about the cost of controls[48] and given that the state is requiring Independence Units 1 and 2 to switch to low sulfur coal within 3 years under the long-term strategy, which is expected to reduce SO_2 emissions and result in visibility improvements at Arkansas' Class I areas, it is not unreasonable for Arkansas to weigh the factors in the way that it did and conclude that no SO_2 controls under the reasonable progress requirements are necessary for the Independence facility in the first implementation period. We are finalizing our approval of Arkansas' reasonable progress determination with respect to the Independence facility and all other Arkansas sources.

Comment: The proposed reasonable progress determination with respect to the Independence facility is arbitrary, capricious, and contrary to law because EPA's and ADEQ's reliance on the visibility ''glidepath'' is an excuse for avoiding pollution reductions and is unlawful. ADEQ unlawfully concluded that no additional controls are required at Independence largely because the state is on the ''glidepath'' toward natural visibility in distant decades. However, the glidepath is not an independently enforceable requirement and being ''on the glidepath'' does not relieve the state of conducting a reasoned analysis. EPA should revise its proposed rule to make clear that ADEQ's reliance on the ''glidepath'' as an excuse to allow unabated air pollution from the Independence facility is unlawful and unreasonable.

Response: We disagree with the commenter that ADEQ concluded that no additional controls are required at Independence because the state's Class I areas are on the glidepath. Instead, ADEQ's determination on reasonable progress with respect to the Independence facility was based on its consideration and weighing of the four reasonable progress factors, as well as consideration of potential visibility benefit of controls, which the state deemed to be a relevant factor for consideration in its analysis. We noted in our proposal that the statutory factor that appears to have been the most significant in Arkansas' reasonable progress determination with respect to the Independence facility is the cost of compliance, along with consideration of visibility benefits.[49] As such, we disagree that ADEQ's determination was based solely or primarily on the fact that the state's Class I areas are on the glidepath toward natural visibility. Regardless of any consideration Arkansas might have placed on the fact that the state's Class I areas are on the glidepath in making its reasonable progress determination, our proposed and final approval is not based on the Class I areas' position with respect to the glidepath. We explained in our proposal that considering the state's concerns about the cost of the evaluated controls[50] and given that the state is requiring Independence Units 1 and 2 to switch to low sulfur coal within 3 years under the long-term strategy, which is expected to reduce SO_2 emissions and result in visibility improvements at Arkansas' Class I areas, we found that it is not unreasonable for Arkansas to conclude that SO_2 controls under the reasonable progress requirements are not necessary for the Independence facility in the first implementation period.[51] Our proposal further stated that one of the components forming the basis of our proposed approval is ''the state's evaluation and reasonable weighing of the four statutory factors along with consideration of the visibility benefits of controls for the Independence facility.''[52] As is evident from our discussion of ''degree of improvement in visibility'' in the proposal, ADEQ considered the potential visibility benefits of controls in its analysis of controls for Independence, as opposed to visibility conditions in relation to the glidepath.[53] We did not point to the glidepath as a basis for our approval of the state's reasonable progress analysis and determination. Therefore, the commenter is incorrect in contending that EPA is relying on the visibility glidepath as a reason for not requiring pollution reductions at the Independence facility.

Comment: ADEQ cites the high capital costs of new scrubbers as a basis for declining to require them for the Independence facility. This is inappropriate because the capital costs are already assessed in the calculation of cost-effectiveness and the rejection of a control on the basis of capital costs neglects consideration of the benefits of that control, which could justify that cost.

Response: While the commenter is correct that Arkansas considered capital costs in its four-factor analysis and that its reasonable progress determination was based in part on the capital cost of controls, this was not the only factor Arkansas considered and based its decision on. Arkansas considered the cost of controls in the form of cost-effectiveness ($/ton) and capital costs, in addition to also considering the remaining reasonable progress factors

[44] As discussed in our proposal, in light of Entergy's anticipated cessation of coal combustion at the Independence facility, although it is not state- or federally-enforceable, Arkansas considered it important to take into account the capital cost of controls along with the cost-effectiveness in terms of dollars per ton of emissions reduced. In its consideration of the cost of compliance, Arkansas also took into account that these costs would be passed on to Arkansas ratepayers. See 83 FR 62230.

[45] 83 FR 62233.

[46] See pages 28–53 of Arkansas Final Regional Haze Phase II SIP. *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20070601_wehrum_reasonable_progress_goals_reghaze.pdf.*

[47] See Section 1.2 of EPA's ''Guidance for Setting Reasonable Progress Goals under the Regional Haze Program'' (June 1, 2007). *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20070601_wehrum_reasonable_progress_goals_reghaze.pdf.*

[48] EPA is revising its assessment of ADEQ's consideration of capital costs in the state's reasonable progress determination for Independence. We are clarifying that our evaluation and conclusion in this final action that Arkansas' reasonable progress determination is reasonable does not rely on Arkansas' consideration of capital costs because Arkansas' decision to consider the capital costs of scrubber controls in its analysis was based on Entergy's anticipated early cessation of coal combustion at the Independence facility, which is not state- or federally-enforceable. However, EPA continues to find that ADEQ's determination is reasonable based on the totality of the circumstances.

[49] 83 FR 62232.

[50] As explained elsewhere in this section of the notice, EPA is revising its assessment of ADEQ's consideration of capital costs in the state's reasonable progress determination for Independence. However, EPA continues to find that ADEQ's determination is reasonable based on the totality of the circumstances.

[51] 83 FR 62233.

[52] 83 FR 62233.

[53] 83 FR 62229.

and the anticipated visibility improvement of controls, as it deemed consideration of visibility to be a relevant factor in its reasonable progress analysis. Arkansas noted that the evaluation of the $/dv metric demonstrated a greater difference in cost between dry FGD and low sulfur coal compared to the $/ton metric, and ultimately concluded that the controls it evaluated would cost millions of dollars for what it considers to be little visibility benefit. Thus, Arkansas' reasonable progress determination with respect to the Independence facility was based on its consideration and weighing of the costs of compliance and the other reasonable progress factors, as well as visibility.

We do note that based on comments we received and having given the matter further consideration, we realize that Arkansas' consideration of capital costs in the four-factor analysis for the Independence facility is not appropriate because the state's decision to consider capital costs was rooted in Entergy's anticipated early cessation of coal combustion at the Independence facility, which is not state- or federally-enforceable. Considering the capital costs of controls in this context would be equivalent to inappropriately assuming a shorter remaining useful life for Independence in the cost-effectiveness calculation based on an unenforceable measure to change future operations. Therefore, we are clarifying that our evaluation and conclusion in this final action that Arkansas' reasonable progress determination is reasonable does not rely on Arkansas' consideration of capital costs. EPA's long-standing position in other regional haze actions is that consideration of certain cost metrics such as capital costs and $/dv are not appropriate bases for rejecting controls that would have otherwise been determined to be reasonable. However, given the totality of the circumstances in this case, including the SIP's requirement for Independence Units 1 and 2 to switch to low sulfur coal within 3-years under the long-term strategy, the anticipated emissions reductions due to the implementation of BART controls required by the SIP revision,[54] and the anticipated cessation of coal combustion at Independence by the end of 2030, we continue to find that Arkansas reasonably exercised its discretion in determining that no SO_2 controls are necessary under reasonable progress for the Independence facility in the first implementation period. We do note that we are merely clarifying the basis for our approval of Arkansas' reasonable progress determination, but the outcome of our evaluation and our decision to approve the state's reasonable progress determination remain unchanged from proposal.

Comment: EPA should disapprove Arkansas' method of identifying sources for further analysis under reasonable progress because Arkansas failed to appropriately evaluate area sources, in particular concentrated animal feeding operations (CAFO's). This is despite clear evidence in the record that area sources, such as CAFO's, are a significant part of the haze problem in Arkansas. CAFO's, which are a source of ammonia emissions, are likely a significant contributor to haze in Arkansas and ADEQ should have evaluated the cost-effectiveness of controlling emissions from these sources.

Response: We disagree with the commenter that Arkansas' reasonable progress analysis was inappropriate with respect to its treatment of area sources, which includes CAFO's. EPA's Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program (EPA's Reasonable Progress Guidance) provides that the reasonable progress analysis involves identification of key pollutants and source categories that contribute to visibility impairment at the Class I area.[55] The guidance provides that once the key pollutants contributing to visibility impairment at each Class I area have been identified, the sources or source categories responsible for emitting these pollutants or pollutant precursors can also be determined.[56] The reasonable progress factors are then to be applied to the key pollutants and sources or source categories contributing to visibility impairment at each affected Class I area.

The approach taken by Arkansas in its reasonable progress analysis involved an assessment of both region-wide Particulate Source Apportionment Technology (PSAT) data and PSAT data for Arkansas sources.[57] Based on this assessment, Arkansas identified sulfate (SO_4) as the key species contributing to light extinction at Caney Creek and Upper Buffalo. Arkansas further determined that the primary driver of SO_4 formation is emissions of SO_2 from point sources both region-wide and in Arkansas. As such, Arkansas decided to focus on point sources emitting at least 250 tpy of SO_2 to determine whether their emissions and proximity to Arkansas Class I areas warranted further analysis using the four statutory factors. Arkansas did assert that when all source categories within Arkansas are considered, light extinction due to Arkansas area sources is greater compared to the light extinction due to Arkansas point sources at both Caney Creek and Upper Buffalo on the 20% worst days in 2002. However, Arkansas explained that the cost of controlling many individual small area sources may be difficult to quantify. CAFO's fall under the category of small area sources and it is therefore likely that Arkansas would find it difficult to quantify the cost of controlling emissions from CAFO's. While we acknowledge the commenter's concerns regarding the visibility impact of ammonia emissions from CAFO's, we note the BART Guidelines provide that states should use their best judgment in deciding whether ammonia emissions from a source are likely to have an impact on visibility in an area, as controlling ammonia emissions in some areas may not have a significant impact on visibility.[58] The BART Guidelines further provide that given that air quality modeling may not be feasible for individual sources of ammonia, states should also exercise their judgement in assessing the degree of visibility impacts due to emissions of ammonia or ammonia compounds.[59] Since our 2007 Reasonable Progress Guidance does not itself provide recommendations on how sources of ammonia should be addressed in the reasonable progress analysis, we believe it would be reasonable for states to rely on the BART Guidelines in this instance for addressing ammonia emissions under the reasonable progress analysis. Therefore, we find that Arkansas' decision not to evaluate sources of ammonia emissions in its reasonable progress analysis to be reasonable. We find that Arkansas has provided a reasoned basis for the approach it took

[54] See ''Arkansas Regional Haze SO_2 and PM SIP Revision,'' section V.E, page 53.

[55] See EPA's ''Guidance for Setting Reasonable Progress Goals under the Regional Haze Program'' (June 1, 2007), page 3–1. The guidance document can be found at the following link: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20070601_wehrum_reasonable_progress_goals_reghaze.pdf.*

[56] See EPA's ''Guidance for Setting Reasonable Progress Goals under the Regional Haze Program'' (June 1, 2007), page 3–1.

[57] As part of its reasonable progress analysis, ADEQ provided a discussion of the results of air quality modeling performed by the Central Regional Air Planning Association (CENRAP) in support of SIP development in the central states region. The CENRAP modeling included Particulate Source Apportionment Technology Tool (PSAT) with CAMx version 4.4, which was used to provide source apportionment by geographic regions and major source categories for pollutants that contribute to visibility impairment at each of the Class I areas in the central states region.

[58] 40 CFR part 51, appendix Y, II(A)(3).

[59] 40 CFR part 51, appendix Y, II(A)(3).

to identify sources for further consideration in the reasonable progress analysis and we find that it is reasonable for Arkansas to arrive at the decision not to further examine area sources in its reasonable progress analysis for the first implementation period. We also note that states may prioritize their planning in the manner that best suits their circumstances, so long as they demonstrate that their prioritization is reasonable given the statutory requirement to make reasonable progress. Our 2007 Reasonable Progress Guidance provides that states may wish to defer emission reductions to later planning periods, which ADEQ cites in its SIP,[60] since the long-term goal of no manmade impairment encompasses several planning periods.[61] We find that ADEQ has appropriately decided to focus on the point source category for evaluation of SO_2 emissions reductions in the reasonable progress analysis for the first planning period. In future planning periods, it may be appropriate for Arkansas to reevaluate the benefit of addressing emissions from area sources, which will likely become more important as emissions from other source categories are reduced.

Comment: Although the commenter supports EPA's proposal to approve ADEQ's reasonable progress determination, which requires no additional controls on sources in Arkansas for the first planning period, the commenter believes that a four-factor analysis was not required because controls are not necessary to ensure reasonable progress for the first planning period. The threshold issue when addressing reasonable progress is whether further actions are necessary to ensure that visibility improvement is continuing toward background levels (*i.e.,* on or below the uniform rate of progress (URP)). Since Arkansas' Class I areas are below the URP and are already meeting the RPGs Arkansas established in the SIP revision, a reasonable progress analysis was not required.

Response: While we appreciate the commenter's support of our proposed approval of Arkansas' reasonable progress determination, we disagree with the commenter that it was not necessary for Arkansas to conduct a reasonable progress analysis for the first implementation period. The Clean Air Act requires that states' SIPs contain a long-term strategy for making reasonable progress, and that in determining reasonable progress states must consider the very four-factor analysis which the commenter purports is not needed. The Regional Haze Rule implements the statutory requirements and provides that states must determine whether controls are necessary to ensure reasonable progress based on four statutory factors. The preamble to the 1999 Regional Haze Rule states that ''. . . EPA is not specifying in this final rule what specific control measures a State must implement in its initial SIP for regional haze. That determination can only be made by a State once it has conducted the necessary technical analyses of emissions, air quality, and the other factors that go into determining reasonable progress.'' [62] The Regional Haze Rule clearly states that the technical analysis of the four factors that determines what is necessary for reasonable progress occurs prior to a reasonable progress determination, including in cases where the reasonable progress determination is that no further controls are required under reasonable progress.[63]

CAA section 169A(g)(1) provides that reasonable progress is determined by consideration of (1) the costs of compliance, (2) the time necessary for compliance, (3) the energy and nonair quality environmental impacts of compliance, and (4) the remaining useful life of any existing source subject to such requirements. The Regional Haze regulations under § 51.308(d)(1)(i)(A) also require consideration of these four statutory factors when establishing the RPGs for a Class I area, along with a demonstration showing how these factors were taken into consideration in selecting the goal.

The statute and regulations are both clear that the states have the authority and obligation to evaluate the four reasonable progress factors and that the decision regarding the controls required to make reasonable progress and the subsequent establishment of the RPGs must be based on these factors identified in CAA section 169A(g)(1) and the Regional Haze regulations under § 51.308(d)(1)(i)(A). The URP framework is not based on the four statutory factors, but is instead an analytical tool created by extrapolating emission reductions from the mid-1990s through approximately 2005 into the future.[64] While § 51.308(d)(1)(i)(B) of the Regional Haze regulations requires that a state also consider the URP glidepath in establishing the RPGs, this does not mean that no further analysis or controls are required as long as a state's Class I areas are below the URP, as the commenter contends. In fact, the preamble to the 1999 Regional Haze Rule reinforces that the amount of progress that is reasonable is defined based on the statutory factors, notwithstanding the URP.[65] Clearly, a state's obligation to evaluate the four statutory factors and set RPGs based on CAA section 169A(g)(1) and § 51.308(d)(1) applies in all cases, without regard to the Class I area's position relative to the URP. There is nothing in the CAA or Regional Haze regulations that suggests that a state's obligation to ensure reasonable progress can be met by just meeting the URP.[66]

We note that our conclusion here is consistent with our final action on the 2008 Arkansas Regional Haze SIP, where we disapproved Arkansas' RPGs and found that Arkansas had not met its reasonable progress obligations precisely because the state established its RPGs without conducting an evaluation of the four statutory factors and did so based on the fact that its Class I areas were below the URP glidepath. In the preamble to our final action on the 2008 Arkansas Regional Haze SIP, we were clear that an evaluation of the four statutory factors is required regardless of the Class I area's position relative to the URP glidepath:

> [B]eing on the ''glidepath'' does not mean a state is allowed to forego an evaluation of the four statutory factors when establishing its RPGs. Based on an evaluation of the four statutory factors, states may determine that RPGs that provide for a greater rate of visibility improvement than would be achieved with the URP for the first implementation period are reasonable.[67]

Our final action on the Arkansas Regional Haze SIP was published in the **Federal Register** on March 12, 2012, and became effective on April 11, 2012. Our final action disapproving Arkansas' reasonable progress determination and RPGs and our position with regard to the URP was not challenged. We reiterate in this final action that the CAA and Regional Haze regulations require an analysis of the four reasonable progress factors regardless of a Class I area's position relative to the URP and that being below the glide path

[60] See pages 28–53 of Arkansas Final Regional Haze Phase II SIP. *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20070601_wehrum_reasonable_progress_goals_reghaze.pdf.*

[61] See Section 1.2 of EPA's ''Guidance for Setting Reasonable Progress Goals under the Regional Haze Program'' (June 1, 2007). *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20070601_wehrum_reasonable_progress_goals_reghaze.pdf.*

[62] 64 FR 35721.

[63] See 64 FR 35714 at 35721 and 35731–35735 and 35734 (July 1, 1999).

[64] See 64 FR 35731–35733.

[65] 64 FR 35732.

[66] See 77 FR 14604, at 14629.

[67] 77 FR 14629.

does not automatically mean that no controls are necessary under reasonable progress.

With regard to the commenter's argument that it was not necessary for Arkansas to conduct a four-factor analysis given that Arkansas Class I areas are already meeting the RPGs established in the SIP revision, we note first that this is a circular argument. The numeric RPGs are calculated by taking into account the visibility improvement anticipated from enforceable emission limitations and other control measures (including BART, reasonable progress, and other ''on the books'' controls). Thus, the RPGs for the first planning period represent the best estimate of the degree of visibility improvement that will result in 2018 from changes in emissions inventories, changes driven by the particular set of control measures the state has adopted in its regional haze SIP to address visibility, as well as all other enforceable measures expected to reduce emissions over the period of the SIP from 2002 to 2018.[68] To argue that a four-factor analysis is not needed because the RPGs, which are based in part on the outcome of that very four-factor analysis, are at a certain level is circular. Furthermore, the Regional Haze Rule provides that the emission limitations and control measures established under BART and under the reasonable progress determinations are what is enforceable, not the RPGs themselves.[69] EPA cannot enforce an RPG in the sense of seeking to apply penalties on a state for failing to meet the RPG or obtaining injunctive relief to require a state to achieve its RPG. However, the long-term strategy can and must contain emission limits and other control measures that apply to specific sources, and that are themselves enforceable. Meeting or being projected to meet the RPG does not automatically demonstrate that a state has satisfied its requirements under BART and reasonable progress.

Comment: The commenter supports EPA's proposal to approve ADEQ's reasonable progress determination, which requires no additional controls on sources in Arkansas for the first planning period. However, Arkansas' reasonable progress analysis ''broadly applicable'' to Arkansas sources was sufficient to satisfy the reasonable progress requirements and Arkansas surpassed the CAA requirements when it nonetheless undertook an analysis that applied the four reasonable progress factors to the Independence facility. EPA inappropriately proposed to conclude that the broad analysis was merely ''informative'' and ''not a determinative component of the state's reasonable progress analysis.'' Even if a four-factor analysis were necessary in this case, ADEQ's broad analysis was sufficient to satisfy its reasonable progress obligations, making a site-specific four-factor analysis for Independence unnecessary. ADEQ's broad approach was appropriate, as there is no requirement that a reasonable progress analysis be performed on a source-specific basis. EPA should conclude that this broad analysis was sufficient and rendered further analysis, including any source-specific four-factor analysis, unnecessary.

Response: While we appreciate the commenter's support of our proposed approval of ADEQ's reasonable progress determination, we disagree with the commenter that the broad analysis included in ADEQ's SIP revision satisfies this reasonable progress obligation and note that it is not a basis for our approval of ADEQ's reasonable progress analysis. While it may not be necessary to conduct a source-specific analysis of the four factors in all instances to satisfy the reasonable progress obligations,[70] we do not agree that the broad analysis provided in ADEQ's SIP revision complies with the applicable statutory and regulatory requirements. As discussed further below, the broad analysis of a group of sources provided by ADEQ in the SIP revision does not clearly identify any sources or controls that were evaluated in the state's weighing of the costs and other statutory factors nor did it estimate in specific numeric form the cost of controls, making it clear that the dispositive consideration in the broad analysis was visibility conditions with respect to the URP.[71] Therefore, we find that the broad analysis presented in the SIP revision does not satisfy Arkansas' reasonable progress obligations. ADEQ's broad analysis does not discuss pollutants or identify possible specific controls for these pollutants or for source categories for these pollutants. Instead, in evaluating the costs of compliance, the broad analysis discusses in a very generic manner the anticipated impact of additional costs of compliance on the health and vitality of industries within the state and on Arkansas ratepayers, without ever even identifying the potential controls or discussing actual cost estimates.

Moreover, ADEQ itself deemed the application of the four factors to the Independence facility necessary, stating in the SIP revision that ''due to the circumstances of the 2016 AR RH FIP, which applied the factors to a single facility, Independence, ADEQ has determined that application of the four factors to the specific source analyzed by EPA is also ''relevant.''[72] The SIP revision further explains that for this reason, ''ADEQ has performed both a broader analysis using the four factors as well as a more narrow analysis specific to Independence before determining whether any controls are necessary.''[73] ADEQ did not reach a final determination regarding reasonable progress until after evaluating large point sources individually to identify sources for potential further evaluation under the four reasonable progress factors and conducting a more narrow and focused analysis on those sources. In this case, one source was identified for further evaluation under the four reasonable progress factors, specifically, the Independence facility. Therefore, we are concluding that the state's broad analysis of a group of sources was not a determinative component of the state's reasonable progress analysis. We appreciate the thoroughness of the state's reasonable progress analysis but reiterate and clarify, as necessary, here that the broad analysis is not a component of our finding that the state has satisfied the reasonable progress requirements.[74]

Although we disagree with the commenter that the broad analysis included in ADEQ's SIP revision satisfies Arkansas' reasonable progress obligations, we are finalizing our proposed approval of ADEQ's reasonable progress determination based on the following: (1) The state's discussion of the key pollutants and source categories that contribute to visibility impairment in Arkansas' Class I areas per the CENRAP's source apportionment modeling; (2) the state's identification of a group of large SO_2 point sources in Arkansas for potential evaluation of controls under reasonable progress; (3) the state's rationale for narrowing down its list of potential sources to evaluate under the reasonable progress requirements; and (4) the state's evaluation and reasonable

[68] 64 FR 35733.

[69] 64 FR 35733.

[70] On the contrary, we discussed in our proposal that we agree that an approach that involves a broad analysis of groups of sources or source categories may be appropriate in certain cases, as provided by EPA's Reasonable Progress Guidance. 83 FR 62232.

[71] 83 FR 62232.

[72] See ''Arkansas Regional Haze SO_2 and PM SIP Revision,'' section V, page 30.

[73] See ''Arkansas Regional Haze SO_2 and PM SIP Revision,'' section V, page 30.

[74] *See* 83 FR 62233 (laying out the four components of ADEQ's reasonable progress analysis on which EPA based its proposed approval).

weighing of the four statutory factors along with consideration of the visibility benefits of controls for the Independence facility.

Comment: No additional controls can be considered for reasonable progress at sources in Arkansas since no controls could be implemented before the end of the first planning period in 2018. EPA's regulations require SIPs to consider ''the emission reduction measures needed to achieve [reasonable progress goals] for the period covered by the implementation plan.'' 40 CFR 51.308(d)(1)(i)(B). In staying the effectiveness of EPA's Regional Haze FIP for the state of Texas, the U.S. Court of Appeals for the Fifth Circuit explained that ''[t]he emissions controls included in a state implementation plan . . . must be those designed to achieve the reasonable progress goal for the period covered by the plan,'' and that the parties challenging the FIP ''persuasively argue that [EPA's requirement that power plants meet Reasonable Progress goals by installing scrubbers in 2019 and 2021] exceeds the power granted by the Regional Haze Rule.'' *Texas* v. *EPA,* 829 F.3d 405, 429 (5th Cir. 2016) (internal citations omitted). It is therefore inappropriate to require reasonable progress controls in a SIP for the first planning period when the controls cannot be installed or result in visibility benefits in that planning period.

Response: The Fifth Circuit stay decision cited by the commenter suggested that it was likely that the EPA had exceeded its statutory authority by imposing emission controls that go into effect after the end of the implementation period in the Texas Regional Haze FIP. This assessment is incorrect. First, we note that the decision, by a Fifth Circuit motions panel, did not cite to a provision of the CAA to support the proposition that the EPA exceeded its statutory authority, as the CAA contains no such constraint. Subsequent to the Fifth Circuit decision to grant a stay of the EPA's Texas FIP, EPA finalized its revisions to the Regional Haze Rule, and, in the process, clarified its long-standing interpretation of the relationship between long-term strategies and RPGs. As stated in the final rule, ''portions of the stay decision indicate a fundamental misunderstanding of aspects of the visibility program and the EPA's action on the Oklahoma and Texas regional haze SIPs.'' 82 FR 3078, 3087 (January 10, 2017). CAA section 169A(b)(2)(B) requires that SIPs include ''a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal.'' In our rulemaking, we noted that ''ten to fifteen years'' was ambiguous and could either mean that the long-term strategy must be updated every ten to fifteen years or that it must be fully implemented within ten to fifteen years. To impose the latter interpretation would restrict states' or the EPA's ability to require controls that could not be fully implemented before the end of the implementation period and would incentivize states to delay the submission of a regional haze SIP since they could essentially ''run out the clock.'' Further, EPA's 2007 reasonable progress guidance specifically recognized that the time needed for full implementation of a control measure might extend beyond the end of the implementation period.[75] Additionally, EPA does not lose its authority to regulate after a deadline, even a mandatory deadline, has passed; rather, the appropriate remedy is a court order compelling the agency to fulfill the regulatory obligation. For a more in-depth discussion on this issue, please see our final rule at 82 FR 3078, 3087–3089.

Comment: Although EPA should finalize its approval of ADEQ's reasonable progress determination, EPA's analysis of the application of DSI and enhanced DSI at the Independence facility should not be part of EPA's final action. ADEQ did not assess these two control technologies in its four-factor analysis for Independence, nor was it required to. Therefore, EPA's DSI and enhanced DSI analyses are inappropriate and extraneous and should not be included in the final action, as EPA has no authority under the CAA to substitute its judgment for that of the state's. Nevertheless, the commenter does agree that DSI and enhanced DSI are not required under reasonable progress.

Response: We appreciate the commenter's support of our proposal to approve ADEQ's reasonable progress determination. While ADEQ's decision to not evaluate DSI or enhanced DSI at the Independence facility does not change the result of the state's determination and we are therefore approving that determination here, we disagree that our analysis of DSI and enhanced DSI at Independence should not be part of our final action. As we explained in our proposal, since the White Bluff and Independence facilities are sister facilities with nearly identical units and comparable levels of annual SO_2 emissions, and since both DSI and enhanced DSI were evaluated in the BART analysis for White Bluff Units 1 and 2, we find it appropriate to consider these controls in the four-factor analysis for the Independence facility as well.[76] However, neither the SIP revision nor Entergy's four factor analysis for controls on the Independence facility considered DSI or enhanced DSI as control options. Therefore, we provided this information in our proposal to demonstrate that even if ADEQ had considered DSI and enhanced DSI in its reasonable progress analysis for the Independence facility, it likely would not have changed the state's final determination on reasonable progress.[77] We note that we estimated the cost-effectiveness of DSI and enhanced DSI at the Independence facility by relying on Entergy's estimates of the capital costs and annual operation and maintenance costs of these controls for White Bluff. Thus, based on the results of our analysis of DSI and enhanced DSI, we do not consider the omission of consideration of DSI and enhanced DSI as control options for SO_2 at the Independence facility to be an impediment to approving ADEQ's reasonable progress analysis. Without the results of our analysis of DSI and enhanced DSI for the Independence facility, we would not be able to arrive at the conclusion that ADEQ's omission did not impact our ultimate conclusion regarding the state's reasonable progress analysis. Therefore, we disagree with the commenter that our analysis of DSI and enhanced DSI for the Independence facility is unnecessary in our review and approval of ADEQ's reasonable progress analysis.

Comment: The commenter agrees that Independence is not subject to BART, that no additional controls beyond use of low-sulfur coal at Independence are necessary to achieve reasonable progress and agrees with the adoption of low-sulfur coal as the long-term strategy for Independence.

Response: We appreciate the commenter's support of our proposal with respect to the Independence facility and the long-term strategy.

C. Clean Air Act Section 110(l)

Comment: EPA's proposed rule as a whole violates the Clean Air Act's ''anti-backsliding'' requirement, 42 U.S.C. 7410(*l*). Compared to the existing FIP, the State's plan would result in greater air pollution and greater visibility impairment at affected Class I areas. In the 2016 Arkansas FIP, EPA required Independence Units 1 and 2 to meet SO_2 emission limits based on the use of new

[75] See Guidance for Setting Reasonable Progress Goals under the Regional Haze Program, June 1, 2007.

[76] 83 FR 62232.

[77] 83 FR 62232.

scrubbers under the reasonable progress provisions. Now, EPA has proposed to approve a SIP revision that would replace those SO_2 emission limits with much higher limits based on the use of low-sulfur coal. In addition, whereas the existing FIP requires White Bluff Units 1 and 2 to meet SO_2 emission limits based on the use of new scrubbers, the proposed SIP revision would replace that requirement with a much higher emission limit based on the use of low sulfur coal. The SIP revision includes no reductions beyond those in the FIP that would compensate for allowing higher SO_2 emissions from both Independence and White Bluff. As a result, EPA's proposed rule would authorize significantly more SO_2 emissions and produce worse air quality than the existing FIP. Section 110(*l*) of the Clean Air Act prohibits a plan revision that would weaken the existing FIP requirements in this manner. This increase in SO_2 emissions under the SIP relative to the FIP violates the Clean Air Act's anti-backsliding provision, which prohibits plan revisions that would interfere with attainment of the NAAQS or other ''applicable requirements'' of the Act and prohibits plan revisions that would interfere with an existing requirement to make reasonable further progress.

Response: We disagree that our rulemaking violates the CAA's requirements under section 110(l). The commenter mischaracterizes CAA section 110(l)'s requirements. Section 110(l) states that, ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with an applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of this chapter.'' First, the SIP revision will not interfere with the ''applicable requirements'' of the regional haze program. The CAA requires that the SIP ''contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.'' The corresponding federal regulations found at 40 CFR 51.308 and appendix Y to part 51 detail the required process for determining the appropriate emission limits for the regional haze program. The State followed the prescribed process for determining the levels of control that are required for BART and reasonable progress. Our approval of the SIP revision is supported by our evaluation of the state's conclusions and our determination that the BART and reasonable progress requirements under the CAA are met. The rationale supporting that determination was presented in the notice of proposed rulemaking for this action.[78] For these reasons, our final approval of the SIP revision and concurrent withdrawal of the corresponding parts of the FIP will not interfere with the CAA requirements for BART or reasonable progress.

Second, the SIP revision will not interfere with any applicable requirement concerning attainment and reasonable further progress. EPA interprets CAA section 110(l) as applying to all NAAQS that are in effect, including those that have been promulgated but for which EPA has not yet made designations. EPA has concluded that 110(l) can be satisfied by demonstrating that substitute measures ensure that status quo air quality is preserved. However, 110(l) can also be satisfied by an air quality analysis demonstrating that any change in emissions will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement. Noninterference with attainment of the NAAQS may be demonstrated by an air quality analysis showing that any emission changes associated with the revision will not interfere with attainment of the NAAQS. This option requires a showing that the area (as well as interstate and intrastate areas downwind) can attain the NAAQS even with the plan in its revised form. *See, e.g. Kentucky Resources Council, Inc.* v. *EPA,* 467 F.3d 986 (6th Cir. 2006).

Though the commenter is correct in noting that the higher SO_2 emission limits for White Bluff Units 1 and 2 contained in the SIP are replacing the more stringent SO_2 emission limits contained in the FIP, the commenter fails to consider that the SIP revision contains an Administrative Order making enforceable Entergy's voluntary plans to cease coal combustion at White Bluff Units 1 and 2 by December 31, 2028. Because the cessation of coal combustion will lead to emission reductions greater than the SO_2 emission reductions required for White Bluff under the FIP, the SIP revision with respect to the SO_2 limits for White Bluff will clearly not interfere with attainment and reasonable further progress in the long term (*i.e.,* after December 31, 2028).

While it is true that the FIP included more stringent SO_2 emission limits for Independence Units 1 and 2 than the SIP revision,[79] there is no evidence that withdrawal of the SO_2 limits in the FIP for White Bluff and Independence and the approval of the SO_2 emission limits in the SIP revision will interfere with attainment of the SO_2 NAAQS. At this time, and notwithstanding the fact that the FIP provisions have not gone into effect, the areas that would be potentially impacted by the increase in SO_2 emissions allowed under the SIP revision as compared to the FIP are attaining the 1-hour SO_2 NAAQS. Based on an assessment of current air quality in the areas most affected by this SIP revision, which we discuss in the paragraphs that follow, we are concluding that the near term less stringent SO_2 emissions limits in the SIP will not interfere with attainment of the NAAQS. Jefferson County, where the White Bluff facility is located, was designated by EPA as ''attainment/unclassifiable,'' for the 2010 1-hour SO_2 NAAQS in a rulemaking signed on June 30, 2016.[80] This area was able to attain the 2010 1-hour SO_2 NAAQS without the emissions limits that were promulgated in the FIP being implemented. In the same June 30, 2016 rulemaking, EPA designated Independence County, where the Independence facility is located, as ''unclassifiable'' for the 2010 1-hour SO_2 NAAQS.[81] In a subsequent rulemaking signed on March 7, 2019, EPA approved the State of Arkansas' request to redesignate Independence County from unclassifiable to attainment/unclassifiable based on a new modeling analysis provided by the State.[82] In a rulemaking signed on December 21,

[78] 83 FR 62204.

[79] Entergy plans to cease coal combustion at Independence Units 1 and 2 by December 31, 2030, which we expect would result in comparable or greater SO_2 emissions reductions than required for the Independence facility under the FIP. However, this planned cessation of coal combustion at the Independence units by the end of 2030 is not required under the SIP revision.

[80] The EPA's attainment/unclassifiable designation for Jefferson County was based on, among other things, our evaluation of the State's modeling that showed attainment, and which we concluded generally followed EPA guidance. See 81 FR 45039 (July 12, 2016).

[81] The EPA's unclassifiable designation for Independence County was based on, among other things, our evaluation of the State's air dispersion modeling analysis, as well as the additional modeling analysis submitted by environmental groups for the area surrounding the Independence Steam Electric Station. Based on our evaluation of these analyses and our consideration of all available data and information, the EPA determined that the area cannot be classified as meeting or not meeting the NAAQS based on information available at the time. See 81 FR 45039 (July 12, 2016).

[82] EPA determined that the modeling analysis submitted by the State appropriately characterized the air quality in Independence County, Arkansas, and predicted that ambient SO_2 concentrations are below the 1-hour SO_2 NAAQS. See 84 FR 8986 (March 13, 2019).

2017, EPA designated all remaining areas in Arkansas as attainment/unclassifiable.[83] On March 18, 2019, EPA finalized a rule which retained the 2010 1-hour SO_2 standard. At the time that Independence County, Jefferson County, and all other areas in Arkansas were designated or redesignated as attainment/unclassifiable under the 2010 1-hour SO_2 NAAQS in June 2016, December 2017, and March 2019, Independence Units 1 and 2 and White Bluff Units 1 and 2 were emitting SO_2 at levels not restricted by SIP or FIP limits. So the establishment of the SIP limits based on low sulfur coal will not interfere with attainment of the SO_2 NAAQS in the near term. In the long term, the cessation of coal combustion at White Bluff will result in more reductions in SO_2 emissions than the FIP and will result in further improvement in air quality.

Since sulfate is a precursor to particulate matter, there is also a need to address whether withdrawal of the FIP and approval of the SIP revision will interfere with attainment of the PM NAAQS. There is no evidence that withdrawal of the SO_2 limits in the FIP and the approval of the SO_2 emission limits in the SIP revision will interfere with attainment of the PM NAAQS. At this time, and notwithstanding the fact that the FIP provisions have not gone into effect, the areas that would be potentially impacted by the increase in SO_2 emissions are attaining the 2012 annual $PM_{2.5}$ NAAQS. In a **Federal Register** document signed on January 15, 2015, EPA designated all areas in Arkansas as unclassifiable/attainment under the 2012 annual $PM_{2.5}$ NAAQS.[84] All areas in Arkansas were able to attain the 2012 annual $PM_{2.5}$ NAAQS before the SO_2 and PM emissions limits from the FIP were promulgated.

While the FIP provisions might have produced better air quality than the provisions we are approving into the SIP, CAA section 110(l) does not require that each SIP revision include greater emissions reductions than the plan being revised or replaced. Instead, section 110(l) requires a showing that approval of the SIP revision will not interfere with attainment and reasonable further progress or any other applicable CAA provision. In this case, the relevant areas are attaining the SO_2 and PM NAAQS even though the units at White Bluff and Independence are emitting SO_2 at levels not restricted by SIP or FIP limits. Thus, by approving the State's 0.60 lb/MMBtu SO_2 emission limits for White Bluff Units 1 and 2 and Independence Units 1 and 2, the EPA is approving limits that will further reduce emissions from the levels that were already sufficient to designate the potentially impacted areas as attainment/unclassifiable for both the 1-hour SO_2 NAAQS and the 2012 annual $PM_{2.5}$ NAAQS. Thus, there is no evidence to suggest that areas will not continue to attain the NAAQS following our approval of the SIP and concurrent withdrawal of the FIP.[85] Therefore, we find that EPA approval of the 0.60 lb/MMBtu SO_2 BART emission limits for White Bluff Units 1 and 2 and the 0.60 lb/MMBtu SO_2 emission limits for Independence Units 1 and 2 under the long-term strategy will not interfere with attainment of the 2010 1-hour SO_2 NAAQS or the 2012 annual $PM_{2.5}$ NAAQS under CAA section 110(l).

Additionally, since there are no areas in Arkansas designated nonattainment under the 2010 1-hour SO_2 NAAQS or the 2012 annual $PM_{2.5}$ NAAQS, the increase in SO_2 emissions would not impact any such nonattainment areas in the state. We are also not aware of any nonattainment areas in downwind states that are likely to be impacted by these emissions.

While the comment appears to focus on SO_2 controls for the White Bluff and Independence facilities, to the extent that the commenter is contending that the SO_2 emission limits we are taking final action to approve for other facilities would also violate the CAA's requirements under section 110(l), we note that this claim is incorrect. As explained above, one way of demonstrating noninterference is by showing that the status quo air quality will be preserved. In this case, the SO_2 controls for all other sources in the Phase II SIP revision (*i.e.,* AECC Bailey Unit 1, AECC McClellan Unit 1, AEP/SWEPCO Flint Creek Plant Boiler No. 1, Entergy Lake Catherine Unit 4, and the Entergy White Bluff Auxiliary Boiler), which we are taking final action to approve, are identical to those contained in the Arkansas FIP. All the PM BART controls in the Phase II SIP revision, which we are taking final action to approve, are also identical to those contained in the Arkansas FIP.

Comment: EPA's approval of ADEQ's SIP revisions is appropriate even though the SIP revision is not based on installation of the same control technology that was used to set the limits for White Bluff and Independence in the currently stayed FIP. While EPA has interpreted the CAA's anti-backsliding provision as allowing the Agency ''to approve a SIP revision unless the agency finds it will make the air quality worse,'' that standard is inapplicable here where the existing requirements have not yet gone into effect and are the subject of administrative and judicial challenges. Specifically, the SO_2 requirements for White Bluff and Independence were judicially stayed and cannot be deemed to represent the existing limitations applicable to the units. Thus, nothing in the SIP revision ''weakens or removes any pollution controls.'' To the contrary, the SIP revision would impose emission limitations that are better than the status quo.

Response: We agree with the commenter's assertion that, in this particular case, our approval of the SIP is appropriate even though the SIP revision is not based on installation of the same control technology that was used to set the limits for White Bluff and Independence in the FIP. However, we disagree with the commenter's characterization of the requirements of CAA 110(l) and the commenter's characterization of EPA's interpretation of those requirements. Under section 110(l) of the CAA, the EPA cannot approve a plan revision if the revision would interfere with any applicable requirements concerning attainment and reasonable further progress of the NAAQS, or any other applicable requirement of the Act. Section 110(l) applies to all requirements of the CAA and to all areas of the country regardless of their attainment status. To evaluate whether a plan revision would interfere with any requirements, air pollutants

[83] The EPA's designations for remaining areas in the state were based on an assessment and characterization of air quality through ambient air quality data, air dispersion modeling, other evidence and supporting information, or a combination of the above. See 83 FR 1098 (January 9, 2018).

[84] 80 FR 2206.

[85] We also note that for any area where modeling of actual SO_2 emissions served as the basis for designating such area as attainment of the 2010 1-hour SO_2 NAAQS, the SO_2 Data Requirements Rule under 40 CFR 51.1205 requires the submission of an annual report that documents the annual SO_2 emissions of each applicable source in each such area and provides an assessment of the cause of any emissions increase from the previous year. That report must also include a recommendation regarding whether additional modeling is needed to characterize air quality in any area to determine whether the area continues to meet the 2010 1-hour SO_2 NAAQS. Since modeling of actual SO_2 emissions served as the basis for EPA's designation of Jefferson County, where the White Bluff facility is located, and redesignation of Independence County, where the Independence facility is located, this annual reporting requirement applies to ADEQ. The data and other information provided by ADEQ in this annual report will help EPA assess whether actual annual SO_2 emissions from White Bluff, Independence, and other sources in Arkansas have increased to such an extent that there is uncertainty as to whether the areas where these sources are located continue to meet the 2010 1-hour SO_2 NAAQS. At this time, no reports have been submitted by ADEQ that indicate that revised modeling of SO_2 emissions from sources in Jefferson and Independence Counties is warranted.

whose emissions and/or ambient concentrations may change as a result of the revision must be identified. Noninterference with attainment of the NAAQS may be demonstrated by an air quality analysis showing that any emission changes associated with the revision will not interfere with attainment of the NAAQS. This option requires a showing that the area (as well as interstate and intrastate areas downwind) can attain the NAAQS even with the plan in its revised form. Noninterference may also be demonstrated by showing that the status quo air quality is preserved by the use of substitute measures to compensate for any emissions increases associated with the revision. *See Kentucky Resources Council* v. *EPA,* 467 F.3d 986 (6th Cir. 2006). A revision that maintains the status quo would not interfere with attainment of the NAAQS. *See Wildearth Guardians* v. *EPA,* 759 F.3d 1064 (9th Cir. 2014). In general, the level of rigor needed for any 110(l) demonstration will vary depending on the nature of the revision, its potential impact on air quality and the air quality in the affected area.

D. Modeling

Comment: We received comments arguing that the CALPUFF model is unreliable and should not be used in making BART determinations. A commenter stated that although CALPUFF may have had some limited utility in the BART screening process, it should not be used in making an SO_2 BART determination for White Bluff due to its purported limitations in accuracy and precision given the distances to Class I areas and the atmospheric conditions involved, as well as limited chemistry mechanism and blanket background ammonia values. One commenter presumed that CAMx modeling for White Bluff would likely show negligible visibility improvements from each of the SO_2 controls evaluated and contended that SO_2 BART is therefore the use of low sulfur coal even without Entergy's voluntary decision to cease coal combustion at White Bluff. Commenters also argued that CALPUFF is no longer an EPA preferred model, and that EPA should instead rely on the Comprehensive Air Quality Model with Extensions (CAMx), which the commenter claims is more reliable in characterizing visibility impairment.

Response: As we discuss in the Response to Comments (RTC) Document associated wih this rulemaking [86] and the RTC Document associated with the Arkansas Regional Haze FIP,[87] the use of CALPUFF in the context of the Regional Haze rule provides results that can be used to evaluate the level of visibility benefits anticipated for each level of control and is one of several factors considered in the overall BART determination. In the rulemaking for the BART Guidelines, we responded to comments concerning the limitations and appropriateness of using CALPUFF, and we further addressed similar comments in the RTC document associated with the Arkansas Regional Haze FIP. We stated in the BART Guidelines that the visibility results from CALPUFF could be used as one of the five factors in a BART evaluation and the impacts could be utilized because CALPUFF was the best modeling method available to calculate potential impacts for a BART evaluation.[88] The regulatory status of CALPUFF was changed in the recent revisions to the Guideline on Air Quality Models (GAQM) [89] as far as the classification of CALPUFF as a preferred model for transport of pollutants for primary impacts, not impacts based on chemistry. The GAQM changes indicated that the change in model preferred status had no impact on the use of CALPUFF to determine the applicability of BART or the BART determination itself.[90] CALPUFF is an appropriate tool for BART evaluations and remains the recommended model for BART.

The commenter contends that CALPUFF may have had some limited utility in the BART screening process (*i.e.,* making ''subject-to-BART'' determinations), but that its use for making a BART determination for White Bluff is not appropriate. We disagree with this contention. The BART Guidelines provide that states should establish a threshold that should be no higher than 0.5 deciviews for determining whether sources contribute to visibility and are therefore subject to BART [91] and recommend the use of CALPUFF [92] to predict the visibility impacts from a single source at a Class I area to compare against this threshold as well as to help inform the BART determination.[93] The CALPUFF modeling ADEQ relied on in its SO_2 BART determination for White Bluff is consistent with the BART Guidelines and Appendix W. Nearly every BART determination made since the promulgation of the Regional Haze Rule and the BART Guidelines has utilized the CALPUFF modeling method in analyzing impacts. Absent any additional information that would justify not using the CALPUFF model in this particular case, it is appropriate for the state to rely on CALPUFF modeling as it has done to support the White Bluff BART determination, consistent with the modeling for nearly every other BART determination EPA has reviewed and acted upon. EPA also concluded from the evaluation of the Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 Report case studies that the CALPUFF dispersion model performs in a reasonable manner and has no apparent bias toward over or under prediction, so long as the transport distance is limited to less than 300 km.[94] [95] We note that since the BART Guidelines were finalized in 2005

[86] See ''Arkansas Regional Haze Phase II SIP Revision Response to Comments,'' which can be found in the docket associated with this final rulemaking.

[87] See ''Response to Comments for the **Federal Register** Notice for the State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan,'' dated 8/31/2016. See Docket ID. EPA–R06–OAR–2015–0189, Document ID. AR020.0187.

[88] 70 FR 39123, 39124. ''We understand the concerns of commenters that the chemistry modules of the CALPUFF model are less advanced than some of the more recent atmospheric chemistry simulations. To date, no other modeling applications with updated chemistry have been approved by EPA to estimate single source pollutant concentrations from long range transport.'' and in discussion of using other models with more advanced chemistry it continues, ''A discussion of the use of alternative models is given in the Guideline on Air Quality in appendix W, section 3.2.''

[89] 82 FR 5182, 5196 (Jan. 17, 2017).

[90] 82 FR 5182, 5196 (Jan. 17, 2017). ''As detailed in the preamble of the proposed rule, it is important to note that the EPA's final action to remove CALPUFF as a preferred appendix A model in this Guideline does not affect its use under the FLM's guidance regarding AQRV assessments (FLAG 2010) nor any previous use of this model as part of regulatory modeling applications required under the CAA. Similarly, this final action does not affect the EPA's recommendation [See 70 FR 39104, 39122–23 (July 6, 2005)] that states use CALPUFF to determine the applicability and level of best available retrofit technology in regional haze implementation plans.''

[91] 40 CFR 51 Appendix Y, III(A)(1): ''As a general matter, any threshold that you use for determining whether a source ''contributes'' to visibility impairment should not be higher than 0.5 deciviews.''

[92] 40 CFR 51 Appendix Y, III(A)(3): ''CALPUFF is the best regulatory modeling application currently available for predicting a single source's contribution to visibility impairment''.

[93] 70 FR 39123: ''. . . we *also* recommend that the States use CALPUFF as a screening application in estimating the degree of visibility improvement that may reasonably be expected from controlling a single source in order to inform the BART determination.''

[94] Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 Summary Report and Recommendations for Modeling Long-Range Transport Impacts. Publication No. EPA–454/R–98–019. Office of Air Quality Planning & Standards, Research Triangle Park, NC. 1998.

[95] See also 68 FR 18458, 2003 Revisions to Appendix W, Guideline on Air Quality Models.

there has been more modeling with CALPUFF for BART and PSD primary impact purposes and the general community has utilized CALPUFF in the 300–450 km range many times. EPA has indicated historically that use of CALPUFF was generally acceptable at 300 km and for larger emissions sources with elevated stacks EPA and FLM representatives have also allowed or supported the use of CALPUFF results beyond 400 km in some cases.[96] EPA and FLM representatives have weighed the additional potential uncertainties with the magnitude of the modeled impacts in comparison to screening/impact thresholds on a case-by-case basis in approving the use of CALPUFF results at these extended ranges. Furthermore, we note that White Bluff is located within 200 km of Caney Creek and Upper Buffalo. Therefore, we find that ADEQ appropriately considered CALPUFF modeling for White Bluff in the SIP revision. We invite the reader to examine our detailed responses to comments arguing against the use of CALPUFF modeling in making BART determinations in the RTC Document associated wih this rulemaking[97] as well as the RTC Document associated with the Arkansas Regional Haze FIP.[98] We find that Arkansas' reliance on CALPUFF modeling in the SIP revision is reasonable and appropriate since it meets the requirements of the CAA and the Regional Haze Rule and is consistent with the BART Guidelines and Appendix W. Therefore, we find no reason to disapprove the SIP's reliance on CALPUFF modeling.

With regard to the comment that CAMx modeling would show that visibility improvements from each of the SO_2 controls evaluated are negligible and that SO_2 BART should therefore be the use of low sulfur coal even without Entergy's voluntary decision to cease coal combustion at White Bluff, we emphasize that the issue of what would constitute BART in the absence of Entergy's enforceable measure to cease burning coal in 2028 is not before the agency in this action. We also note that the CALPUFF results are not an apples to apples comparison to the CAMx model results referred to by the commenter due to differences in metrics, models and model inputs.[99] We discuss this issue and our assessment of CAMx modeling in detail in the RTC Document associated with this rulemaking.[100] In sum, the visibility modeling provided in the SIP revision demonstrates that scrubber controls are anticipated to result in significant visibility benefits.

E. Legal

Comment: EPA cannot approve Arkansas's SIP submission because ADEQ failed to comply with Arkansas's statutory legislative review process for rulemaking by not submitting the Regional Haze SIP for legislative review; the SIP is therefore invalid and unenforceable until ADEQ complies with the law.

Response: It is EPA's position that Arkansas' SIP revision has met applicable requirements for an enforceable SIP, including enforceable emission limitations and other control measures, means, or techniques as well as schedules and timetables for compliance as required under section 110(a)(2)(A). The SIP also includes a program to provide for enforcement of the measures described above, as required by section 110(a)(2)(C). Furthermore, the ADEQ has shown the SIP meets Section 110(a)(2)(F)(i) through (iii) (monitoring and recordkeeping for sources) and section 110(a)(2)(K) (modeling). Section 169A(b)(2) requires a regional haze SIP to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress, including a long-term strategy and certain defined major stationary sources to meet BART. ADEQ's SIP revision included Administrative Orders entered between ADEQ and the companies that own the facilities that are required to comply with emission limits and schedules in compliance with the BART and long-term strategy requirements. Based upon all of the above, it is appropriate for EPA to approve Arkansas SIP revision in accordance with section 110(k)(3).

As part of the state's notice and comment period for the SIP, ADEQ received a comment that ADEQ lacked the authority to implement the SIP revision under state law since the SIP (including the Administrative Orders) did not undergo legislative review. The comment further alleged that EPA cannot approve the SIP until the Arkansas legislature has reviewed the SIP revision. ADEQ responded that the SIP did not need to undergo legislative review per Arkansas state law because, among other things, it does not fit within the state's statutory definition of a ''rule'', rather state law defines SIPs as a plan, the statutory construction of provisions pertaining to plans, and in particular SIPs, exhibits an intent on the part of the Arkansas legislature to create a separate and distinct set of requirements for SIPs, and the SIP is issued by the Director and such action is subject to an appeals process differently from that of a rule. Furthermore, ADEQ has the authority under state law to enter into Administrative Orders to include as part of its SIP revision. These all establish that legislative review is not required for this SIP revision, thereby the state's SIP process met the state's statutory requirements and when the Director issued the SIP, it became an enforceable document under state law. See Response 33 of Arkansas' ''Responsive Summary for State Implementation Plan Revision: Revisions to Arkansas SIP: Regional Haze SIP Revision for 2008–2018 Planning Period.'' [101] This is a matter of Arkansas interpreting its state law. EPA finds it is a reasonable interpretation and defers to ADEQ's interpretation regarding the resulting requirements for the process for state rulemaking for enforceable SIP revisions.

Based on ADEQ's response to comments explaining the state authority to issue an enforceable SIP revision without the need to undergo state legislative review, we find it reasonable

[96] For example, South Dakota used CALPUFF for Big Stone's BART determination, including its impact on multiple Class I areas further than 400 km away, including Isle Royale, which is more than 600 km away. See 76 FR 76656. Nebraska relied on CALPUFF modeling to evaluate whether numerous power plants were subject to BART where the ''Class I areas [were] located at distances of 300 to 600 kilometers or more from'' the sources. See Best Available Retrofit Technology Dispersion Modeling Protocol for Selected Nebraska Utilities, p. 3. EPA Docket ID No. EPA–R07–OAR–2012–0158–0008. Texas relied on CALPUFF to screen BART-eligible non-EGU sources at distances of 400 to 614 km for some sources. See 79 FR 74818 (Dec. 16, 2014), 81 FR 296 (Jan. 5, 2016).

[97] See ''Arkansas Regional Haze Phase II SIP Revision Response to Comments,'' which can be found in the docket associated with this final rulemaking.

[98] See ''Response to Comments for the **Federal Register** Notice for the State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan,'' dated 8/31/2016. See Docket ID. EPA–R06–OAR–2015–0189, Document ID. AR020.0187.

[99] Some of the major differences are: (1) CALPUFF modeling used maximum 24-hour emission rates, while the CAMx modeling used annual average emission rates; (2) CALPUFF focuses on the day with the 98th percentile highest visibility impact from the source being evaluated, whereas the CAMx modeling analysis was focused on the average visibility impacts across the 20% worst days regardless of whether the impacts from a specific facility are large or small; and (3) CAMx models all sources of emissions in the modeling domain, which includes all of the continental U.S., whereas CALPUFF only models the impact of emissions from one facility without explicit chemical interaction with other sources' emissions.

[100] See ''Arkansas Regional Haze Phase II SIP Revision Response to Comments,'' which can be found in the docket associated with this final rulemaking.

[101] *https://www.adeq.state.ar.us/air/planning/sip/pdfs/regional-haze/public-notice-and-comments-aggregated.pdf.*

for the state to conclude that ADEQ followed state law in developing and finalizing its SIP revision. Thus, the state's SIP revision is enforceable as a matter of state law and ADEQ has met the requirements of section 110(a)(2)(A), 110(a)(2)(C), and 110(a)(2)(E) since its SIP includes ''necessary assurances'' that the state agency responsible for implementing the SIP has adequate ''authority'' under state law ''to carry out such implementation plan'' and ''responsibility for ensuring adequate implementation'' of the plan. It also includes ''enforceable limitations and other control measures'' as necessary to meet ''the applicable requirements of the CAA and includes ''a program for enforcement'' of the required emission limitations and control measures. Thus, it is appropriate for EPA to finalize approval of ADEQ's plan since it meets all applicable requirements of the Clean Air Act. We believe it is reasonable to rely on ADEQ's explanation and interpretation. Moreover, an Administrative Law Judge and the APCEC have also upheld the state's interpretation of the state law with regards to the issuance of SIPs not being a ''rule'' including SIPs containing administrative orders and there being no statutory requirement for them to undergo state legislative review. However, we also acknowledge that an appeal process of the state rulemaking procedures for the SIP revision is still ongoing. When a rulemaking is being challenged, the EPA relies on the current legal interpretation of state law. If circumstances change where Arkansas is no longer found to have followed the state process for issuing the SIP and the Administrative Orders and needs to undergo another round of state rulemaking because the SIP revision is unenforceable, section 110(k)(5) of the CAA allows for EPA to call for plan revisions and sets out timetables for a SIP or FIP revision. This is commonly known as a ''SIP call.''

Comment: In its attempt to avoid Arkansas' statutory legislative-review requirement, ADEQ has repeatedly represented to an Arkansas tribunal that the SIP itself is not actually enforceable. Thus, according to ADEQ, the SIP itself is not enforceable under state law, but only enforceable through separate Administrative Orders. Because ADEQ admits that the SIP revision is not, by itself, enforceable, the SIP is not approvable under the Clean Air Act. 42 U.S.C. 7410(a)(2)(A). EPA cannot approve the SIP revision unless ADEQ corrects the state law deficiencies or provides the necessary assurances that the state plan is, in fact, an enforceable implementation plan.

Response: While we agree with the commenter's statement that a state must demonstrate that it has the necessary legal authority under state law to adopt and implement an enforceable SIP, we disagree with the commenter's assertion that Arkansas has failed to demonstrate that it has such authority. According to appendix V to 40 CFR part 51, states are required to submit evidence that they have this authority at the time they submit a SIP revision. Arkansas submitted such evidence. See AR020.0267–003 State Legal Authority to Adopt and Implement SIP. The requirements that need to be met in order for a state to adopt and implement provisions intended to meet CAA requirements vary from state to state and are governed by state law. The requirements that govern SIP submissions for Arkansas are found in Ark. Code Ann. 8–4–317, and, as explained by the State, there is no legislative review required for a SIP. See pg. 5 of Ex. A. This position does not make the SIP unenforceable. The Director issues the decision and an appeal is processed as a permit appeal. ADEQ is not arguing that the SIP is not an enforceable decision; rather, it is arguing issuance of the SIP does not fall within the state statutory definition of a ''rule'' requiring legislative review. As explained above, the State has already provided evidence that EPA deemed adequate to meet the requirements in Appendix V. We are aware that the commenter requested an adjudicatory hearing at the state level, as is appropriate, and the administrative law judge ruled in the State's favor. If it is eventually found by a judge or hearing officer during the appropriate state judicial or administrative process that the Commenter is correct in their assertion that the State did not submit an enforceable SIP to EPA, EPA can issue a SIP call under CAA 110(k)(5) to require the State to correct this deficiency.

In addition, the commenter states that ADEQ's position is that the SIP revision as a package is not enforceable, only the individual, component Administrative Orders. According to the commenter, since the SIP package as a whole is not enforceable, it does not meet the requirements of CAA section 110(a)(2). We reject that the ADEQ's position is that the SIP package as a whole is not enforceable, as discussed previously. As explained above, an Administrative Law Judge and the Commission have determined that the issuance of the SIP revision by the Director did not need legislative review in order for the SIP to be adopted and implemented as a matter of state law, thereby making it enforceable.

F. General

Comment: Although public utility plant owners and operators will be responsible initially for installing the pollution controls or taking other actions required under the Arkansas Regional Haze SO_2 and PM SIP Revision, under Arkansas law, such owners and operators are permitted to directly pass through and recover the costs and expenses of installing, operating, and maintaining pollution controls from electric utility customers and ratepayers through electricity rates and tariffs filed with the APSC. In addition, utility plant owners and operators are permitted to recover from electric utility customers and ratepayers the cost of replacement power or capacity needed to replace the premature retirement of electric generating units, or the costs of switching fuel at such facilities. These ratepayers, some of which are providers of goods and services, would be harmed financially if any of these plants were to curtail or modify operations or prematurely close pursuant to the Arkansas Regional Haze SO_2 and PM SIP Revision.

Response: We appreciate the commenter's concerns. We note that the SIP revision submitted by ADEQ did not contain an analysis of the impact the requirement of these controls would have on electricity ratepayers. Neither has the commenter provided such an analysis. There are many factors that could serve to increase or decrease electric rates and absent such an analysis, it is not possible to say what overall effect the SIP's requirements will have on electric rates. ADEQ, in its drafting of the SIP revision, ensured that the requirements of the CAA and the Regional Haze Rule were met, including cost considerations for BART determinations for each of the affected facilities. While we assure the commenter that we are very sensitive to the ramifications of our actions in the regional haze program, we note that we are approving a majority of the Arkansas Regional Haze SO_2 and PM SIP Revision as it meets the requirements of the CAA and the Regional Haze Rule. Our proposal and our final action associated with this document explain the rationale for our approval. We cannot disapprove a SIP revision and/or substitute our judgment for that of the state when we find that the SIP revision meets all requirements of the CAA and applicable federal regulations.

Comment: Various commenters expressed support for one or more portions of our proposal, including our proposed approval of ADEQ's SO_2 BART determination for White Bluff Units 1 and 2; SO_2 BART determination for Flint Creek No. 1 Boiler; SO_2, NO_X, and PM BART determinations for the White Bluff Auxiliary Boiler; and ADEQ's reasonable progress determination.

Response: We appreciate support of our proposed approval of ADEQ's SIP revision. After careful consideration of all the comments we received, we are finalizing our approval of the majority of the SIP revision without changes from proposal. We identify the portions of the SIP revision we are approving elsewhere in this final action.

IV. Final Action

We are approving a portion of the Arkansas SIP revision submitted on August 8, 2018, as meeting the regional haze requirements for the first implementation period. This action includes the finding that the submittal meets the applicable regional haze requirements as set forth in sections 169A and 169B of the CAA and 40 CFR 51.300–308. The EPA is approving the SIP revision submittal as meeting the following regional haze requirements for the first implementation period: The core requirements for regional haze SIPs found in 40 CFR 51.308(d), including the reasonable progress requirements as well as the long-term strategy requirements with respect to all sources other than the Domtar Ashdown Mill; the SO_2, PM, and particular NO_X BART requirements for regional haze visibility impairment with respect to emissions of visibility impairing pollutants from EGUs in 40 CFR 51.308(e); the requirement for coordination with state and FLMs in 40 CFR 51.308(i); and the requirement for coordination and consultation with states with Class I areas affected by Arkansas sources in 40 CFR 51.308(d)(3)(i).

Specifically, the EPA is finalizing approval of the following revisions to the Arkansas Regional Haze SIP submitted to EPA on August 8, 2018: The SO_2 and PM BART requirements for the AECC Bailey Plant Unit 1; the SO_2 and PM BART requirements for the AECC McClellan Plant Unit 1; the SO_2 BART requirements for Flint Creek Plant Boiler No. 1; the SO_2 BART requirements for the White Bluff Plant Units 1 and 2; the SO_2, NO_X, and PM BART requirements for the White Bluff Auxiliary Boiler; and the prohibition on burning of fuel oil at Lake Catherine Unit 4 until SO_2 and PM BART determinations for the fuel oil firing scenario are approved into the SIP by EPA. We are also finalizing our approval of the compliance dates and reporting and recordkeeping requirements associated with these BART determinations. These BART requirements have been made enforceable by the state through Administrative Orders that have been adopted and incorporated in the SIP revision. We are finalizing our approval of these BART Administrative Orders as part of the SIP. The BART requirements and associated Administrative Orders are listed under Table 1 below. We are finalizing our withdrawal of our February 12, 2018,[102] approval of Arkansas' reliance on participation in the CSAPR ozone season NO_X trading program to satisfy the NO_X BART requirement for the White Bluff Auxiliary Boiler given that Arkansas erroneously identified the Auxiliary Boiler as participating in CSAPR for ozone season NO_X. We are taking final action to replace our prior approval of Arkansas' determination for the White Bluff Auxiliary Boiler with our final approval of the source-specific NO_X BART emission limit contained in the Arkansas Regional Haze Phase II SIP revision. The NO_X BART requirement has been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are finalizing our approval of the Administrative Order that contains the NO_X BART requirement as part of the SIP. The NO_X BART requirement and associated Administrative Order is listed under Table 1 below. We are finalizing our approval of ADEQ's revised identification of the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible and the determination based on additional information and technical analysis presented in the SIP revision that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART.

We are also finalizing our determination that the reasonable progress requirements under § 51.308(d)(1) have been fully addressed for the first implementation period. The Arkansas Regional Haze Phase I SIP revision, which we approved on February 12, 2018,[103] addressed the reasonable progress requirements with respect to NO_X emissions and the SIP revision before us addresses the reasonable progress requirements with respect to SO_2 and PM emissions. Specifically, we are finalizing our approval of the state's focused reasonable progress analysis and the reasonable progress determination that no additional SO_2 controls at Independence Units 1 and 2 or any other Arkansas sources are necessary under reasonable progress for the first implementation period. We are also in agreement with the state's calculation of revised RPGs for Arkansas' Class I areas. We are basing our final approval of the reasonable progress provisions and agreement with the state's calculation of the revised RPGs on the following: The state's discussion of the key pollutants and source categories that contribute to visibility impairment in Arkansas' Class I areas per the CENRAP's source apportionment modeling; the state's identification of a group of large SO_2 point sources in Arkansas for potential evaluation of controls under reasonable progress; the state's rationale for narrowing down its list of potential sources to evaluate under the reasonable progress requirements; and the state's evaluation and reasonable weighing of the four statutory factors along with consideration of the visibility benefits of controls for the Independence facility.

The Arkansas Regional Haze Phase II SIP revision does not address BART and associated long-term strategy requirements for the Domtar Ashdown Mill Power Boilers No. 1 and 2, and the FIP's BART emission limits for the facility continue to remain in place at this time. However, ADEQ recently submitted a SIP revision to address the regional haze requirements for Domtar Power Boilers No. 1 and No. 2, and we will evaluate any conclusions ADEQ has drawn in that submission with respect to the need to conduct a reasonable progress analysis for Domtar. As long as the BART requirements for Domtar continue to be addressed by the measures in the FIP, however, we propose to agree with ADEQ's conclusion that nothing further is needed to satisfy the reasonable progress requirements for the first implementation period. With respect to the RPGs for Arkansas' Class I areas, we will assess the SIP revision ADEQ recently submitted addressing Domtar to determine if changes are needed based on any differences between the SIP-based measures and the measures currently contained in the FIP. We intend to take action on the SIP revision addressing Domtar in a future rulemaking.

We are finalizing our approval of the components of the long-term strategy under § 51.308(d)(3) addressed by the Arkansas Regional Haze Phase II SIP revision, including the BART measures contained in the SIP revision and the SO_2 emission limit of 0.60 lb/MMBtu under the long-term strategy provisions

[102] 83 FR 5927.

[103] 83 FR 5927.

for Independence Units 1 and 2 based on the use of low sulfur coal. We are also finalizing our approval of the compliance date and reporting and recordkeeping requirements associated with the SO_2 emission limit for the Independence facility under the long term strategy provisions. These requirements for Independence Units 1 and 2 have been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are finalizing our approval of this BART Administrative Order as part of the SIP. The SO_2 emission limit and associated Administrative Order for the Independence facility are listed under Table 2 below. We are making a final determination that Arkansas' long-term strategy is approved with respect to sources other than the Domtar Ashdown Mill. We are also finalizing our determination that Arkansas has appropriately provided an opportunity for consultation to the FLMs and to Missouri on the SIP revision, as required under § 51.308(d)(3)(i) and (i)(2).

The BART emission limits we are approving as source-specific requirements that are part of the SIP are presented in Table 1; the SO_2 emission limits under the long-term strategy and associated Administrative Order we are approving for the Independence facility are presented in Table 2; and Arkansas' revised 2018 RPGs are presented in Table 3.

TABLE 1—SIP REVISION BART EMISSION LIMITS AND ADMINISTRATIVE ORDERS EPA IS APPROVING IN THIS FINAL ACTION

Subject-to-BART source	SIP revision SO_2 BART emission limits	SIP revision PM BART emission limits	SIP revision NO_X BART emission limits	Administrative order
AECC Bailey Unit 1	0.5% limit on sulfur content of fuel combusted*.	0.5% limit on sulfur content of fuel combusted*.	Already SIP-approved ..	Administrative Order LIS No. 18–071.
AECC McClellan Unit 1	0.5% limit on sulfur content of fuel combusted*.	0.5% limit on sulfur content of fuel combusted*.	Already SIP-approved ..	Administrative Order LIS No. 18–071.
AEP Flint Creek Boiler No. 1.	0.06 lb/MMBtu*	Already SIP-approved ..	Already SIP-approved ..	Administrative Order LIS No. 18–072.
Entergy Lake Catherine Unit 4 (fuel oil firing scenario)	Unit is allowed to burn only natural gas*.	Unit is allowed to burn only natural gas*.	Already SIP-approved ..	Administrative Order LIS No. 18–073.
Entergy White Bluff Unit 1.	0.60 lb/MMBtu (Interim emission limit with a 3-year compliance date and cessation of coal combustion by end of 2028).	Already SIP-approved ..	Already SIP-approved ..	Administrative Order LIS No. 18–073.
Entergy White Bluff Unit 2.	0.60 lb/MMBtu (Interim emission limit with a 3-year compliance date and cessation of coal combustion by end of 2028).	Already SIP-approved ..	Already SIP-approved ..	Administrative Order LIS No. 18–073.
Entergy White Bluff Auxiliary Boiler.	105.2 lb/hr*	4.5 lb/hr*	32.2 lb/hr*	Administrative Order LIS No. 18–073.

*This BART emission limit required by the SIP revision is the same as what was required under the Arkansas Regional Haze FIP.

TABLE 2—SIP REVISION EMISSION LIMITS UNDER REASONABLE PROGRESS AND ADMINISTRATIVE ORDERS PROPOSED FOR APPROVAL

Source	SIP revision SO_2 emission limits (lb/MMBtu)	Administrative order
Entergy Independence Unit 1	0.60	Administrative Order LIS No. 18–073.
Entergy Independence Unit 2	0.60	Administrative Order LIS No. 18–073.

TABLE 3—ARKANSAS' REVISED 2018 RPGS

Class I area	2018 RPG 20% worst days (dv)
Caney Creek	22.47
Upper Buffalo	22.51

Concurrent with our final approval of the Arkansas Regional Haze Phase II SIP revision, we are finalizing in a separate rulemaking our final action to withdraw those portions of the Arkansas Regional Haze FIP at 40 CFR 52.173 that impose SO_2 and PM BART emission limits for Bailey Unit 1; SO_2 and PM BART emission limits for McClellan Unit 1; the SO_2 BART emission limit for Flint Creek Boiler No. 1; the SO_2 BART emission limits for White Bluff Units 1 and 2; the SO_2 and PM BART emission limits for the White Bluff Auxiliary Boiler; the prohibition on burning fuel oil at Lake Catherine Unit 4; and the SO_2 emission limits for Independence Units 1 and 2 under the reasonable progress provisions.[104]

[104] Our final action withdrawing part of the Arkansas Regional Haze FIP is published elsewhere in this issue of the **Federal Register**.

We find that an approval of the SIP revision meets the Clean Air Act's 110(1) provisions. Approval of the Arkansas Regional Haze SO_2 and PM SIP revision will not interfere with continued attainment of all the NAAQS within the state of Arkansas, nor will it interfere with any other applicable requirements of the CAA.

V. Incorporation by Reference

In this final action, we are including regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are incorporating by reference revisions to the Arkansas source-specific requirements as described in the Final Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and in hard copy at the EPA Region 6 office (please contact the person listed in **FOR FURTHER INFORMATION CONTACT** for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated in the next update to the SIP compilation.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k)(3); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Best available retrofit technology, Incorporation by reference, Intergovernmental relations, Ozone, Particulate Matter, Regional haze, Reporting and recordkeeping requirements, Sulfur Dioxide, Visibility.

Dated: August 28, 2019.

Kenley McQueen,

Regional Administrator, Region 6.

Title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart E—Arkansas

■ 2. In § 52.170:

■ a. The table in paragraph (d), entitled ''EPA-Approved Arkansas Source-Specific Requirements'' is revised; and

■ b. The third table in paragraph (e), entitled ''EPA-Approved Non-Regulatory Provisions and Quasi-Regulatory Measures in the Arkansas SIP,'' is amended by adding and entry for ''Arkansas Regional Haze Phase II SIP Revision'' at the end of the table.

The revision and addition read as follows:

§ 52.170 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED ARKANSAS SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit or Order No.	State approval/ effective date	EPA approval date	Comments
Arkansas Electric Cooperative Corporation Carl E. Bailey Generating Station.	Administrative Order LIS No. 18–071.	8/7/2018	9/27/2019 [[Insert **Federal Register** citation of the final rule].	Unit 1.
Arkansas Electric Cooperative Corporation John L. McClellan Generating Station.	Administrative Order LIS No. 18–071.	8/7/2018	9/27/2019 [[Insert **Federal Register** citation of the final rule].	Unit 1.
Southwestern Electric Power Company Flint Creek Power Plant.	Administrative Order LIS No.. 18–072	8/7/2018	9/27/2019 [[Insert **Federal Register** citation of the final rule].	Unit 1.
Entergy Arkansas, Inc. Lake Catherine Plant.	Administrative Order LIS No. 18–073.	8/7/2018	9/27/2019 [[Insert **Federal Register** citation of the final rule].	Unit 4.
Entergy Arkansas, Inc. White Bluff Plant.	Administrative Order LIS No. 18–073.	8/7/2018	9/27/2019 [[Insert **Federal Register** citation of the final rule].	Units 1, 2, and Auxiliary Boiler.
Entergy Arkansas, Inc. Independence Plant.	Administrative Order LIS No. 18–073.	8/7/2018	[[Insert Date of publication of the final rule in the **Federal Register**] [[Insert **Federal Register** citation of the final rule].	Units 1 and 2.

(e) * * *

* * * * *

EPA-APPROVED NON-REGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE ARKANSAS SIP

Name of SIP provision	Applicable geographic or non-attainment area	State submittal/ effective date	EPA approval date	Explanation
*	*	*	*	*
Arkansas Regional Haze Phase II SIP Revision.	Statewide	August 8, 2018	9/27/2019 [[Insert **Federal Register** citation of the final rule].	Regional Haze SIP revision addressing SO_2 and PM BART requirements for Arkansas EGUs, NO_X BART requirement for the White Bluff Auxiliary Boiler, reasonable progress requirements for SO_2 and PM for the first implementation period, and the long-term strategy requirements. We are approving a portion of this SIP revision. There are two aspects of this SIP revision we are not taking action on at this time: (1) The interstate visibility transport requirements under section 110(a)(2)(D)(i)(II); and (2) the long-term strategy is approved with respect to sources other than the Domtar Ashdown Mill.

■ 3. In § 52.173, add paragraph (g) to read as follows:

§ 52.173 Visibility protection.

* * * * *

(g) *Regional Haze Phase II SIP Revision.* A portion of the Regional Haze Phase II SIP Revision submitted on August 8, 2018, is approved as follows:

(1) Identification of the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible and the determination based on the additional information and technical analysis presented in the SIP revision that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART. (2) SO_2 and PM BART for the AECC Bailey Plant Unit 1; SO_2 and PM BART for the AECC McClellan Plant Unit 1; SO_2 BART for the AEP/SWEPCO Flint Creek Plant Boiler No. 1; SO_2 BART for Entergy White Bluff Units 1 and 2; SO_2, NO_X, and PM BART for the Entergy White Bluff Auxiliary Boiler; and the prohibition on burning of fuel oil at Entergy Lake Catherine Unit 4 until SO_2 and PM BART determinations for the fuel oil firing scenario are approved into the SIP by EPA.

(3) The focused reasonable progress analysis and the reasonable progress determination that no additional SO_2 and PM controls are necessary under the reasonable progress requirements for the first implementation period.

(4) The long-term strategy is approved with respect to sources other than the Domtar Ashdown Mill. This includes the BART emission limits contained in the SIP revision and the SO_2 emission limit of 0.60 lb/MMBtu under the long-term strategy provisions for Independence Units 1 and 2 based on the use of low sulfur coal.

(5) Consultation and coordination in the development of the SIP revision with the FLMs and with other states with Class I areas affected by emissions from Arkansas sources.

[FR Doc. 2019–19497 Filed 9–26–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2019–0081; FRL–9999–66–Region 8]

Clean Data Determination; Salt Lake City, Utah 2006 Fine Particulate Matter Standards Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a clean data determination (CDD) for the 2006 24-hour fine particulate matter ($PM_{2.5}$) Salt Lake City, Utah, (UT) nonattainment area (NAA). The proposed determination is based upon quality-assured, quality-controlled, and certified ambient air monitoring data for the period 2016–2018, available in the EPA's Air Quality System (AQS) database, showing the area has monitored attainment of the 2006 24-hour $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). Based on our proposed determination that the Salt Lake City, UT NAA is currently attaining the 24-hour $PM_{2.5}$ NAAQS, the EPA is also proposing to determine that the obligation for Utah to make submissions to meet certain Clean Air Act (CAA or the Act) requirements related to attainment of the NAAQS for this area is not applicable for as long as the area continues to attain the NAAQS.

DATES: This rule is effective on October 28, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2019–0081. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Crystal Ostigaard, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–QP, 1595 Wynkoop Street, Denver, Colorado, 80202–1129, (303) 312–6602, *ostigaard.crystal@epa.gov.*

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

I. Background

On June 5, 2019 (84 FR 26053), we published a notice proposing a CDD for the 2006 24-hour $PM_{2.5}$ Salt Lake City, UT NAA and requested comments by July 5, 2019. Specifically, the proposed determination was based upon quality-assured, quality-controlled, and certified ambient air monitoring data for the period 2016–2018, available in the AQS database, showing the area has attained the 2006 24-hour $PM_{2.5}$ NAAQS. Based on our proposed determination that the Salt Lake City, UT NAA is currently attaining the 24-hour $PM_{2.5}$ NAAQS, the EPA also proposed to determine that the obligation for Utah to make submissions to meet certain CAA requirements related to attainment of the NAAQS for this area is not applicable for as long as the area continues to attain the NAAQS.

We received a request from the Center for Biological Diversity to extend the comment period and, in response, we extended the comment period to July 22, 2019 (84 FR 29455).

II. Response to Comments

The EPA received a total of six comments on the proposed action prior to the close of the public comment period. The first comment was from the Center for Biological Diversity (requesting an extended comment period), the second and third comments were from named individuals, the fourth comment was anonymous, the fifth comment was from the Utah Petroleum Association (UPA), and the sixth comment was from the Center for Biological Diversity, HEAL Utah, and Western Resource Advocates. Our Response to Comments document in the docket for this action contains a summary of the comments and the EPA's responses. The full text of the public comments, as well as all other documents relevant to this action, are available in the docket (EPA–R08–OAR–2019–0081).

III. Final Action

No comments were submitted that changed our assessment of the adequacy of the proposed CDD for the Salt Lake City $PM_{2.5}$ NAA. For the reasons stated in our proposed notice the EPA is finalizing a CDD for the 2006 24-hour $PM_{2.5}$ Salt Lake City, UT NAA based on the area's current attainment of the standard. Pursuant to 40 CFR 51.1015(a) and (b), the EPA is determining that the obligation to submit any remaining attainment-related state implementation plan (SIP) revisions arising from classification of the Salt Lake City, UT area as a Moderate NAA and subsequent reclassification as a Serious NAA under subpart 4 of part D (of title I of the Act) for the 2006 24-hour $PM_{2.5}$ NAAQS is not applicable for so long as the area continues to attain the 2006 24-hour $PM_{2.5}$ NAAQS. In particular, as discussed in the proposed action (84 FR 3373), the obligation for Utah to submit attainment demonstrations, projected emissions inventories, reasonably available control measures (including reasonably available control technology), reasonable further progress plans, motor vehicle emissions budgets, quantitative milestones, and contingency measures, for the Salt Lake City, UT area are suspended until such time as: (1) The area is redesignated to attainment, after which such requirements are permanently discharged; or (2) the EPA determines that the area has re-violated the $PM_{2.5}$ NAAQS, at which time the State shall submit such attainment plan elements for the Moderate and Serious NAA plans by a future date to be determined by the EPA and announced through publication in the **Federal Register** at the time the EPA determines the area is violating the $PM_{2.5}$ NAAQS.

The CDD does not suspend Utah's obligation to submit CAA requirements not related to demonstrating attainment, which includes the base-year emission inventory, nonattainment new source review revisions, and best available control measures/best available control technology. This action does not constitute a redesignation to attainment under CAA section 107(d)(3).

IV. Statutory and Executive Order Reviews

This action finalizes a determination of attainment based on air quality and suspends certain federal requirements, and thus would not impose additional requirements beyond those imposed by state law. For this reason, this final 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 (82 FR 9339, February 2, 2017) regulatory action because this action is not significant under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 16, 2019.

Gregory Sopkin,

Regional Administrator, Region 8.

[FR Doc. 2019–20380 Filed 9–26–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0189; FRL–9997–88–Region 6]

Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze Federal Implementation Plan Revisions; Withdrawal of Portions of the Federal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending a Federal Implementation Plan (FIP) that addresses regional haze for the first planning period for Arkansas as it applies to the best available retrofit technology (BART) requirements for sulfur dioxide (SO_2) and particulate matter (PM) for seven electric generating units (EGUs) in Arkansas and the SO_2 requirements under the reasonable progress provisions. These portions of the FIP will be replaced by the portions of a revision to the Arkansas State Implementation Plan (SIP) that we are taking final action to approve in a separate rulemaking that is published elsewhere in this issue of the **Federal Register**.

DATES: This final rule is effective October 28, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R06–OAR–2015–0189. All documents in the dockets are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270–2102.

FOR FURTHER INFORMATION CONTACT: Dayana Medina, (214) 665–7241; *medina.dayana@epa.gov.*

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

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I. What is the background for this action?
II. What Final action is EPA taking?
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IV. Statutory and Executive Order Reviews

I. What is the background for this action?

Arkansas submitted a SIP revision on September 9, 2008, to address the requirements of the first regional haze implementation period. On August 3, 2010, Arkansas submitted a SIP revision with mostly non-substantive revisions to Arkansas Pollution Control and Ecology Commission (APCEC) Regulation 19, Chapter 15.[1] On September 27, 2011, the State submitted supplemental information to clarify several aspects of the September 9, 2008 submittal. We are hereafter referring to these regional haze submittals collectively as the ''2008 Arkansas Regional Haze SIP.'' On March 12, 2012, we partially approved and partially disapproved the 2008 Arkansas Regional Haze SIP.[2] On September 27, 2016, in accordance with Section 110(c)(1) of the CAA, we promulgated a FIP (the Arkansas Regional Haze FIP) addressing the disapproved portions of

[1] The September 9, 2008 SIP submittal included APCEC Regulation 19, Chapter 15, which is the state regulation that identified the BART-eligible and subject-to-BART sources in Arkansas and established BART emission limits for subject-to-BART sources. The August 3, 2010 SIP revision did not revise Arkansas' list of BART-eligible and subject-to-BART sources or revise any of the BART requirements for affected sources. Instead, it included mostly non-substantive revisions to the state regulation.

[2] 77 FR 14604.

the 2008 Arkansas Regional Haze SIP.[3] Among other things, the FIP established SO_2, nitrogen oxide (NO_X), and PM emission limits under the BART requirements for nine units at six facilities: Arkansas Electric Cooperative Corporation (AECC) Bailey Plant Unit 1; AECC McClellan Plant Unit 1; the American Electric Power/Southwestern Electric Power Company (AEP/SWEPCO) Flint Creek Plant Boiler No. 1; Entergy Arkansas, Inc. (Entergy) Lake Catherine Plant Unit 4; Entergy White Bluff Plant Units 1 and 2; Entergy White Bluff Auxiliary Boiler; and the Domtar Ashdown Mill Power Boilers No. 1 and 2. The FIP also established SO_2 and NO_X emission limits under the reasonable progress requirements for Entergy Independence Units 1 and 2.

Following the issuance of the Arkansas Regional Haze FIP, the State of Arkansas and several industry parties filed petitions for reconsideration and a motion for an administrative stay of the final rule.[4] On April 14, 2017, we announced our decision to reconsider several elements of the FIP, as follows: appropriate compliance dates for the NO_X emission limits for Flint Creek Boiler No. 1, White Bluff Units 1 and 2, and Independence Units 1 and 2; the low-load NO_X emission limits applicable to White Bluff Units 1 and 2 and Independence Units 1 and 2 during periods of operation at less than 50 percent of the units' maximum heat input rating; the SO_2 emission limits for White Bluff Units 1 and 2; and the compliance dates for the SO_2 emission limits for Independence Units 1 and 2.[5]

EPA also published a notice in the **Federal Register** on April 25, 2017, which administratively stayed the effectiveness of the NO_X compliance dates in the FIP for the Flint Creek, White Bluff, and Independence units, as well as the compliance dates for the SO_2 emission limits for the White Bluff and Independence units for a period of 90 days.[6] On July 13, 2017, the EPA published a notice proposing to extend the NO_X compliance dates for Flint Creek Boiler No. 1, White Bluff Units 1 and 2, and Independence Units 1 and 2, by 21 months, to January 27, 2020.[7] However, EPA did not take final action on the July 13, 2017 proposed rule because on July 12, 2017, Arkansas submitted a proposed SIP revision with a request for parallel processing (Arkansas Regional Haze NO_X SIP revision or Arkansas NO_X SIP revision). The State's proposed revision addressed the NO_X BART requirements for Bailey Unit 1, McClellan Unit 1, Flint Creek Boiler No. 1, Lake Catherine Unit 4, White Bluff Units 1 and 2, and White Bluff Auxiliary Boiler, as well as the reasonable progress requirements with respect to NO_X. We processed this proposed SIP revision in parallel with the state's SIP approval process and, in a proposed rule published in the **Federal Register** on September 11, 2017, we proposed approval of the Arkansas Regional Haze NO_X SIP revision and withdrawal of the corresponding parts of the Arkansas Regional Haze FIP.[8] On October 31, 2017, we received ADEQ's final Regional Haze NO_X SIP revision addressing NO_X BART for EGUs and the reasonable progress requirements with respect to NO_X for the first implementation period. On February 12, 2018, we finalized our approval of the Arkansas Regional Haze NO_X SIP revision and our withdrawal of the corresponding parts of the FIP.[9]

On August 8, 2018, Arkansas submitted another SIP revision (Arkansas Regional Haze SO_2 and PM SIP revision or Phase II SIP revision) addressing all remaining disapproved parts of the 2008 Regional Haze SIP, with the exception of the BART and associated long-term strategy requirements for the Domtar Ashdown Mill Power Boilers No. 1 and 2. The Phase II SIP revision also included a discussion on Arkansas' interstate visibility transport requirements. In a proposed rule published in the **Federal Register** on November 30, 2018, we proposed approval of a portion of the SIP revision and we also proposed to withdraw the parts of the FIP corresponding to our proposed approvals.[10] We stated in our proposed rule that we intended to propose action on the portion of the SIP revision discussing the interstate visibility transport requirements in a future proposed rulemaking. Since we proposed to withdraw certain portions of the FIP, we also proposed to revise the numbering of certain paragraphs under section 40 CFR 52.173 of the FIP. In a final action being published separately in today's **Federal Register**, we are taking final action to approve the Arkansas Regional Haze SO_2 and PM SIP revision.

The background for this final rule and the separate final action also being published today that approves the Arkansas Regional Haze SO_2 and PM SIP revision is also discussed in detail in our November 30, 2018 proposal.[11] The comment period was open for 30 days, and we received comments from four commenters in response to our proposed action.

II. What final action is EPA taking?

We are withdrawing the majority of the Arkansas Regional Haze FIP that we promulgated on September 27, 2016. Specifically, we are withdrawing the following components of the FIP at 40 CFR 52.173: The SO_2 and PM BART emission limits for Bailey Unit 1; the SO_2 and PM BART emission limits for McClellan Unit 1; the SO_2 BART emission limit for Flint Creek Boiler No. 1; the SO_2 BART emission limits for White Bluff Units 1 and 2; the SO_2 and PM BART emission limits for the White Bluff Auxiliary Boiler; the prohibition on burning fuel oil at Lake Catherine Unit 4; and the SO_2 emission limits for Independence Units 1 and 2 under the reasonable progress provisions. Therefore, we are removing these SO_2 and PM emission limitations and associated requirements for Arkansas EGUs from 40 CFR 52.173(c), and as of the effective date of this final rule they will no longer apply to the nine aforementioned units. Since we are withdrawing certain portions of the FIP, we are also revising the numbering of certain paragraphs under section 40 CFR 52.173 of the FIP. Our renumbering of these paragraphs is non-substantive in nature. The provisions of the Arkansas Regional Haze FIP addressing the Domtar Ashdown Mill are unaffected by this action and the Domtar Ashdown Mill is the only remaining facility subject to the FIP.

As explained in our November 30, 2018 proposal,[12] this action is based on our separate action being published in today's **Federal Register** to approve the Arkansas Regional Haze SO_2 and PM SIP revision submitted to us on August 8, 2018. In that separate action, EPA is making the determination that the Arkansas Regional Haze SO_2 and PM SIP revision is approvable because the plan's provisions meet the applicable requirements of the CAA and EPA implementing regulations. EPA is

[3] 81 FR 66332; *see also* 81 FR 68319 (October 4, 2016) (correction).

[4] See the docket associated with this proposed rulemaking for a copy of the petitions for reconsideration and administrative stay submitted by the State of Arkansas; Entergy Arkansas Inc., Entergy Mississippi Inc., and Entergy Power LLC (collectively ''Entergy''); AECC; and the Energy and Environmental Alliance of Arkansas (EEAA).

[5] Letter from E. Scott Pruitt, Administrator, EPA, to Nicholas Jacob Bronni and Jamie Leigh Ewing, Arkansas Attorney General's Office (April 14, 2017). A copy of this letter is included in the docket, *https://www.regulations.gov/document?D=EPA-R06-OAR-2015-0189-0240.*

[6] 82 FR 18994.

[7] 82 FR 32284.

[8] 82 FR 42627.

[9] 83 FR 5927 and 83 FR 5915 (February 12, 2018).

[10] 83 FR 62204 (November 30, 2018).

[11] 83 FR 62204.

[12] 83 FR 62204.

finalizing this action under section 110 and part C of the Act.

III. Responses to Comments Received

We received several comment letters concerning our proposed action, which included both our proposed approval of the portions of the Phase II SIP revision listed in the previous section and proposed withdrawal of the FIP provisions addressing the requirements for which we were proposing SIP approval. EPA did not receive any comments specifically on withdrawal of the FIP provisions; rather, the comments addressed EPA's proposed approval of the SIP provisions that would replace the FIP. Therefore, we have responded to all relevant comments in response to our proposed action in a separate, final notice published elsewhere in this issue of the **Federal Register** that approves the Arkansas Regional Haze SO_2 and PM SIP revision and/or in a separate document titled the ''Arkansas Regional Haze Phase II SIP Revision Response to Comments,'' which can be found in the docket associated with this final rulemaking.[13] Copies of the comments are also available in the docket for this rulemaking.

V. Statutory and Executive Order Reviews

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

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review. This final rule revises a FIP to withdraw source-specific SO_2 and PM emission limits for only six individually identified facilities in Arkansas and is therefore not a rule of general applicability.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA. Burden is defined at 5 CFR 1320.3(b). This final rule revises a FIP to withdraw source-specific SO_2 and PM emission limits for six individually identified facilities in Arkansas.

D. Regulatory Flexibility Act (RFA)

I certify that this final action will not have a significant economic impact on a substantial number of small entities under the RFA. This final action will not impose any requirements on small entities. This final action revises a FIP to withdraw source-specific SO_2 and PM emission limits that apply to six individually identified power plants in Arkansas.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

F. Executive Order 13132: Federalism

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

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

This action does not have tribal implications, as specified in Executive Order 13175, because this partial FIP withdrawal does not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. This final action revises a FIP to withdraw source-specific SO_2 and PM emission limits that apply to six individually identified power plants in Arkansas. There are no Indian reservation lands in Arkansas. Thus, Executive Order 13175 does not apply to this action.

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

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

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

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

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potentially disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

L. Determination Under Section 307(d)

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

M. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicably. EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability that only affects six individually identified facilities in Arkansas.

N. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 26, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

[13] Please see Docket No. EPA–R06–OAR–2015–0189 in the *regulations.gov* website.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Best available retrofit technology, Incorporation by reference, Intergovernmental relations, Ozone, Particulate Matter, Regional haze, Reporting and recordkeeping requirements, Sulfur Dioxide, Visibility.

Dated: September 9, 2019.

Andrew R. Wheeler,

Administrator.

Title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart E—Arkansas

■ 2. Section 52.173 is amended:
■ a. By revising paragraphs (c) introductory text and (c)(1);
■ b. In paragraph (c)(2), by revising the definition of ''Boiler-operating-day'';
■ c. By removing paragraphs (c)(3) through (12) and (22) through (24);
■ d. By redesignating paragraphs (c)(13) through (21) as paragraphs (c)(3) through (11) and paragraphs (c)(25) through (27) as paragraphs (c)(12) through (14); and
■ f. By revising newly redesignated paragraphs (c)(4), (5), (7), (8), (10), and (11).

The revisions read as follows:

§ 52.173 Visibility protection.

* * * * *

(c) *Federal implementation plan for regional haze.* Requirements for Domtar Ashdown Paper Mill Power Boilers No. 1 and 2 affecting visibility.

(1) *Applicability.* The provisions of this section shall apply to each owner or operator, or successive owners or operators of the sources designated as Domtar Ashdown Paper Mill Power Boilers No. 1 and 2.

(2) * * *

Boiler-operating-day means a 24-hr period between 6 a.m. and 6 a.m. the following day during which any fuel is fed into and/or combusted at any time in the power boiler.

* * * * *

(4) *Compliance dates for Domtar Ashdown Mill Power Boiler No. 1.* The owner or operator of the boiler must comply with the SO_2 and NO_X emission limits listed in paragraph (c)(3) of this section by November 28, 2016.

(5) *Compliance determination and reporting and recordkeeping requirements for Domtar Ashdown Paper Mill Power Boiler No. 1.* (i)(A) SO_2 emissions resulting from combustion of fuel oil shall be determined by assuming that the SO_2 content of the fuel delivered to the fuel inlet of the combustion chamber is equal to the SO_2 being emitted at the stack. The owner or operator must maintain records of the sulfur content by weight of each fuel oil shipment, where a ''shipment'' is considered delivery of the entire amount of each order of fuel purchased. Fuel sampling and analysis may be performed by the owner or operator, an outside laboratory, or a fuel supplier. All records pertaining to the sampling of each shipment of fuel oil, including the results of the sulfur content analysis, must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. SO_2 emissions resulting from combustion of bark shall be determined by using the following site-specific curve equation, which accounts for the SO_2 scrubbing capabilities of bark combustion:

$$Y = 0.4005 * X—0.2645$$

Where:

Y= pounds of sulfur emitted per ton of dry fuel feed to the boiler.

X= pounds of sulfur input per ton of dry bark.

(B) The owner or operator must confirm the site-specific curve equation through stack testing. By October 27, 2017, the owner or operator must provide a report to EPA showing confirmation of the site specific-curve equation accuracy. Records of the quantity of fuel input to the boiler for each fuel type for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Each boiler-operating-day of the 30-day rolling average for the boiler must be determined by adding together the pounds of SO_2 from that boiler-operating-day and the preceding 29 boiler-operating-days and dividing the total pounds of SO_2 by the sum of the total number of boiler operating days (*i.e.,* 30). The result shall be the 30 boiler-operating-day rolling average in terms of lb/day emissions of SO_2. Records of the total SO_2 emitted for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the 30 boiler-operating-day rolling averages for SO_2 as described in this paragraph (c)(5)(i) must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives.

(ii) If the air permit is revised such that Power Boiler No. 1 is permitted to burn only pipeline quality natural gas, this is sufficient to demonstrate that the boiler is complying with the SO_2 emission limit under paragraph (c)(3) of this section. The compliance determination requirements and the reporting and recordkeeping requirements under paragraph (c)(5)(i) of this section would not apply and confirmation of the accuracy of the site-specific curve equation under paragraph (c)(5)(i)(B) of this section through stack testing would not be required so long as Power Boiler No. 1 is only permitted to burn pipeline quality natural gas.

(iii) To demonstrate compliance with the NO_X emission limit under paragraph (c)(3) of this section, the owner or operator shall conduct stack testing using EPA Reference Method 7E, found at 40 CFR part 60, appendix A, once every 5 years, beginning 1 year from the effective date of our final rule, which corresponds to October 27, 2017. Records and reports pertaining to the stack testing must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives.

(iv) If the air permit is revised such that Power Boiler No. 1 is permitted to burn only pipeline quality natural gas, the owner or operator may demonstrate compliance with the NO_X emission limit under paragraph (c)(3) of this section by calculating NO_X emissions using fuel usage records and the applicable NO_X emission factor under AP–42, Compilation of Air Pollutant Emission Factors, section 1.4, Table 1.4–1. Records of the quantity of natural gas input to the boiler for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the calculation of NO_X emissions for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Each boiler-operating-day of the 30-day rolling average for the boiler must be determined by adding together the pounds of NO_X from that day and the preceding 29 boiler-operating-days and dividing the total pounds of NO_X by the sum of the total number of hours during the same 30 boiler-operating-day period. The result

shall be the 30 boiler-operating-day rolling average in terms of lb/hr emissions of NO_X. Records of the 30 boiler-operating-day rolling average for NO_X must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives. Under these circumstances, the compliance determination requirements and the reporting and recordkeeping requirements under paragraph (c)(5)(iii) of this section would not apply.

* * * * *

(7) *SO_2 and NO_X Compliance dates for Domtar Ashdown Mill Power Boiler No. 2.* The owner or operator of the boiler must comply with the SO_2 and NO_X emission limits listed in paragraph (c)(6) of this section by October 27, 2021.

(8) *SO_2 and NO_X Compliance determination and reporting and recordkeeping requirements for Domtar Ashdown Mill Power Boiler No. 2.* (i) NO_X and SO_2 emissions for each day shall be determined by summing the hourly emissions measured in pounds of NO_X or pounds of SO_2. Each boiler-operating-day of the 30-day rolling average for the boiler shall be determined by adding together the pounds of NO_X or SO_2 from that day and the preceding 29 boiler-operating-days and dividing the total pounds of NO_X or SO_2 by the sum of the total number of hours during the same 30 boiler-operating-day period. The result shall be the 30 boiler-operating-day rolling average in terms of lb/hr emissions of NO_X or SO_2. If a valid NO_X pounds per hour or SO_2 pounds per hour is not available for any hour for the boiler, that NO_X pounds per hour shall not be used in the calculation of the 30 boiler-operating-day rolling average for NO_X. For each day, records of the total SO_2 and NO_X emitted for that day by the boiler must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the 30 boiler-operating-day rolling average for SO_2 and NO_X for the boiler as described in this paragraph (c)(8)(i) must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives.

(ii) The owner or operator shall continue to maintain and operate a CEMS for SO_2 and NO_X on the boiler listed in paragraph (c)(6) of this section in accordance with 40 CFR 60.8 and 60.13(e), (f), and (h), and appendix B of 40 CFR part 60. The owner or operator shall comply with the quality assurance procedures for CEMS found in 40 CFR part 60. Compliance with the emission limits for SO_2 and NO_X shall be determined by using data from a CEMS.

(iii) Continuous emissions monitoring shall apply during all periods of operation of the boiler listed in paragraph (c)(6) of this section, including periods of startup, shutdown, and malfunction, except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments. Continuous monitoring systems for measuring SO_2 and NO_X and diluent gas shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period. Hourly averages shall be computed using at least one data point in each fifteen-minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling system, and recertification events. When valid SO_2 or NO_X pounds per hour emission data are not obtained because of continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained by using other monitoring systems approved by the EPA to provide emission data for a minimum of 18 hours in each 24-hour period and at least 22 out of 30 successive boiler operating days.

(iv) If the air permit is revised such that Power Boiler No. 2 is permitted to burn only pipeline quality natural gas, this is sufficient to demonstrate that the boiler is complying with the SO_2 emission limit under paragraph (c)(6) of this section. Under these circumstances, the compliance determination requirements under paragraphs (c)(8)(i) through (iii) of this section would not apply to the SO_2 emission limit listed in paragraph (c)(6) of this section.

(v) If the air permit is revised such that Power Boiler No. 2 is permitted to burn only pipeline quality natural gas and the operation of the CEMS is not required under other applicable requirements, the owner or operator may demonstrate compliance with the NO_X emission limit under paragraph (c)(6) of this section by calculating NO_X emissions using fuel usage records and the applicable NO_X emission factor under AP–42, Compilation of Air Pollutant Emission Factors, section 1.4, Table 1.4–1. Records of the quantity of natural gas input to the boiler for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the calculation of NO_X emissions for each day must be compiled no later than 15 days after the end of the month and must be maintained and made available upon request to EPA and ADEQ representatives. Each boiler-operating-day of the 30-day rolling average for the boiler must be determined by adding together the pounds of NO_X from that day and the preceding 29 boiler-operating-days and dividing the total pounds of NO_X by the sum of the total number of hours during the same 30 boiler-operating-day period. The result shall be the 30 boiler-operating-day rolling average in terms of lb/hr emissions of NO_X. Records of the 30 boiler-operating-day rolling average for NO_X must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives. Under these circumstances, the compliance determination requirements under paragraphs (c)(8)(i) through (iii) of this section would not apply to the NO_X emission limit.

* * * * *

(10) *PM compliance dates for Domtar Ashdown Mill Power Boiler No. 2.* The owner or operator of the boiler must comply with the PM BART requirement listed in paragraph (c)(9) of this section by November 28, 2016.

(11) Alternative *PM Compliance Determination for Domtar Ashdown Paper Mill Power Boiler No. 2.* If the air permit is revised such that Power Boiler No. 2 is permitted to burn only pipeline quality natural gas, this is sufficient to demonstrate that the boiler is complying with the PM BART requirement under paragraph (c)(9) of this section.

* * * * *

[FR Doc. 2019–19877 Filed 9–26–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2017–0651; FRL–9996–66]

2-Phenoxyethanol; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of 2-

phenoxyethanol when used as an inert ingredient (solvent or cosolvent) limited to 0.2% by weight in pesticide formulations applied to growing crops and raw agricultural commodities after harvest. The Dow Chemical Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of 2-phenoxyethanol when used in accordance with the terms of the exemption.

DATES: This regulation is effective September 27, 2019. Objections and requests for hearings must be received on or before November 26, 2019, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0651, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Director, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2017–0651 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 26, 2019. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2017–0651, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Petition for Exemption

In the **Federal Register** of June 14, 2018 (83 FR 27743) (FRL–9978–41), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–11069) by The Dow Chemical Company, 1803 Building, Washington Street, Midland, MI 48764. The petition requested that 40 CFR 180.910 be amended by establishing an exemption from the requirement of a tolerance for residues of 2-phenoxyethanol (CAS Reg. No. 122–99–6) when used as an inert ingredient (solvent or co-solvent) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest. That document referenced a summary of the petition prepared by The Dow Chemical Company, the petitioner, which is available in the docket, *http://www.regulations.gov*. One comment was received on the notice of filing. EPA's response is discussed in Unit V.C.

Based upon review of the data supporting the petition, EPA has limited the maximum end-use concentration of 2-phenoxyethanol as not to exceed 0.2% by weight in pesticide formulations, when ready for use. The reason for this change is explained in Unit V.B.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption

from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for 2-phenoxyethanol including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with 2-phenoxyethanol follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Single and repeat-dose studies in rats indicated that 2-phenoxyethanol is rapidly and nearly completely absorbed after oral administration and more than 90% of the administered dose is excreted in urine within 24 hours of exposure. Following oral and dermal exposure the terminal hydroxyl group of 2-phenoxyethanol is metabolized, mainly in the liver, by alcohol dehydrogenase (ADH) to 2-phenoxyacetaldehyde and then by aldehyde dehydrogenase (ALDH) to 2-phenoxyacetic acid (PhAA).

2-Phenoxyethanol exhibits low levels of acute toxicity. Acute studies in rats showed oral LD_{50} ranging from 1,260 to more than 2,500 mg/kg. The dermal LD_{50} in two rabbit studies were more than 2,200 and more than 3,653 mg/kg and 14391 mg/kg in a rat study. The inhalation LC_{50} in the rat was more than 1,000 mg/m^3. 2-Phenoxyethanol is considered to be an eye irritant and a mild skin irritant. However, it was not found to be a dermal sensitizer.

Studies on 2-phenoxyethanol show that the target organ in rats and mice is the kidney, most likely due to an extensive first-pass metabolism and formation of high amounts/concentrations of 2-phenoxyacetic acid in systemic circulation. Following oral and dermal exposure the terminal hydroxyl group of 2-phenoxyethanol is metabolized, mainly in the liver, to 2-phenoxyacetic acid (PhAA). Data suggest that mice are somewhat more resistant to the toxic effects of 2-phenoxyethanol and its main metabolite 2-phenoxyacetic acid than rats.

In addition to the effects on the kidney, hematotoxicity was also observed. This appears to be the result of exposure to the parent compound. Although hemotoxic effects of 2-phenoxyethanol were observed in repeat dose studies, the available repeat dose dataset indicates that the rabbit is the most sensitive species. The hemolysis was less pronounced in rats and mice. Based on differences in metabolism, humans are expected to be the least susceptible to RBC hemolysis.

In developmental toxicity studies in rats and rabbits, no evidence of developmental toxicity was observed. In a two-generation reproductive toxicity study in mice, an effect on fertility was observed but only at a dose level above limit dose values. Offspring toxicity was observed, but only in the presence of maternal toxicity (*i.e.,* decreased body weight and increased liver weight).

There is no evidence that exposure to 2-phenoxyethanol suppresses or otherwise harms immune function in humans. No signs of neurotoxicity were reported in acute or repeat-dose oral studies. There were also no signs of carcinogenicity in the database including the 2-year feeding studies. Similarly, all tests were negative for genotoxicity and mutagenicity. The available data suggests that 2-phenoxyethanol is not carcinogenic.

Specific information on the studies received and the nature of the adverse effects caused by 2-phenoxyethanol as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) identified from the toxicity studies can be found at *http://www.regulations.gov* in the document ''IN–11069; 2-Phenoxyethanol: Human Health Risk and Ecological Effects—Assessment of a Food Use Pesticide Inert Ingredient'' at pages 9–32 in docket ID number EPA–HQ–OPP–2017–0651.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for 2-phenoxyethanol used

for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR 2-PHENOXYETHANOL FOR USE IN HUMAN RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/ safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Chronic dietary (All populations)	NOAEL = 369 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 3.69 mg/kg/day. cPAD = 3.69 mg/kg/day	90-Day Drinking Water Toxicity (rat). LOAEL = 10,000 mg/L (687 mg/kg/day in males and 1,000 mg/kg/day in females) based on hematotoxicity and histopathological changes in the kidney and bladder.
Incidental oral short-term (1 to 30 days).	NOAEL = 369 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	90-Day Drinking Water Toxicity (rat). LOAEL = 10,000 mg/L (687 mg/kg/day in males and 1,000 mg/kg/day in females) based on hematotoxicity and histopathological changes in the kidney and bladder.
Dermal short-term (1 to 30 days) and intermediate-term (1 to 6 months).	Dermal study NOAEL = 500 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	90-Day Dermal Toxicity Study (rabbit). LOAEL = 600 mg/kg/day from hemolysis and death seen in the Developmental Toxicity-Dermal (rabbit).
Inhalation short-term (1 to 30 days).	Inhalation study NOAEL = ~12.7 mg/kg/day (inhalation absorption rate = 100%). UF_A = 100x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	14-Day Inhalation Toxicity Study (rat). LOAEL = ~65 mg/kg/day based on respiratory effects (*i.e.,* degeneration/squamous metaplasia of respiratory epithelium in the nasal cavity, hyperplasia of the respiratory epithelium in the nasal cavity of all males and females, inflammatory cell infiltrates in the nasal cavity, and statistically significant increased absolute lung weights in males).
Inhalation (1 to 6 months)	Inhalation study NOAEL = 12.7 mg/kg/day (inhalation absorption rate = 100%). UF_A = 10x UF_H = 10x UF_S = 10x FQPA SF = 1x	LOC for MOE = 1,000.	14-Day Inhalation Toxicity Study (rat). LOAEL = ~65 mg/kg/day based on respiratory effects (*i.e.,* degeneration/squamous metaplasia of respiratory epithelium in the nasal cavity, hyperplasia of the respiratory epithelium in the nasal cavity of all males and females, inflammatory cell infiltrates in the nasal cavity, and statistically significant increased absolute lung weights in males).
Cancer (Oral, dermal, inhalation).	No evidence of carcinogenicity in the available database.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day (= milligram/kilogram/day). MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_S = use of a short-term study for long-term risk assessment.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to 2-phenoxyethanol, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from 2-phenoxyethanol in food as follows:

Because no acute endpoint of concern was identified, a quantitative acute dietary exposure assessment is unnecessary. In conducting the chronic dietary exposure assessment using the Dietary Exposure Evaluation Model DEEM– FCID™, Version 3.16, EPA used food consumption information from the U.S. Department of Agriculture's National Health and Nutrition Examination Survey, What we eat in America, (NHANES/WWEIA). This dietary survey was conducted from 2003 to 2008. The Inert Dietary Exposure Evaluation Model (I–DEEM) is a highly conservative model with the assumption that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation between the active and inert ingredient (if any) and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient. The model assumes 100 percent crop treated (PCT) for all crops and that every food eaten by a person each day has tolerance-level residues. In the case of 2-phenoxyethanol, a 0.2% by weight limitation in formulation was incorporated into the model.

A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled ''Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk

Assessments for the Inerts.'' (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

2. *Dietary exposure from drinking water.* For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for 2-phenoxyethanol, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compound. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables). 2-Phenoxyethanol is currently approved as a nonfood use inert ingredient. A review of residential products containing this inert ingredient revealed that it is currently used in antimicrobial cleaning products and in pet spot-on treatment products. There is also a potential for outdoor uses in pesticides applied to residential lawns and turf. In a conservative effort to assess exposure, the EPA has conducted a screening level assessment using high-end exposure scenarios for pesticidal use on lawns/turf, in antimicrobial spray cleaning products, and in pet spot-on application.

In addition to the proposed and current pesticidal uses of 2-phenoxyethanol, 2-phenoxyethanol is also used in various non-pesticidal products such as paints and coatings, personal care/cosmetic products, and cleaning products. The Agency incorporated known non-pesticidal background exposure to 2-phenoxyethanol used in latex paint, cosmetic products, and cleaning products into this risk assessment.

For each residential scenario, short-term exposure for both the handler (adult) and post-application exposure (adult and child) is expected. Based on the proposed use pattern, intermediate-term and long-term pesticidal exposures from residential uses are not expected. Non-pesticidal use in cosmetics can result in short-term, intermediate-term, and long-term exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found 2-phenoxyethanol to share a common mechanism of toxicity with any other substances, and 2-phenoxyethanol does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that 2-phenoxyethanol does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* A reproductive toxicity study showed effects on reproductive parameters of fertility at doses of 4,000 mg/kg/day. These effects were not seen in animals dosed with 2,000 mg/kg/day which is above the limit dose of 1,000 mg/kg/day. Although evidence of adverse effects were observed in the offspring (*i.e.,* decreased pup weight), this effect was only seen in the presence of maternal toxicity. In addition, two developmental studies showed no effect on offspring at the limit dose of 1,000 mg/kg/day.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for 2-phenoxyethanol is complete.

ii. There is no indication that 2-phenoxyethanol is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that 2-phenoxyethanol results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study. All evidence of toxicity was seen in the presence of maternal toxicity.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and incorporated a limitation of 0.2% by weight in pesticide formulation. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to 2-phenoxyethanol in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by 2-phenoxyethanol.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, 2-phenoxyethanol is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to 2-phenoxyethanol from food and water will utilize 0.00007% of the cPAD for children 1 to 2 years of age, the population group receiving the greatest exposure. Based on the explanation in this unit, regarding residential use patterns, chronic residential exposure to residues of 2-phenoxyethanol is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus

chronic exposure to food and water (considered to be a background exposure level). 2-Phenoxyethanol is currently used as an inert ingredient in pesticide products that are registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to 2-phenoxyethanol. However, the mode of action of the toxicological effect must be the same across routes of exposure in order to aggregate the exposure. In this case, the toxic effects are different by one route and duration from those produced by a different route and duration. To produce an aggregate risk estimate in situations in which it is not appropriate to aggregate exposures due to differing toxicological effects, risk measures are calculated separately for each route and duration for a given toxic effect for each hypothetical ''individual.'' In these situations, multiple aggregate assessments are performed for a single chemical of interest if the relevant toxicological endpoints for all routes/pathways are not the same. When that is the case, a separate aggregate assessment is then performed for each toxic effect of concern.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs above the Agency's level of concern. Aggregate dermal exposures resulted in a MOE of 114 for adults and a MOE of 165 in children. Because EPA's level of concern for 2-phenoxyethanol is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term and long-term risk.* Intermediate- and long-term aggregate exposure takes into account intermediate- or long-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). An intermediate-term and long-term adverse effect was identified; however, 2-phenoxyethanol is not currently used as an inert ingredient in pesticide products that are registered for any use patterns that would result in intermediate- or long-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Long-term risk is assessed based on long-term residential exposure plus chronic dietary exposure. Although intermediate- and long- term residential pesticidal uses of 2-phenoxyethanol are not expected, because 2-phenoxyethanol is used in cosmetics, intermediate- and long-term residential exposure is possible. However, in this case, the relevant toxicological endpoints resulting from intermediate- and long-term exposure from cosmetic use and chronic dietary exposures from pesticidal uses are not the same; therefore, an intermediate- and long-term aggregate risk assessment was not conducted.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, 2-phenoxyethanol is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to 2-phenoxyethanol residues.

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is not establishing a numerical tolerance for residues of 2-phenoxyethanol in or on any food commodities. EPA is establishing limitations on the amount of 2-phenoxyethanol that may be used in pesticide formulations applied pre- and post-harvest. These limitations will be enforced through the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA''), 7 U.S.C. 136 *et seq.* EPA will not register any pesticide formulation for food use that exceeds 0.2% by weight of 2-phenoxyethanol in the final pesticide formulation.

B. Revisions to Petitioned for Tolerances

Although the petition did not specify a limitation on concentration of this inert ingredient in end-use pesticide formulations, the Agency is establishing this exemption with the limitation of 0.2% by weight in pesticide formulations. Based upon an evaluation of the data included in the petition, as well as publicly available literature, it was determined that 2-phenoxyethanol has biocidal properties; therefore, EPA is establishing a limitation in formulation, when ready for use, (*i.e.,* the end-use concentration is not to exceed 0.2% by weight). This limitation is being placed to ensure that the chemical is functioning as an inert ingredient and not a biocide. This limitation is explained in the Agency's risk assessment which can be found at *http://www.regulations.gov* in document *IN–11069; 2-Phenoxyethanol: Human Health Risk and Ecological Effects Assessment of a Food Use Pesticide Inert Ingredient* in docket ID number EPA–HQ–OPP–2017–0651.

C. Response to Comments

One comment was submitted generally opposing the establishment of tolerance exemptions. Although the Agency recognizes that some individuals believe that pesticides should be banned on agricultural crops, the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) authorizes EPA to establish tolerances when it determines that the tolerance is safe. Upon consideration of the validity, completeness, and reliability of the available data as well as other factors the FFDCA requires EPA to consider, EPA has determined that this exemption from the requirement of a tolerance is safe. The commenter provided no information to support a conclusion that the exemption was not safe.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.910 for 2-phenoxyethanol (CAS Reg. No. 122–99–6) when used as an inert ingredient (solvent or co-solvent) limited to 0.2% by weight in pesticide formulations applied to growing crops and raw agricultural commodities after harvest.

VII. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does

it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 16, 2019.

Michael Goodis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.910, add a heading to the table and alphanumerically add inert ingredient ''2-phenoxyethanol (CAS Reg. No. 122–99–6)'' to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.910

Inert ingredients	Limits	Uses
* * *	* * *	*
2-Phenoxyethanol (CAS Reg. No. 122–99–6)	0.2% by weight in pesticide formulation	Solvent or co-solvent.
* * *	* * *	*

[FR Doc. 2019–20529 Filed 9–26–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 19–57, RM–11827; DA 19–492]

Radio Broadcasting Services; Caliente, Nevada

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: At the request of SSR Communications Inc., the Audio Division amends the FM Table of Allotments, by allotting Channel 264A at Caliente, Nevada, as the first local service. A staff engineering analysis indicates that Channel 264A can be allotted to Caliente consistent with the minimum distance separation requirements of the Commission's rules without a site restriction. The reference coordinates are 37–36–02 NL and 114–30–32 WL.

DATES: Effective September 27, 2019.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 19–57, adopted May 30, 2019, and released May 31, 2019. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street SW, Washington, DC 20554. The full text is also available online at *http://apps.fcc.gov/ecfs/.* This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. The Commission will send a copy of the *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336 and 339.

§ 73.202 [Amended]

■ 2. In § 73.202, the table in paragraph (b) is amended under Nevada by adding an entry for ''Caliente'' in alphabetical order to read as follows:

§ 73.202 Table of Allotments.

* * * * *

(b) *Table of FM Allotments.*

TABLE 1 TO PARAGRAPH (b)—[U.S. STATES]

Channel No.				
*	*	*	*	*
Nevada				
*	*	*	*	*
Caliente				264A
*	*	*	*	*

* * * * *

[FR Doc. 2019–20734 Filed 9–26–19; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 84, No. 188
Friday, September 27, 2019

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 955

[Doc. No. AMS–SC–19–0065; SC19–955–1 CR]

Vidalia Onions Grown in Georgia; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible producers of Vidalia onions to determine whether they favor continuance of the marketing order regulating the handling of Vidalia onions produced in Georgia.

DATES: The referendum will be conducted from October 7 through October 28, 2019. Only current producers of Vidalia onions within the production area that produced onions during the period January 1, 2018, through December 31, 2018, are eligible to vote in this referendum.

ADDRESSES: Copies of the marketing order may be obtained from the Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1124 First Street South, Winter Haven, FL 33880; Telephone: (863) 324–3375; from the Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491; or on the internet: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Steven W. Kauffman, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1124 First Street South, Winter Haven, FL 33880; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Steven.Kauffman@usda.gov* or *Christian.Nissen@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Marketing Agreement and Order No. 955, as amended (7 CFR part 955), hereinafter referred to as the ''Order,'' and the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act,'' it is hereby directed that a referendum be conducted to ascertain whether continuance of the Order is favored by producers. The referendum will be conducted from October 7 through October 28, 2019, among Vidalia onion producers in the production area. Only current Vidalia onion producers who were also engaged in the production of Vidalia onions during the period of January 1, 2018, through December 31, 2018, may participate in the continuance referendum.

USDA has determined that continuance referenda are an effective means for determining whether producers favor the continuation of marketing order programs. USDA would consider termination of the Order if less than two-thirds of the producers in the referendum, and producers of less than two-thirds of the volume of Vidalia onions voting in the referendum favor continuance of the program. In evaluating the merits of continuance versus termination, USDA will not exclusively consider the results of the continuance referendum. USDA will also consider all other relevant information regarding operation of the Order and relative benefits and disadvantages to producers, handlers, and consumers to determine whether continuing the Order would tend to effectuate the declared policy of the Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the ballots used in the referendum have been approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0178, Vegetable and Specialty Crops. It has been estimated it will take an average of 20 minutes for each of the approximately 65 Vidalia onion producers to cast a ballot. Participation is voluntary. Ballots postmarked after October 28, 2019, will not be included in the vote tabulation.

Steven W. Kauffman and Christian D. Nissen of the Southeast Marketing Field Office, Specialty Crops Program, AMS, USDA, are hereby designated as the referendum agents of the Secretary of Agriculture to conduct this referendum. The procedure applicable to the referendum shall be the ''Procedure for the Conduct of Referenda in Connection With Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended'' (7 CFR 900.400 through 900.407).

Ballots will be mailed to all producers of record and may also be obtained from the referendum agents or from their appointees.

List of Subjects in 7 CFR Part 955

Marketing agreements, Onions, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 601–674.

Dated: September 18, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–20571 Filed 9–26–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0687; Airspace Docket No. 19–ASO–17]

RIN 2120–AA66

Proposed Amendment of Area Navigation Routes, Florida Metroplex Project; Southeastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend 12 high altitude area navigation (RNAV) routes (Q-routes) in support of the Florida Metroplex Project. The proposed amendments would provide more efficient, streamlined options for users, and improve the efficiency of the National Airspace System (NAS).

DATES: Comments must be received on or before November 12, 2019.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building

Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527 or (202) 366–9826. You must identify FAA Docket No. FAA–2019–0687; Airspace Docket No. 19–ASO–17 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email: *fedreg.legal@nara.gov* or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would expand the availability of area navigation routes in the NAS, increase airspace capacity, and reduce complexity in high air traffic volume areas.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2019–0687; Airspace Docket No. 19–ASO–17) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2019–0687; Airspace Docket No. 19–ASO–17.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this proposed rule. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The Florida Metroplex Project developed Performance Based Navigation (PBN) routes involving Jacksonville Air Route Traffic Control Center (ARTCC), Miami ARTCC, and San Juan Center Radar Approach Control (CERAP). The FAA issued a final rule for Docket No. FAA–2018–0437 in the **Federal Register** (83 FR 43750; August 28, 2018) establishing 16 new high altitude area navigation (RNAV) routes (Q-routes) and modifying 7 existing Q-routes in the southeastern United States. The routes became effective on November 8, 2018. Of those 23 routes, the FAA is proposing to modify 12 Q-routes as described below.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend 12 existing Q-routes, in the southeastern United States in support of the Florida Metroplex Project. The amendments would include adding additional waypoints (WP) to various Q-routes. These added WPs would give air traffic controllers more predictability, and provide users with more options when filing flight plans. Amendments would be made to the descriptions of the following routes: Q–65, Q–77, Q–79, Q–81, Q–85, Q–87, Q–93, Q–99, Q–109, Q–110, Q–116, and Q–118.

The proposed Q-route amendments are as follows (full route descriptions are detailed in the proposed amendments to 14 CFR part 71 set forth below):

Q–65: Q–65 extends between the KPASA, FL, WP, and the Rosewood, OH, VORTAC. The FAA proposes to realign the southern end point of the route by approximately 50 nautical miles (NM) to the southwest from the KPASA, FL, WP, to the MGNTY, FL, WP (located near the St Petersburg, FL, (PIE) VORTAC. The KPASA WP would be removed from the route. The purpose of this amendment is to realign the southern end of Q–65 to a point over Florida's west coast thereby enhancing separation from other air traffic using central Florida routes. Q–65 between DOFFY, FL, and Rosewood, OH, would remain as currently charted.

Q–77: Q–77 extends between the OCTAL, FL, WP, and the WIGVO, GA,

WP. This proposal would update the latitude/longitude coordinates for the OCTAL, FL, the STYMY, FL, and the WAKKO, FL, WPs. The coordinates for the OCTAL, FL, WP would be changed from ''lat. 26°09′01.91″ N, long. 080°06′37.51″ W,'' to ''lat.26°09′01.92″ N, long. 080°12′11.60″ W'' This would move OCTAL approximately 5 NM to the west of its current position. The STYMY, FL, WP, coordinates would be changed from ''lat. 28°01′09.65″ N, long. 081°08′41.27″ W,'' to ''lat. 28°02′12.25″ N, long. 081°09′05.47″ W'' This would move STYMY approximately 1 NM to the north of its current position. The WAKKO, FL, WP coordinates would be changed from ''lat. 28°18′00.69″ N, long. 081°24′53.49″ W,'' to ''lat. 28°20′31.57″ N, long. 081°18′32.14″ W'' This change would move WAKKO approximately 6 NM to the east of its current position. Updating the coordinates for these WPs would provide ''tie-ins'' for new procedures to Q–77. The FAA also proposes to remove the WASUL, FL, WP (located between the WAKKO, FL, and the MJAMS, FL, WPs) from Q–77. Removal of the WASUL WP, along with the updated positions of the STYMY and WAKKO WPs, would allow straightening of the route segments between the STYMY and MJAMS WPs.

Q–79: Q–79 extends between the MCLAW, FL, WP, and the Atlanta, GA, (ATL) VORTAC. This action would add two new points: The EVANZ, FL, and the IISLY, GA, WPs, between the existing DOFFY, FL, and the YUESS, GA, WPs.

Q–81: Q–81 extends between the TUNSL, FL, WP, and the HONID, GA, WP. The MGNTY, FL, WP would be added between the existing FARLU, FL, and the ENDEW, FL, WPs. The SNAPY, FL, the BULZI, FL, and the IPOKE, GA, WPs would be added between the existing NICKI, FL, and the HONID, GA, WPs.

Q–85: Q–85 extends between the LPERD, FL, WP, and the SMPRR, NC, WP. This change would add the BEEGE, GA, WP between the existing LPERD, FL, and the GIPPL, GA, WPs.

Q–87: Q–87 extends between the PEAKY, FL, WP, and the LCAPE, SC, WP. The OVENP, FL, WP would be added between the existing DUCEN, FL, and the FEMON, FL, WPs. Additionally, the SUSYQ, GA, WP would be added between the VIYAP, GA, Fix, and the TAALN, GA, WPs.

Q–93: Q–93 extends between the MCLAW, FL, WP, and the QUIWE, SC, WP. The SUSYQ, GA, WP would be added between the existing GIPPL, GA, and the ISUZO, GA, WPs. The GURGE, SC, WP would be added between the ISUZO, GA, and the FISHO, SC, WPs.

Q–99: Q–99 extends between the DOFFY, FL, WP, and the POLYY, NC, WP. This proposal would extend the southern end of the route from the current DOFFY, FL, WP approximately 75 NM southeast to the KPASA, FL, WP. Adding the KPASA WP would expand the availability of RNAV routing in the area. Q–99 between DOFFY, FL, and POLYY, NC, would remain as currently charted.

Q–109: Q–109 extends between the DOFFY, FL, WP, and the LAANA, NC, WP. This action would realign the southern end of the route from the current DOFFY, FL, WP, to the KNOST, OG, WP (which is located over the Gulf of Mexico) approximately 78 NM southwest of the DOFFY, WP. The DOFFY, WP would be removed from Q–109. This change would provide connection to the U.S. NAS for users from Mexico and Central America. In addition, the DEANER, FL, the BRUTS, FL, and the EVANZ, FL, WPs would be added to the route between the KNOST, OG, WP, and the CAMJO, FL, WP. After CAMJO, Q–109 would extend as currently charted to the LAANA, NC, WP.

Q–110: Q–110 extends between the BLANS, IL, WP, and the OCTAL, FL, WP.

The coordinates for the OCTAL, FL, WP would be updated as described above. In addition, an editorial change would be made to the order of the WPs listed in the Q–110 description and published in FAA Order 7400.11D. Currently, the route description lists the points from ''BLANS, IL, to OCTAL, FL.'' This change would simply reverse the order of the points listed in the Q–110 description in Order 7400.11 to ''OCTAL, FL, to BLANS, IL.'' This change would match airspace database documentation. Except for the change to the OCTAL, FL, WP coordinates, the amendment the order of points would not affect the alignment of Q–110.

Q–116: Q–116 extends between the Vulcan, AL, (VUZ) VORTAC, and the OCTAL, FL, WP. Q–116 would be amended by updating the coordinates for the OCTAL, FL, WP, as described above. In addition, the DEANR, FL, WP would be added between the existing MICES, FL, and the PATOY, FL, WPs.

Q–118: Q–118 extends between the Marion, IN, (MZZ) VOR/DME, and the PEAKY, FL, WP, FL. The BRIES, FL, WP would be removed from the route description as it is no longer required for air traffic control purposes.

Note: In the regulatory text, below, some route descriptions include waypoints located over international waters. In those route descriptions, in place of a two-letter state abbreviation, either ''OA,'' meaning ''Offshore Atlantic,'' or ''OG,'' meaning ''Offshore Gulf of Mexico,'' is used.

RNAV routes are published in paragraph 2006 of FAA Order 7400.11D dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 2006 United States Area Navigation Routes

* * * * *

Q–65 MGNTY, FL to Rosewood, OH (ROD) [Amended]

MGNTY, FL	WP	(Lat. 28°01′32.99″ N, long. 082°53′19.71″ W)
DOFFY, FL	WP	(Lat. 29°15′22.73″ N, long. 082°31′38.10″ W)
FETAL, FL	WP	(Lat. 30°11′03.69″ N, long. 082°30′24.76″ W)
ENEME, GA	WP	(Lat. 30°42′12.09″ N, long. 082°26′09.31″ W)
JEFOI, GA	WP	(Lat. 31°35′37.02″ N, long. 082°31′18.38″ W)
TRASY, GA	WP	(Lat. 31°55′25.92″ N, long. 082°35′50.51″ W)
CESKI, GA	WP	(Lat. 32°16′21.27″ N, long. 082°40′38.96″ W)
DAREE, GA	WP	(Lat. 34°37′35.72″ N, long. 083°51′35.03″ W)
LORNN, TN	WP	(Lat. 35°21′16.33″ N, long. 084°14′19.35″ W)
SOGEE, TN	WP	(Lat. 36°31′50.64″ N, long. 084°11′35.39″ W)
ENGRA, KY	WP	(Lat. 37°29′02.34″ N, long. 084°15′02.15″ W)
OCASE, KY	WP	(Lat. 38°23′59.05″ N, long. 084°11′05.32″ W)
Rosewood, OH (ROD)	VORTAC	(Lat. 40°17′16.08″ N, long. 084°02′35.15″ W)

Q–77 OCTAL, FL to WIGVO, GA [New]

OCTAL, FL	WP	(Lat. 26°09′01.92″ N, long. 080°12′11.60″ W)
MATLK, FL	WP	(Lat. 27°49′36.54″ N, long. 080°57′04.27″ W)
STYMY, FL	WP	(Lat. 28°02′12.25″ N, long. 081°09′05.47″ W)
WAKKO, FL	WP	(Lat. 28°20′31.57″ N, long. 081°18′32.14″ W)
MJAMS, FL	WP	(Lat. 28°55′37.59″ N, long. 081°36′33.30″ W)
ETORE, FL	WP	(Lat. 29°41′49.00″ N, long. 081°40′47.75″ W)
SHRKS, FL	WP	(Lat. 30°37′23.23″ N, long. 081°45′59.13″ W)
TEUFL, GA	WP	(Lat. 31°52′00.46″ N, long. 082°01′04.56″ W)
WIGVO, GA	WP	(Lat. 32°27′24.00″ N, long. 082°02′18.00″ W)

Q–79 MCLAW, FL to Atlanta, GA (ATL) [New]

MCLAW, FL	WP	(Lat. 24°33′49.00″ N, long. 081°01′00.00″ W)
VAULT, FL	WP	(Lat. 24°45′54.75″ N, long. 081°00′33.72″ W)
FEMID, FL	WP	(Lat. 26°06′29.59″ N, long. 081°27′23.07″ W)
WULFF, FL	WP	(Lat. 27°04′03.14″ N, long. 081°58′44.99″ W)
MOLIE, FL	WP	(Lat. 28°01′55.53″ N, long. 082°18′25.55″ W)
DOFFY, FL	WP	(Lat. 29°15′22.73″ N, long. 082°31′38.10″ W)
EVANZ, FL	WP	(Lat. 29°54′12.11″ N, long. 082°52′03.81″ W)
IISLY, GA	WP	(Lat. 30°42′37.70″ N, long. 083°17′57.72″ W)
YUESS, GA	WP	(Lat. 31°41′00.00″ N, long. 083°33′31.20″ W)
Atlanta, GA (ATL)	VORTAC	(Lat. 33°37′44.68″ N, long. 084°26′06.23″ W)

Q–81 TUNSL, FL to HONID, GA [New]

TUNSL, FL	WP	(Lat. 24°54′02.43″ N, long. 081°31′02.80″ W)
KARTR, FL	FIX	(Lat. 25°29′45.76″ N, long. 081°30′46.24″ W)
FIPES, OG	WP	(Lat. 25°41′30.15″ N, long. 081°37′13.79″ W)
THMPR, FL	WP	(Lat. 26°46′00.21″ N, long. 082°20′23.99″ W)
LEEHI, FL	WP	(Lat. 27°07′21.91″ N, long. 082°34′54.57″ W)
FARLU, FL	WP	(Lat. 27°45′32.56″ N, long. 082°50′43.77″ W)
MGNTY, FL	WP	(Lat. 28°01′32.99″ N, long. 082°53′19.71″ W)
ENDEW, FL	WP	(Lat. 28°18′01.73″ N, long. 082°55′56.70″ W)
BITNY, OG	WP	(Lat. 28°46′11.98″ N, long. 083°07′53.01″ W)
NICKI, FL	WP	(Lat. 29°15′20.19″ N, long. 083°20′31.80″ W)
SNAPY, FL	WP	(Lat. 29°48′51.17″ N, long. 083°42′23.61″ W)
BULZI, FL	WP	(Lat. 30°22′24.93″ N, long. 084°04′34.47″ W)
IPOKE, GA	WP	(Lat. 30°51′48.89″ N, long. 084°11′52.43″ W)
HONID, GA	WP	(Lat. 31°38′50.31″ N, long. 084°23′42.60″ W)

Q–85 LPERD, FL to SMPRR, NC [New]

LPERD, FL	WP	(Lat. 30°36′09.18″ N, long. 081°16′52.16″ W)
BEEGE, GA	WP	(Lat. 31°10′59.98″ N, long. 081°16′57.50″ W)
GIPPL, GA	WP	(Lat. 31°22′53.96″ N, long. 081°09′53.70″ W)
ROYCO, GA	WP	(Lat. 31°35′10.38″ N, long. 081°02′22.45″ W)
IGARY, SC	WP	(Lat. 32°34′41.37″ N, long. 080°22′36.01″ W)
PELIE, SC	WP	(Lat. 33°21′23.88″ N, long. 079°44′43.43″ W)
BUMMA, SC	WP	(Lat. 34°01′58.09″ N, long. 079°11′07.50″ W)
KAATT, NC	WP	(Lat. 34°15′35.43″ N, long. 078°59′42.38″ W)
SMPRR, NC	WP	(Lat. 34°26′28.32″ N, long. 078°50′31.80″ W)

Q–87 PEAKY, FL to LCAPE, SC [New]

PEAKY, FL	WP	(Lat. 24°35′23.72″ N, long. 081°08′53.91″ W)
GOPEY, FL	WP	(Lat. 25°09′32.92″ N, long. 081°05′17.11″ W)
GRIDS, FL	WP	(Lat. 26°24′54.27″ N, long. 080°57′11.40″ W)
TIRCO, FL	WP	(Lat. 27°19′05.75″ N, long. 080°51′16.67″ W)
MATLK, FL	WP	(Lat. 27°49′36.54″ N, long. 080°57′04.27″ W)
ONEWY, FL	WP	(Lat. 28°21′53.66″ N, long. 081°03′21.04″ W)
ZERBO, FL	WP	(Lat. 28°54′56.68″ N, long. 081°17′40.13″ W)
DUCEN, FL	WP	(Lat. 29°16′33.83″ N, long. 081°19′23.24″ W)
OVENP, FL	WP	(Lat. 30°08′04.41″ N, long. 081°22′26′25″ W)
FEMON, FL	WP	(Lat. 30°27′31.57″ N, long. 081°23′36.20″ W)
VIYAP, GA	FIX	(Lat. 31°15′08.15″ N, long. 081°26′08.18″ W)
SUSYQ, GA	WP	(Lat. 31°40′54.28″ N, long. 081°12′07.99″ W)
TAALN, GA	WP	(Lat. 31°59′56.18″ N, long. 081°01′41.91″ W)
JROSS, SC	WP	(Lat. 32°42′40.00″ N, long. 080°37′38.00″ W)
RAYVO, SC	WP	(Lat. 33°38′44.12″ N, long. 080°04′00.84″ W)

HINTZ, SC	WP	(Lat. 34°10′11.02″ N, long. 079°44′48.12″ W)
REDFH, SC	WP	(Lat. 34°22′36.35″ N, long. 079°37′08.34″ W)
LCAPE, SC	WP	(Lat. 34°33′03.47″ N, long. 079°30′39.47″ W)

Q–93 MCLAW, FL to QUIWE, SC [New]

MCLAW, FL	WP	(Lat. 24°33′49.00″ N, long. 081°01′00.00″ W)
VAULT, FL	WP	(Lat. 24°45′54.75″ N, long. 081°00′33.72″ W)
LINEY, FL	WP	(Lat. 25°16′44.02″ N, long. 080°53′15.43″ W)
FOBIN, FL	WP	(Lat. 25°47′02.00″ N, long. 080°46′00.89″ W)
EBAYY, FL	WP	(Lat. 27°43′40.20″ N, long. 080°30′03.59″ W)
MALET, FL	FIX	(Lat. 28°41′29.90″ N, long. 080°52′04.30″ W)
DEBRL, FL	WP	(Lat. 29°17′48.73″ N, long. 081°08′02.88″ W)
KENLL, FL	WP	(Lat. 29°34′28.35″ N, long. 081°07′25.26″ W)
PRMUS, FL	WP	(Lat. 29°49′05.67″ N, long. 081°07′20.74″ W)
WOPNR, OA	WP	(Lat. 30°37′36.03″ N, long. 081°04′26.44″ W)
GIPPL, GA	WP	(Lat. 31°22′53.96″ N, long. 081°09′53.70″ W)
SUSYQ, GA	WP	(Lat. 31°40′54.28″ N, long. 081°12′07.99″ W)
ISUZO, GA	WP	(Lat. 31°57′47.85″ N, long. 081°14′14.79″ W)
GURGE, SC	WP	(Lat. 32°29′02.26″ N, long. 081°12′41.48″ W)
FISHO, SC	WP	(Lat. 33°16′46.25″ N, long. 081°24′43.52″ W)
QUIWE, SC	WP	(Lat. 33°57′05.56″ N, long. 081°30′07.93″ W)

Q99 KPASA, FL to POLYY, NC [New]

KPASA, FL	WP	(Lat. 28°10′34.00″ N, long. 081°54′27.00″ W)
DOFFY, FL	WP	(Lat. 29°15′22.73″ N, long. 082°31′38.10″ W)
CAMJO, FL	WP	(Lat. 30°30′32.00″ N, long. 082°41′11.00″ W)
HEPAR, GA	WP	(Lat. 31°05′13.00″ N, long. 082°33′46.00″ W)
TEEEM, GA	WP	(Lat. 32°08′41.20″ N, long. 081°54′50.57″ W)
BLAAN, SC	WP	(Lat. 33°51′09.38″ N, long. 080°53′32.78″ W)
BWAGS, SC	WP	(Lat. 34°00′03.77″ N, long. 080°45′12.26″ W)
EFFAY, SC	WP	(Lat. 34°15′30.67″ N, long. 080°30′37.94″ W)
WNGUD, SC	WP	(Lat. 34°41′53.16″ N, long. 080°06′12.12″ W)
POLYY, NC	WP	(Lat. 34°48′37.54″ N, long. 079°59′55.81″ W)

Q–109 KNOST, OG to LAANA, NC [New]

KNOST, OG	WP	(Lat. 28°00′02.55″ N, long. 083°25′23.99″ W)
DEANR, FL	WP	(Lat. 29°15′30.40″ N, long. 083°03′30.24″ W)
BRUTS, FL	WP	(Lat. 29°30′58.00″ N, long. 082°58′57.00″ W)
EVANZ, FL	WP	(Lat. 29°54′12.11″ N, long. 082°52′03.81″ W)
CAMJO, FL	WP	(Lat. 30°30′32.00″ N, long. 082°41′11.00″ W)
HEPAR, GA	WP	(Lat. 31°05′13.00″ N, long. 082°33′46.00″ W)
TEEEM, GA	WP	(Lat. 32°08′41.20″ N, long. 081°54′50.57″ W)
RIELE, SC	WP	(Lat. 32°37′27.14″ N, long. 081°23′34.97″ W)
PANDY, SC	WP	(Lat. 33°28′29.39″ N, long. 080°26′55.21″ W)
RAYVO, SC	WP	(Lat. 33°38′44.12″ N, long. 080°04′00.84″ W)
SESUE, GA	WP	(Lat. 33°52′02.58″ N, long. 079°33′51.88″ W)
BUMMA, SC	WP	(Lat. 34°01′58.09″ N, long. 079°11′07.50″ W)
YURCK, NC	WP	(Lat. 34°11′14.80″ N, long. 078°52′40.62″ W)
LAANA, NC	WP	(Lat. 34°19′41.35″ N, long. 078°35′37.16″ W)

Q–110 OCTAL, FL to BLANS, IL [Amended]

OCTAL, FL	WP	(Lat. 26°09′01.92″ N, long. 080°12′11.60″ W)
JAYMC, FL	WP	(Lat. 26°58′51.00″ N, long. 081°22′08.00″ W)
SHEEK, FL	WP	(Lat. 27°35′15.40″ N, long. 081°46′27.82″ W)
SMELZ, FL	WP	(Lat. 28°04′59.00″ N, long. 082°06′34.00″ W)
AMORY, FL	WP	(Lat. 29°13′17.02″ N, long. 082°55′42.90″ W)
JOKKY, FL	WP	(Lat. 30°11′31.47″ N, long. 083°38′41.86″ W)
DAWWN, GA	WP	(Lat. 31°28′49.96″ N, long. 084°36′46.69″ W)
JYROD, AL	WP	(Lat. 33°10′53.29″ N, long. 085°51′54.85″ W)
BFOLO, AL	WP	(Lat. 34°03′33.98″ N, long. 086°31′30.49″ W)
SKIDO, AL	WP	(Lat. 34°31′49.10″ N, long. 086°53′11.16″ W)
BETIE, TN	WP	(Lat. 36°07′29.88″ N, long. 087°54′01.48″ W)
BLANS, IL	WP	(Lat. 37°28′09.27″ N, long. 088°44′00.68″ W)

Q–116 Vulcan, AL (VUZ) to OCTAL, FL [Amended]

Vulcan, AL (VUZ)	VORTAC	(Lat. 33°40′12.48″ N, long. 086°53′59.41″ W)
DEEDA, GA	WP	(Lat. 31°34′13.55″ N, long. 085°00′31.10″ W)
JAWJA, FL	WP	(Lat. 30°10′25.55″ N, long. 083°48′58.94″ W)
MICES, FL	WP	(Lat. 29°51′37.65″ N, long. 083°33′18.30″ W)
DEANR, FL	WP	(Lat. 29°15′30.40″ N, long. 083°03′30.24″ W)
PATOY, FL	WP	(Lat. 29°03′52.49″ N, long. 082°54′00.09″ W)
SMELZ, FL	WP	(Lat. 28°04′59.00″ N, long. 082°06′34.00″ W)
SHEEK, FL	WP	(Lat. 27°35′15.40″ N, long. 081°46′27.82″ W)
JAYMC, FL	WP	(Lat. 26°58′51.00″ N, long. 081°22′08.00″ W)
OCTAL, FL	WP	(Lat. 26°09′01.92″ N, long. 080°12′11.60″ W)

Q–118 Marion, IN (MZZ) to PEAKY, FL [Amended]

Marion, IN (MZZ)	VOR/DME	(Lat. 40°29′35.99″ N, long. 085°40′45.30″ W)
HEVAN, IN	WP	(Lat. 39°21′08.86″ N, long. 085°07′46.70″ W)
ROYYZ, IN	WP	(Lat. 39°56′28.93″ N, long. 084°56′10.19″ W)
VOSTK, KY	WP	(Lat. 38°28′15.86″ N, long. 084°43′03.58″ W)
HELUB, KY	WP	(Lat. 37°42′54.84″ N, long. 084°44′28.31″ W)
JEDER, KY	WP	(Lat. 37°19′30.54″ N, long. 084°45′14.17″ W)
GLAZR, TN	WP	(Lat. 36°25′20.78″ N, long. 084°46′49.29″ W)
KAILL, GA	WP	(Lat. 34°01′47.21″ N, long. 084°31′24.18″ W)
Atlanta, GA (ATL)	VORTAC	(Lat. 33°37′44.68″ N, long. 084°26′06.23″ W)
JOHNN, GA	FIX	(Lat. 31°31′22.94″ N, long. 083°57′26.55″ W)

JAMIZ, FL	WP	(Lat. 30°13′46.91″ N, long. 083°19′27.78″ W)
BRUTS, FL	WP	(Lat. 29°30′58.00″ N, long. 082°58′57.00″ W)
JINOS, FL	WP	(Lat. 28°28′46.00″ N, long. 082°08′52.00″ W)
KPASA, FL	WP	(Lat. 28°10′34.00″ N, long. 081°54′27.00″ W)
SHEEK, FL	WP	(Lat. 27°35′15.40″ N, long. 081°46′27.82″ W)
CHRRI, FL	FIX	(Lat. 27°03′00.70″ N, long. 081°39′14.81″ W)
FEMID, FL	WP	(Lat. 26°06′29.59″ N, long. 081°27′23.07″ W)
PEAKY, FL	WP	(Lat. 24°35′23.72″ N, long. 081°08′53.91″ W)

* * * * *

Issued in Washington, DC, on September 18, 2019.

Scott M. Rosenbloom,

Acting Manager, Airspace Policy Group.

[FR Doc. 2019–20693 Filed 9–26–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Part 718

RIN 1240–AA12

Black Lung Benefits Act: Quality Standards for Medical Testing

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Request for information.

SUMMARY: The Black Lung Benefits Act provides benefits to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment and to certain miners' survivors. Determining benefits entitlement necessarily entails evaluating the miner's physical condition, particularly his or her respiratory system. These evaluations usually involve medical tests that assess the miner's respiratory capacity. To promote accuracy when tests are conducted in connection with a claim, the program regulations set out quality standards for administering and interpreting two commonly used tests: pulmonary function tests and arterial blood gas studies. The Office of Workers' Compensation Programs (OWCP) is considering updating the quality standards, which were last amended in 2000, to better reflect current medical technology and practice. This request for information seeks the public's input on current standards for administering pulmonary function tests and arterial blood gas studies; criteria used to evaluate the results of these tests; whether OWCP should adopt quality standards for additional testing methods; and the economic impact of any changes to the quality standards.

DATES: The Department invites written comments on the request for information from interested parties. Written comments must be received by January 27, 2020.

ADDRESSES: You may submit written comments by any of the following methods. To facilitate receipt and processing of comments, OWCP encourages interested parties to submit their comments electronically.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the website for submitting comments.
- *Facsimile:* (202) 693–1395 (this is not a toll-free number). Only comments of ten or fewer pages, including a Fax cover sheet and attachments, if any, will be accepted by Fax.
- *Regular Mail/Hand Delivery/Courier:* Submit comments on paper to the Division of Coal Mine Workers' Compensation Programs, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C–3520, 200 Constitution Avenue NW, Washington, DC 20210. The Department's receipt of U.S. mail may be significantly delayed due to security procedures. You must take this into consideration when preparing to meet the deadline for submitting comments.

Instructions: You must include the agency name and the Regulatory Information Number (RIN) for this rulemaking in your submission. *Caution:* All comments received will be posted without change to *http://www.regulations.gov.* Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

Docket: For access to the rulemaking docket and to read background documents or comments received, go to *http://www.regulations.gov.* Although some information (*e.g.,* copyrighted material) will not be available through the website, the entire rulemaking record, including copyrighted material, will be available for inspection at OWCP. Please contact the individual named below if you would like to inspect the record.

FOR FURTHER INFORMATION CONTACT: Michael Chance, Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, 200 Constitution Avenue NW, Suite N–3520, Washington, DC 20210. Telephone: 1–800–347–2502. This is a toll-free number. TTY/TDD callers may dial toll-free 1–800–877–8339 for further information.

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

The Black Lung Benefits Act (BLBA), 30 U.S.C. 901–944, provides for the payment of benefits to coal miners and certain of their dependent survivors for total disability or death due to coal workers' pneumoconiosis arising from coal mine employment. *See* 30 U.S.C. 901(a); *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 5 (1976). Medical testing evidence is used to evaluate benefits entitlement in virtually every claim filed by miners and in many claims filed by survivors. For this reason, the BLBA gives the Secretary of Labor authority to develop, in consultation with the National Institute for Occupational Safety and Health (NIOSH), ''criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners.'' 30 U.S.C. 902(f)(1)(D).

The Department of Labor first published ''Criteria for the Development of Medical Evidence,'' commonly referred to as the ''quality standards,'' on February 29, 1980. 45 FR 13679–85; 13694–712. Originally published at 20 CFR 718.102–718.103, 718.105 and appendices A–C (1981), these standards set out detailed requirements for administering chest radiographs, pulmonary function tests (PFTs), and arterial blood gas studies (ABGs). The Department based the requirements on then-current medical industry practices, standards, and equipment. *See, e.g.,* 45 FR 13697. The quality standards were intended to ensure that claims determinations were based on the best available medical evidence.

Simultaneously, the Department adopted criteria to establish total disability based on these tests. 45 FR 13687–90, 13699–13711, 20 CFR 718.204 and appendices B–C (1981). PFT and ABG results that met the criteria in part 718, appendices B or C (commonly referred to as ''qualifying'' results) were sufficient, absent ''contrary probative evidence,'' to establish total respiratory disability. 45 FR 13688, 20 CFR 718.204(c) (1981). For PFTs, the criteria addressed the forced expiratory volume in 1 second (FEV_1), the forced

vital capacity (FVC), and the maximum voluntary ventilation (MVV) maneuvers.

The quality standards and the disability criteria remained the same until 2000 when, in addition to a few revisions to the existing PFT standards, the Department required that a ''flow-volume loop'' be included in each PFT. The Department adopted this requirement to increase the reliability of the testing results. *See* 65 FR 79929–30 (Dec. 20, 2000), 20 CFR 718.103(a) (2001).

In the 2000 rulemaking, the Department also added two additional points related to all of the quality standards. First, the Department clarified that the standards for test administration applied only to tests conducted ''in connection with a claim'' for benefits after the date the regulations went into effect (*i.e.,* after January 19, 2001). 65 FR 79927–29, 20 CFR 718.101(b) (2001). Second, the Department required that any test subject to the quality standards had to be in ''substantial compliance'' with the applicable standard to be valid evidence. *Id.* Before then, the regulations imposed this requirement only on PFTs. *See* 20 CFR 718.103(c) (1999).

In 2014, OWCP, in consultation with NIOSH, comprehensively revised the standards applicable to chest radiographs and added new standards addressing digital imaging methods. 79 FR 21606–15 (April 17, 2014), 20 CFR 718.101 and appendix A (2015). OWCP also updated the criteria for establishing pneumoconiosis by chest radiograph. 79 FR 21612, 20 CFR 718.102 (2015).

OWCP is now considering, again in consultation with NIOSH, updating the standards for administering PFTs and ABGs and the criteria for establishing total disability based on these tests. OWCP's goal is to adopt regulations that reflect current medical technology and practice.

II. Information Request

OWCP requests input from medical professionals, medical associations, black lung clinics, miners, employers, insurance carriers, trade associations, and other interested parties on current techniques, equipment, and best practices for administering PFTs and ABGs to ensure accurate and reliable results. OWCP also seeks input on PFT- and ABG-related criteria for establishing total respiratory disability under the BLBA. Finally, OWCP requests information regarding whether test administration standards or qualifying disability criteria should be developed for other tests (for example, pulse oximetry) and, if so, what those standards or criteria should be.

When responding, please:

- Address your comments to the topic and question number whenever possible. For example, you would identify your response to questions regarding administration of PFTs, Question 1, as ''A.1.''
- Provide your rationale for your views.
- Provide sufficient detail in your responses to enable proper agency review and consideration. OWCP wants to fully understand your answers and any recommendations you make.
- Identify the information on which you rely. Please provide specific examples. Include applicable data, studies, or articles regarding standard professional practices, availability of technology, and costs.

OWCP invites comment in response to the specific questions posed below and encourages commenters to include any related cost and benefit data. OWCP is especially interested in issues related to the economic impact on small entities as defined by the Regulatory Flexibility Act, 5 U.S.C. 601(6).

Please note that as used in the questions below: (1) ''Administration'' refers to the methods, equipment, and techniques used to conduct the test and interpret the results; and (2) ''criteria'' refers to the values set to define total respiratory disability (*i.e.,* ''qualifying'' test results) in coal miners absent contrary probative evidence.

A. Pulmonary Function Tests—Test Administration

OWCP is considering aligning the black lung program's PFT administration standards, currently codified at 20 CFR 718.103 and part 718, appendix B, with NIOSH's requirements for NIOSH-approved spirometry facilities and the Social Security Administration's (SSA's) medical testing standards for evaluating respiratory disorders, both of which were updated in 2016. *See* 81 FR 37138–53 (June 9, 2016), 20 CFR part 404, subpart P, appendix 1, part A, Listing 3.00 *et seq.* (SSA); 81 FR 73274–77, 73286–90 (Oct. 24, 2016), 42 CFR part 37, subpart—Spirometry Testing (NIOSH). OWCP seeks information on the following issues:

1. Should OWCP require PFTs to be administered according to the procedures in pages 323–326 of M.R. Miller, et al., ATS/ERS Task Force: Standardisation of Lung Function Testing, *Standardisation of Spirometry,* 26 Eur. Respir. J. 319 (2005) (''2005 ATS/ERS Standardisation of Spirometry''), including M.R. Miller, et al., *Standardisation of Lung Function Testing: the Authors' Replies to Readers' Comments,* 36 Euro. Respir. J. 1496 (2010). *See* 42 CFR 37.95(c)(5). Are there alternative standards OWCP should consider?

2. Should OWCP require spirometers to undergo calibration checks according to the procedures on pages 322–323 in 2005 ATS/ERS Standardisation of Spirometry? *See* 42 CFR 37.93(b)(1). Are there alternative standards OWCP should consider?

3. Should OWCP require spirometers to meet the specifications for spirometer accuracy, precision, and real-time display size and content listed on pages 322 (Table 2), 325, and 331–333 in 2005 ATS/ERS Standardisation of Spirometry? 42 CFR 37.93(b)(2), 37.95(b). Are there alternative standards OWCP should consider?

4. Should OWCP require each person administering a spirometry test to complete NIOSH-approved training and maintain a valid NIOSH certificate by periodically completing NIOSH-approved refresher courses? *See* 42 CFR 37.95(a).

5. Currently, appendix B to part 718 provides that PFTs ''shall not be performed during or soon after an acute respiratory illness.'' Should OWCP further define this requirement? If so, how should it be defined?

6. Are there any other standards OWCP should consider regarding the validity of PFTs?

7. Should OWCP consider removing MVV test administration standards (and criteria) from the regulations given its limited usefulness? *See, e.g.,* R. Pellegrino, et al., ATS/ERS Task Force: Standardisation of Lung Function Testing, *Interpretive Strategies for Lung Function Tests,* 26 Eur. Respir. J. 957 (2005) (MVV ''is not generally included in the set of lung function parameters needed for diagnosis or follow-up of the pulmonary abnormalities[;]'' MVV ''may be of some help'' in upper airway obstruction and ''may be of limited value in mild-to-moderate COPD''). Please explain your view.

8. What are the costs, benefits, and the technological and economic feasibility of these potential changes to PFT administration standards?

B. Pulmonary Function Tests—Qualifying Disability Criteria

The current FEV_1 and FVC Tables in appendix B, which specify the FEV_1 and FVC values that qualify as totally disabling (in the absence of contrary probative evidence) for purposes of the black lung program, are based on reference values in Ronald J. Knudson, et al., *The Maximal Expiratory Flow-*

Volume Curve Normal Standards, Variability, and Effects of Age, 113 Am. Rev. of Respir. Disease 587 (1976) (''Knudson 1976''). *See* 45 FR 13711. OWCP is considering developing new tables based on reference values in one of two more recent studies: (1) John L. Hankinson, et al., *Spirometric Reference Values from a Sample of the General U.S. Population,* 159 Am. J. of Respir. & Critical Care Med. 179 (1999) (''NHANES III''); or (2) Philip H. Quanjer, et al., *Multi-Ethnic Reference Values for Spirometry for the 3–95-Year Age Range: The Global Lung Function 2012 Equations,* 40 Eur. Respir. J. 1324 (2012) (''GLI 2012'').

9. Is either (or both) of these sets of reference values superior to the Knudson 1976 values? Why?

10. Which of these two sets of reference values is better suited to evaluating respiratory disability in coal miners? Why?

11. Are there other sets of reference values OWCP should consider?

C. Arterial Blood Gas Studies—Test Administration

12. Should OWCP require facilities administering ABG studies and analyzing samples to either have a Clinical Laboratory Improvement Amendments of 1988 (CLIA) certificate or be CLIA-exempt? *See* 42 CFR 493.2.

13. Should OWCP require the use of plastic syringes instead of glass syringes? If plastic syringes are used, should OWCP prohibit icing blood samples prior to analysis? *See, e.g.,* Thomas P. Knowles, et al., *Effects of Syringe Material, Sample Storage Time, and Temperature on Blood Gases and Oxygen Saturation in Arterialized Human Blood Samples,* 51 Resp. Care 732 (2006); Gregg L. Ruppel, *Of Time and Temperature, Plastic and Glass: Specimen Handling in the Blood-Gas Laboratory,* 51 Resp. Care 717 (2006).

14. Should OWCP require that a blood sample be analyzed within a certain time period of the sample being drawn for the result to be considered valid, and if so, what should that time period be? *See id.*

15. Currently, § 718.105(b) provides that if an exercise ABG study is conducted, ''blood shall be drawn during exercise.'' Should OWCP allow pulse oximetry measurements (S_pO_2) to be used in lieu of a blood draw during exercise? *See, e.g.,* 20 CFR part 404, subpart P, appendix 1, part A, Listing 3.02C (allowing chronic impairment of gas exchange to be demonstrated through ABG test or pulse oximetry results).

16. Currently, appendix C to part 718 provides that ABG tests ''must not be performed during or soon after an acute respiratory or cardiac illness.'' Should OWCP further define this requirement? If so, how should it be defined?

17. What are the costs, benefits, and the technological and economic feasibility of these suggested changes to ABG administration standards?

D. Arterial Blood Gas Studies—Qualifying Disability Criteria

18. Do the Tables in Appendix C need to be revised? If so, what criteria should OWCP consider and why?

E. Pulse Oximetry (S_pO_2)

19. Should OWCP adopt test administration standards for pulse oximetry? If so, what standards should OWCP consider adopting and why? *See, e.g.,* 20 CFR part 404, subpart P, appendix 1, part A, Listing 3.00H1–2.

20. Are there S_pO_2 values that would establish total respiratory disability in a coal miner under the BLBA absent contrary probative evidence? If so, what values should OWCP consider and why?

21. Should OWCP require a threshold measurement of a miner's oxygen saturation level through pulse oximetry before determining whether more invasive testing such as an ABG is necessary? If so, what should the threshold be? What are the advantages and disadvantages (including potential costs or benefits) of adopting such a threshold measurement?

F. Diffusing Capacity of the Lungs for Carbon Monoxide (DLCO)

22. Should OWCP adopt test administration standards for DLCO testing? If so, what standards should OWCP consider adopting and why? *See, e.g.,* Brian L. Graham, et al., *2017 ERS/ATS Standards for Single-Breath Carbon Monoxide Uptake in the Lung* (2017); 20 CFR part 404, subpart P, appendix 1, part A, Listing 3.00F1–3.

23. Are there DLCO values that would establish total respiratory disability in a coal miner under the BLBA absent contrary probative evidence? If so, what values should OWCP consider and why?

G. Other Information

24. Please provide any other data or information that may be useful to OWCP in evaluating its quality standards and related disability criteria, including whether there are other tests of respiratory disability for which quality standards or qualifying disability criteria should be developed.

Dated: September 18, 2019.

Julia K. Hearthway,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2019–20851 Filed 9–26–19; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57, 70, 71, 72, and 90

[Docket No. MSHA–2016–0013]

RIN 1219–AB36

Respirable Silica (Quartz)

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Announcement of public meeting and correction.

SUMMARY: The Mine Safety and Health Administration (MSHA) is announcing the date and location of a public meeting on the Agency's Request for Information on Respirable Silica (Quartz). In addition, this document corrects a typographical error included in the Request for Information that published on August 29, 2019.

DATES: The meeting date and location is listed in the **SUPPLEMENTARY INFORMATION** section of this document. Comments must be received or postmarked by midnight Eastern Daylight Saving time on October 28, 2019.

ADDRESSES: Submit comments and informational materials, identified by Docket No. MSHA–2016–0013, by one of the following methods:

- *Federal E-Rulemaking Portal: https://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: zzMSHA-comments@dol.gov.*
- *Email: GoodGuidance@dol.gov.*
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.
- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.
- *Fax:* 202–693–9441.

Instructions: All submissions must include Docket No. MSHA–2016–0013. Do not include personal information that you do not want publicly disclosed.

Email Notification: To subscribe to receive email notification when MSHA

publishes rulemaking documents in the **Federal Register**, go to *https://public.govdelivery.com/accounts/USDOL/subscriber/new.*

Docket: For access to the docket to read comments received, go to *http://www.regulations.gov* or *http://arlweb.msha.gov/currentcomments.asp.* To read background documents, go to *http://www.regulations.gov.* Review the docket in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays. Sign in at the receptionist's desk in Suite 4E401. [Docket Number: MSHA–2016–0013]

FOR FURTHER INFORMATION CONTACT: Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *mcconnell.sheila.a@dol.gov* (email), 202–693–9440 (voice), or 202–693–9441 (fax). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Public Meeting

MSHA will hold a public meeting on the Agency's Request for Information on Respirable Silica (Quartz) to receive input from industry, labor, and other interested parties. The public meeting will be held on October 17, 2019, at MSHA Headquarters, 201 12th Street South, Arlington, Virginia 22202–5452. The public meeting will begin at 9 a.m. local time and conclude at 5 p.m., or until the last speaker speaks. The meeting will be conducted in an informal manner. Presenters and attendees may provide written information to the court reporter for inclusion in the record. MSHA will make the transcript of the meeting available at *http://www.regulations.gov* and on MSHA's website at: *https://arlweb.msha.gov/currentcomments.asp.*

II. Correction

MSHA's Request for Information, which published in the issue of August 29, 2019, at 84 FR 45452, included a typographical error.

On page 45453, in the first paragraph, in the third column, the last sentence is revised to read: ''In 2016, the Occupational Safety and Health Administration (OSHA) amended MSHA's existing respirable crystalline silica standards to establish a permissible exposure limit (PEL) of 50 μg/m^3 (ISO).[11]'' The sentence should read, ''In 2016, the Occupational Safety and Health Administration (OSHA) amended OSHA's existing respirable crystalline silica standards to establish a permissible exposure limit (PEL) of 50 μg/m^3 (ISO).[11]''

David G. Zatezalo,

Assistant Secretary of Labor for Mine Safety and Health Administration.

[FR Doc. 2019–20751 Filed 9–26–19; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2019–0093]

RIN 2127–AL37

Federal Motor Vehicle Safety Standards; Occupant Crash Protection

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

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Moving Ahead for Progress in the 21st Century Act of 2012 directs NHTSA to initiate a rulemaking proceeding to amend Federal Motor Vehicle Safety Standard No. 208, ''Occupant crash protection,'' to require a seat belt use warning system for rear seats. NHTSA initiated a rulemaking proceeding in 2013, and as it continues with this proceeding NHTSA is seeking public comment on a variety of issues related to a requirement for a rear seat belt warning system. NHTSA seeks comment on, among other things, potential requirements for such systems, the vehicles to which they should apply, their effectiveness, the likely consumer acceptance, and the associated costs and benefits.

DATES: You should submit your comments early enough to be received not later than November 26, 2019.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
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FOR FURTHER INFORMATION CONTACT: You may contact Ms. Carla Rush, Office of Crashworthiness Standards, Telephone: 202–366–4583, Facsimile: 202–493–2739 or Mr. John Piazza, Office of Chief Counsel, Telephone: 202–366–2992, Facsimile: 202–366–3820. You may

[11] Occupational Safety and Health Administration (OSHA). 2016. Occupational Exposure to Respirable Crystalline Silica—Final Rule. 81 FR 16286.

send mail to these officials at: The National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

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I. Executive Summary

The Moving Ahead for Progress in the 21st Century Act of 2012 (MAP–21) directs the National Highway Traffic Safety Administration (NHTSA) to initiate a rulemaking proceeding to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' to require a seat belt use warning system for rear seats. As it continues with this proceeding, NHTSA is seeking comment on a variety of issues related to a potential requirement for a rear seat belt warning system.

Using a seat belt is one of the most effective actions a motor vehicle occupant can take to prevent death and injury in a crash. Seat belts are effective in most types of crashes. Research has found that seat belts greatly reduce the risk of fatal and non-fatal injuries, compared to the risk faced by unrestrained occupants. Unbelted occupants are overrepresented in fatal crashes. For rear seat occupants, seat belts reduce the risk of fatality by 55 percent (for passenger cars) and 74 percent (for light trucks and vans).[1]

Although seat belt use has steadily increased over the past few decades, usage rates for rear belts have consistently been below those for the front seats. According to data from NHTSA's National Occupant Protection Use Survey, from 2006 to 2017, seat belt use was consistently lower in rear seats than in front seats, with the lowest difference of 6.2 percent in 2007 and the highest difference of 15.6 percent in 2006. Most recently, in 2017, front seat belt use was 89.7 percent, while rear seat belt use was only 75.4 percent, a difference of 14.3 percent.

Seat belt warning systems encourage seat belt use by reminding unbuckled occupants to fasten their belts and/or by informing the driver that an occupant is unbelted, so that the driver can request the unbelted occupant to fasten their seat belt. FMVSS No. 208 requires a seat belt warning system for the driver's seat, but not other seating positions. Most currently-produced vehicles also have a seat belt warning for the front outboard passenger seat, although FMVSS No. 208 does not require this. About 13 percent of model year (MY) 2019 vehicles sold in the United States came equipped with a rear seat belt warning system. Volvo, Toyota, Mazda, Ford and Jaguar Land Rover offer vehicles for sale in the U.S. with rear seat belt warning systems. All of those manufacturers' rear seat belt warning systems use a display that is visible to the driver and indicates which rear seat belts are in use, as well as employing a change-of-status reminder that has visual and audible components.

Euro New Car Assessment Program (NCAP) [2] awards points for front and rear seat belt reminder systems (SBRSs) as part of their Safety Assist score. Their assessment protocol dictates the requirements for the activation and duration of the warning signals for front and rear seats including a change of status warning.

Starting in September 2019, the Economic Commission for Europe (ECE) Regulation No. 16 will require a rear seat belt warning. This includes, among other things, a visual warning indicating any rear seating position in which a seat belt is unfastened. It also includes an audiovisual change-in-status warning.

In 2007, Public Citizen and Advocates for Highway and Auto Safety petitioned NHTSA to amend FMVSS No. 208 to require a seat belt warning system for rear seats on passenger cars and multipurpose passenger vehicles (MPVs) with a gross vehicle weight rating (GVWR) of 4,536 kilograms (10,000 pounds) or less. The petitioners stated that rear seat belt warnings would save hundreds of lives each year and that a large percentage of the lives saved would be children. In 2010, the agency published a Request for Comments (RFC) on the petition. The RFC discussed the agency's research and findings regarding rear seat belt warnings and solicited comments.

In 2012, Congress passed MAP–21. That law requires DOT to initiate a rulemaking proceeding to amend FMVSS No. 208 to provide a safety belt use warning system for designated seating positions in the rear seat. It directs the Secretary to either issue a final rule, or, if the Secretary determines that such an amendment does not meet the requirements and considerations of 49 U.S.C. 30111,[3] to submit a report to Congress describing the reasons for not prescribing such a standard. (MAP–21 also repeals a statutory provision that prohibited NHTSA from requiring or specifying as a compliance option an audible seat belt warning lasting longer than 8 seconds.) In accordance with MAP–21, in early 2013, NHTSA initiated a rulemaking proceeding when it submitted for public comment a

[1] Donna Glassbrenner & Marc Starnes. 2009. Lives Saved Calculations for Seat Belts and Frontal Air Bags. DOT HS 811 206. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration, pp. 18–20.

[2] Euro NCAP provides consumer information on the safety of new cars. Euro NCAP uses a five-star safety rating system to help consumers, their families and businesses compare vehicles more easily and to help them identify the safest choice for their needs.

[3] This requires, among other things, that a federal motor vehicle safety standard be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

proposal to undertake a study regarding the effectiveness of existing rear seat belt warning systems. This study, which was completed in 2015, involved a telephone survey of the drivers of vehicles with and without rear seat belt warning systems. The study found that overall, drivers of vehicles with a rear seat belt warning system were satisfied with the system and noticed an increase in rear seat belt use. For example, approximately 80 percent of drivers of vehicles with a rear seat belt warning were satisfied with the system and 65 percent of drivers of vehicles equipped with rear seat belt reminders reported that the rear seat belt reminder made it easier to encourage rear seat passengers to buckle up.[4]

NHTSA has granted Public Citizen and Advocates for Highway and Auto Safety's petition. In accordance with that grant and continuing with the proceeding that MAP–21 required to be initiated, the agency is publishing this Advance Notice of Proposed Rulemaking. In it, we seek comment on a variety of issues related to a requirement for a rear seat belt warning system, including potential requirements for such systems, the vehicles to which they should apply, their effectiveness, the likely consumer acceptance, and the associated costs and benefits. This document also provides relevant background information, such as up-to-date information on rear seat belt warning systems that are currently available on some new motor vehicles. The document also seeks comment on removing the 8-second maximum duration for the driver's seat belt warning specified in FMVSS No. 208, S7.3; this amendment would reflect MAP–21's repeal of the statutory limitation that was the basis for this provision.

[4] Below we seek comment on possible sample selection bias (because these survey respondents were drivers of vehicles equipped with rear seat belt warning systems).

II. Background

Section 31503 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141) directs the Secretary [5] of Transportation to initiate a rulemaking proceeding to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection'' (49 CFR 571.208) to require a seat belt use warning system for rear seats.[6] As it continues with this proceeding, the National Highway Traffic Safety Administration (NHTSA) seeks comment on a variety of issues related to a requirement for a rear seat belt warning system, including potential requirements for such systems, the vehicles to which they should apply, their effectiveness, the likely consumer acceptance, and the associated costs and benefits.

Using a seat belt is one of the most effective actions a motor vehicle occupant can take to prevent death and injury in a crash.[7] Seat belts protect occupants in various ways. They prevent occupants from being ejected from the vehicle; provide ''ride-down'' by gradually decelerating the occupant as the vehicle deforms and absorbs energy; and reduce the occurrence of occupant contact with harmful interior surfaces and other occupants.[8] Seat belts are effective in most types of crashes. Research has found that seat belts greatly reduce the risk of fatal and non-fatal injuries, compared to the risk faced by unrestrained occupants. Unbelted occupants are overrepresented in fatal crashes.[9] Seat belts reduce the risk of fatality for rear outboard occupants by 54 percent (passenger cars) and 75 percent (light trucks and vans), and for center occupants, by 58 percent (passenger cars) and 75 percent (light trucks and vans).[10]

[5] Authority has been delegated to NHTSA.

[6] Seat belt use warning systems may also be referred to in this document as seat belt ''warning systems'' or seat belt ''reminder'' systems.

[7] 68 FR 46262 (Aug. 5, 2003). *See also* Buckling Up: Technologies to Increase Seat Belt Use. Special Report 278 at 18, Committee for the Safety Belt Technology Study, Transportation Research Board of The National Academies (2003) [hereinafter Transportation Research Board Study].

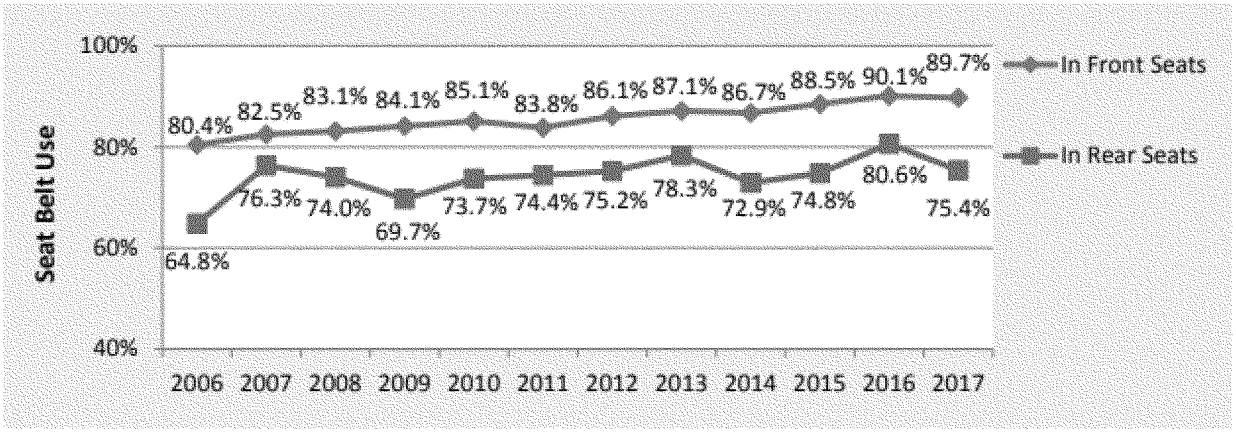
[8] Charles J. Kahane. 2015. Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012—Passenger Cars and LTVs—With Reviews of 26 FMVSS and the Effectiveness of Their Associated Safety Technologies in Reducing Fatalities, Injuries, and Crashes. DOT HS 812 069. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration, p. 89.

[9] Mark Freedman *et al.* 2009. Effectiveness and Acceptance of Enhanced Seat Belt Reminder Systems: Characteristics of Optimal Reminder Systems, Final Report. DOT HS 811 097. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration [hereinafter DOT 2009 Belt Warning Study], p. 1.

[10] Charles J. Kahane. 2017. Fatality Reduction by Seat Belts in the Center Rear Seat and Comparison of Occupants' Relative Fatality Risk at Various Seating Positions. DOT HS 812 369. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration, pp. 18–20.

Although seat belt use has steadily increased over the past few decades, usage rates for rear belts have consistently fallen below those for the front seats. According to data from NHTSA's National Occupant Protection Use Survey (NOPUS), from 2006 to 2017, seat belt use was lower in the rear seat than in the front seat, ranging from a difference of 6.2 percent in 2007 (76.3% vs. 82.5%) to 15.6 percent in 2006 (64.8% vs. 80.4%).[11] Front seat belt use in 2017 reached 89.7 percent. Rear seat belt use in 2017, however, was 75.4 percent.[12] See Figure 1.

Figure 1 – NOPUS Front and Rear Seat Belt Use Rate



NHTSA has, over time, used a variety of strategies to increase seat belt use, including sponsoring national media campaigns, providing assistance to states enacting seat belt use laws and high-visibility enforcement campaigns, and facilitating or requiring vehicle-based strategies. Some of these strategies are non-regulatory; some are regulatory. NHTSA has implemented a variety of non-regulatory approaches to increase seat belt use, such as the annual Click It or Ticket mobilization, which includes a national advertising campaign backed up by high-visibility local enforcement of state seat belt laws. Some states with mandatory rear seat belt laws include rear-seat specific messaging in their media campaigns.

One type of vehicle-based strategy is seat belt warning systems. Seat belt warning systems encourage seat belt use by reminding unbuckled occupants to fasten their belts and/or by informing the driver that an occupant is unbelted, so that the driver can request the unbelted occupant to fasten their seat belt.[13] The warnings provided by seat belt warning systems typically consist of visual and/or audible signals. An optimized warning system balances effectiveness and annoyance, so that the warning is noticeable enough that the occupants will be motivated to fasten their belts, but not so intrusive that an occupant will circumvent or disable it or the public will not accept it.[14] FMVSS No. 208 requires a seat belt warning system for the driver's seat, but not other seating positions. Most currently-produced vehicles also have a seat belt warning for the front outboard passenger seat, although FMVSS No. 208 does not require this.

Based on the agency's New Car Assessment Program (NCAP) Buying a Safer Car data, about 13 percent of model year (MY) 2019 vehicles sold in the United States came equipped with a rear seat belt warning system. Volvo, Toyota, Mazda, Ford and Jaguar Land Rover offer vehicles for sale in the U.S. with rear seat belt warning systems. Volvo started offering rear seat belt warnings in its vehicles in 2009 and currently all its vehicle models are equipped with rear seat belt warnings. Mazda and Ford introduced rear seat belt reminders in MY 2018 and 2019, respectively. Mazda MY 2019 CX–9, CX–5, 3, and 6 vehicles are equipped with rear seat belt reminder systems (SBRS), and Ford offers such systems on the Ranger. GM also offered rear seat belt warning systems as standard equipment in the United States (starting in MY 2010 for the Cadillac SRX and MY 2011 for the Volt) and such systems were offered on the Cadillac MY 2016 XTS and MY 2015 ELR, as well as the MY 2016 Chevy SS. Jaguar Land Rover first introduced rear seat belt warning systems in the MY 2010 Jaguar XJ, and since then has equipped four additional vehicles models with such systems (Range Rover Evoque, Range Rover, Range Rover Sport, and Discovery Sport). Toyota introduced rear seat belt warning systems in several MY 2017 vehicles and increased the number of equipped vehicles in MY 2018. All of these manufacturers' rear seat belt warning systems use a display that is visible to the driver and indicates which rear seat belts are in use, as well as employing a change-of-status reminder that has visual and audible components.

Euro NCAP introduced SBRS bonus points in 2002. The Euro NCAP protocol for Safety Assist systems describes which features a seat belt reminder must have to qualify for extra points.[15] For rear seats, a visual signal must start once the ignition switch is engaged. The visual signal must be at least 60 seconds long. For systems without occupant

[11] Li, R., Pickrell, T.M. (2019, February). Occupant restraint use in 2017: Results from the NOPUS controlled intersection study (Report No. DOT HS 812 594). Washington, DC: National Highway Traffic Safety Administration. NOPUS is the only nationwide probability-based observational survey of seat belt use in the United States. The survey observes seat belt use as it actually occurs at randomly-selected roadway sites, and involves a large number of occupants (almost 64,000 in 2015). NOPUS observations are made during daylight hours and are not necessarily representative of high-risk driving times when belt use may be lower.

[12] Li, R., Pickrell, T.M. (2019, February). Occupant restraint use in 2017: Results from the NOPUS controlled intersection study (Report No. DOT HS 812 594). Washington, DC: National Highway Traffic Safety Administration.

[13] Akamatsu, M., Hashimoto, H., and Shimaoka, S., ''Assessment Method of Effectiveness of Passenger Seat Belt Reminder,'' SAE Technical Paper 2012–01–0050, 2012, doi:10.4271/2012–01–0050.

[14] *See, e.g.,* Transportation Research Board Study, p. 25; DOT 2009 Belt Warning Study, p. 2.

[15] European New Car Assessment Programme Assessment Protocol—Safety Assist, Version 8.0.2, November 2017.

detection, the visual signal must clearly indicate to the driver which seat belts are in use and not in use. For systems with occupant detection on all rear seating positions, the visual signal does not need to indicate the number of seat belts in use or not in use, but the signal must remain active if a seat belt remains unfastened on any of the occupied seats in the rear. No visual signal is required if all the rear occupants are belted. For systems with rear seat occupant detection, a 30-second audible signal needs to activate before reaching a vehicle speed of 25 km/h or before traveling 500 meters when any occupied seat has an unbuckled belt. Except for change of status events, the system may allow the driver to acknowledge the signal for rear seats and switch it off.[16] Furthermore, when any seat belt experiences a change of status at vehicle speeds above 25 km/h, an audiovisual signal is required; the requirements for this warning are the same as for the seat belt reminder.

The European Union is set to adopt an updated version of Regulation No. 16[17] of the Economic Commission for Europe of the United Nations (UNECE) that will require seat belt reminder systems in all front and rear seats on new cars beginning in September 2019.[18] For the front seats the seat belt reminder system is required to have a 2-level approach. The first level warning consists of a visual warning that is active for at least 30 seconds when any occupied front seat has an unfastened seat belt. The second level warning is triggered by threshold criteria based on distance traveled, speed, or duration of travel, which are determined by the manufacturer. The second level warning consists of a visual and audible signal activated for at least 30 seconds, not counting periods in which the warning may stop for up to 3 seconds. A change in seat belt status in front and rear seats also initiates the second level warning. For rear seats, only the first level warning is required, which consists of a visual warning that must be active for at least 60 seconds. The visual warning must indicate any seating position in which the seat belt is unfastened, so as to allow the driver to identify any unbelted occupants while facing forward in the driver's seat. For vehicles that have information on the occupancy status of the rear seats, the visual warning does not need to indicate unfastened seat belts for unoccupied seating positions. Also, the first level warning for rear seats can be dismissed by the driver.

[16] For front seat belts, the assessment protocol requires both a visual and an audible warning signal. The front occupant visual signal must remain active until the seat belt is fastened. The audible signal for the front occupants has two stages, an initial and final audible signal, which have different onset criteria. The initial audible signal must not exceed 30 seconds and the final audible signal must be at least 90 seconds. To prevent unnecessary signals, the system must also be capable of detecting whether the front passenger seat is occupied.

[17] ECE Regulation No. 16, Revision 9.

[18] The regulation will be introduced in two phases: September 1, 2019 for new vehicle types, *i.e.,* applied to all vehicle models that get a new type approval and September 1, 2021 for all newly produced and registered vehicles.

III. Regulatory and Legislative History

Current Driver's Seat Belt Warning Requirements

FMVSS No. 208 is intended to reduce the likelihood of occupant deaths and the likelihood and severity of occupant injuries in crashes. The standard took effect in 1968 and from its inception required seat belts in passenger cars.[19]

The standard currently requires a seat belt warning for the driver's seat belt on passenger cars;[20] trucks and multipurpose passenger vehicles (MPVs) with a gross vehicle weight rating (GVWR) of 4,536 kilograms (kg) (10,000 pounds (lb)) or less (except for some compliance options which do not require the warning);[21] and buses with a GVWR of 3,855 kg (8,500 lb) or less and an unloaded weight less than or equal to 2,495 kg (5,500 lb).[22] The regulations do not require seat belt warnings for any seating position other than the driver's seat.[23]

Manufacturers have two compliance options for the driver's warning.[24] The first option requires that if the key is in the ''on'' or ''start'' position and the seat belt is not in use, the vehicle must provide a visual warning for at least 60 seconds, and an audible warning that lasts 4 to 8 seconds. Under the second option, when the key is turned to the ''on'' or ''start'' position, the vehicle must provide a visual warning for 4 to 8 seconds (regardless of whether the driver seat belt is fastened) and an audible warning lasting 4 to 8 seconds, if the driver seat belt is not in use. What is now the second option (S7.3(a)(2)) became effective in 1974 and has remained unchanged since then.[25] What is now the first option (S7.3(a)(1)) was added to S7.3 in 1991.[26]

[19] 32 FR 2408, 2415 (Feb. 3, 1967) (initial Federal motor vehicle safety standards).

[20] S4.1.5.1(a)(3); S7.3.

[21] S4.2.6; S7.3.

[22] S4.2.6 (with the exception of some options).

[23] *See, e.g.,* Interpretation Letter from NHTSA to R. Lucki (July 24, 1985) (''Thus, the intent was to require a warning system for only the driver's position.''), *available at http://isearch.nhtsa.gov/search.htm.*

[24] 49 CFR 571.208, S7.3.

[25] *See* 39 FR 42692 (Dec. 4, 1974).

NHTSA Experience in the 1970s: Consumer Backlash Against Seat Belt Interlock and Subsequent Statutory Limitation on Belt Warning Requirements

Prior to 1974, NHTSA had promulgated a series of occupant protection regulations that, at various times, specified as compliance options various combinations of active and passive occupant crash protection, seat belt interlocks, and seat belt warnings.[27] A seat belt warning was first required in 1971, when NHTSA sought to increase seat belt use by adopting occupant protection compliance options that included the use of a seat belt warning for the front outboard seating positions.[28] This seat belt warning option required audible and visible warning signals that lasted for as long as the occupant was unbelted, the ignition was ''on,'' and the transmission was in forward or reverse. In 1972, NHTSA adopted occupant protection options for passenger cars that included (for cars that did not provide automatic protection) an interlock system that would prevent the engine from starting if any of the front seat belts were not fastened.[29] Contrary to the agency's expectations, the initial vehicle introduction of these systems in the early 1970s was not well-received by the public. In particular, continuous buzzers and ignition interlocks annoyed many consumers to the point of their disabling or circumventing the systems.

As a result of the strong negative consumer reaction, Congress adopted a provision, as part of the Motor Vehicle and School Bus Safety Amendments of 1974, prohibiting the agency from prescribing a motor vehicle safety

[26] *See* 56 FR 3222 (Jan. 29, 1991). The warning requirements for automatic belts in S4.5.3 mirror, with some differences, the first compliance option. Automatic belts are rarely, if ever, installed in current production vehicles, and NHTSA's regulations limit the seating positions for which automatic belts may be used to rear seats.

[27] ''Active protection'' refers to features, such as manual seat belts, that require action by the occupant, while ''passive protection,'' sometimes called ''automatic protection,'' refers to safety features that do not require any action by the occupant other than sitting in a designated seating position. Seat belt interlocks prevent starting or operating a motor vehicle if an occupant is not using a seat belt. For a fuller discussion of the history of the active and passive protection requirements in FMVSS No. 208, see Stephen R. Kratzke. Regulatory History of Automatic Crash Protection in FMVSS 208. SAE Technical Paper 950865, International Congress and Exposition, Society of Automotive Engineers, Detroit, Michigan, Feb. 27–March 2 (1995).

[28] 36 FR 4600 (May 10, 1971).

[29] 37 FR 3911 (Feb. 24, 1972).

standard that required, or permitted as a compliance option, seat belt interlocks or audible seat belt warnings lasting longer than eight seconds.[30] In response, NHTSA amended FMVSS No. 208 in 1974 to require that only the driver seating position be equipped with a seat belt warning system providing a visual and audible warning, with the audible warning not lasting longer than eight seconds.[31] The limited duration driver's seat belt warning requirement has remained in the standard, with some changes, since 1974. NHTSA has not subsequently amended FMVSS No. 208 to require seat belt warnings for any of the passenger seating positions.

Recent Regulatory History

In 2001, the House Committee on Appropriations directed NHTSA to contract with the Transportation Research Board (TRB) of the National Academy of Sciences to conduct a study on the benefits and acceptability of minimally intrusive vehicle technologies to increase seat belt use.[32] The Committee also requested that the study consider potential legislative and regulatory actions to facilitate installation of devices to encourage seat belt use. The TRB report (published in 2004) found that new seat belt use technologies could increase belt use without being overly intrusive.[33] It recommended that rear seat belt warning systems be developed and that NHTSA undertake a broad, multi-year program of research on the effectiveness and acceptability of different seat belt warning systems to establish a basis for future regulation. It also recommended that Congress amend the Safety Act to eliminate the 8-second limit on the length of the audible warning.

In 2002 and 2003, NHTSA sent letters to several vehicle manufacturers encouraging them to enhance seat belt warning systems beyond the FMVSS No. 208 minimum requirements.[34] (An ''enhanced'' warning system is one with visual and/or audible warning signals that exceed the maximum durations specified in S7.3, and/or that applies to seating positions other than the driver's seat). The agency also determined that the Safety Act did not prohibit manufacturers from implementing enhanced warning systems as long as the manufacturer provided some means of differentiating the voluntarily-provided signal from the required signal (for example, by a clearly distinguished lapse in time between the two signals).[35] Many vehicle manufacturers subsequently implemented enhanced seat belt warnings for the driver and front outboard passenger seating positions. Based on information submitted to the agency in connection with the agency's NCAP for MY 2018, 99.9 percent of participating vehicle models offered for sale in the U.S. had an enhanced warning (audio and/or visual) for the driver, right front passenger, or both, with a duration exceeding the FMVSS No. 208 requirement.[36]

In 2005, Congress passed legislation—the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) [37]—that required NHTSA to evaluate the effectiveness and acceptability of several different types of enhanced seat belt warnings offered by a number of manufacturers. In response, the agency conducted a multi-phase research study (described below).

On November 21, 2007, Public Citizen and Advocates for Highway and Auto Safety (petitioners) petitioned NHTSA to amend FMVSS No. 208 to require a seat belt warning system for rear seats on passenger cars and MPVs with a GVWR of 4,536 kg (10,000 lb) or less.[38] The petitioners noted that primary enforcement laws typically do not cover rear seat occupants and asserted that studies have proven that warnings for rear seat belts significantly increase rear passenger seat belt use. The petitioners further asserted that rear seat belt warnings are technologically feasible and would be less costly if they were required in all vehicles. The petitioners provided a range of estimates for how much a rear seat belt warning system could increase rear belt use. Petitioners asserted that rear seat belt warnings would save hundreds of lives each year and that a large percentage of the lives saved would be children.

On June 29, 2010, the agency published a Request for Comments (RFC) on the petition.[39] The RFC discussed the agency's research and findings regarding requiring rear seat belt warnings and solicited comments. The agency received 26 comments. Five commenters opposed requiring rear seat belt warnings: Ford Motor Company, General Motors, the Alliance of Automobile Manufacturers, the Association of International Automobile Manufacturers (now known as the Association of Global Automakers), and a commenter from the general public. Among those that supported requiring rear seat belt warnings were IEE S.A., Consumers Union, Insurance Institute for Highway Safety, the Automotive Occupant Restraint Council (now known as the Automotive Safety Council), and the American Academy of Pediatrics. NHTSA has granted the petition.

In 2012, Congress passed MAP–21.[40] MAP–21 contains two provisions regarding seat belt warning systems. First, it repeals the statutory provision that prohibited NHTSA from requiring or specifying as a compliance option an audible seat belt warning lasting longer than 8 seconds.[41] Second, it requires the Secretary to initiate a rulemaking proceeding to amend FMVSS No. 208 to provide a safety belt use warning system for designated seating positions in the rear seat.[42] It directs the Secretary to either issue a final rule, or, if the Secretary determines that such an amendment does not meet the requirements and considerations of 49 U.S.C. 30111,[43] to submit a report to Congress describing the reasons for not prescribing such a standard. In accordance with MAP–21, in early 2013 NHTSA initiated a rulemaking proceeding when it submitted for public comment a proposal to undertake a study regarding the effectiveness of existing rear seat belt warning systems.[44] (The results of this study, which involved a consumer phone survey and was completed in 2015, are discussed later in this document.)

IV. NHTSA Research on Effectiveness and Acceptance of Seat Belt Warnings

In light of the Congressional directives concerning seat belt warnings, NHTSA has taken a variety of actions to research the effectiveness and acceptance of seat belt warnings.

In 2002, the agency chartered an integrated project team to recomm8end

[30] These amendments were codified at 49 U.S.C. 30124. As explained below, this provision was amended in 2012 by MAP–21.

[31] 39 FR 42692 (Dec. 6, 1974).

[32] House Report 107–108, June 22, 2001.

[33] Transportation Research Board Study, p. 9.

[34] *See* Docket No. NHTSA–2002–13226.

[35] *See* Docket Nos. NHTSA–2001–9899, NHTSA–2002–13379, NHTSA–2003–14742, NHTSA–2003–15006, and NHTSA–2003–15156.

[36] IIHS reported that enhanced SBRSs are standard equipment for the driver and front passenger in 90 and 78 percent, respectively, of the 2013 vehicle models. This is based on the data maintained in their Highway Loss Data Institute, Vehicle Information Database.

[37] Public Law 109–59, 10306 (2005).

[38] Docket No. NHTSA–2010–0061–0002.

[39] 75 FR 37343 (June 29, 2010) (Docket No. NHTSA–2010–0061).

[40] Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141 (2012).

[41] *Id.* at § 31202(a)(2) (repealing portion of 49 U.S.C. 30124).

[42] *Id.* at § 31503.

[43] Section 30111 requires that a Motor Vehicle Safety Standard meet the need for safety, be stated in objective terms, and be practicable, among other requirements. *See infra,* Part V.

[44] 78 FR 5865 (Jan. 28, 2013).

strategies for increasing seat belt use.[45] The team's report, issued in 2003, observed that ''[d]espite the significant increases over the past twenty years, safety belt use in the United States falls short of that in some industrialized nations.'' [46] The report also noted that there are a ''wide range of initiatives . . . that have the potential to raise and/or sustain safety belt use rates.'' The report went on to identify several such initiatives, which it classified as either behavioral or vehicle-based. The behavioral strategies were upgrading existing state seat belt laws; high-visibility enforcement campaigns; a national communications plan; employer policies and regulation; and insurance industry collaboration. The vehicle-based strategies included encouraging vehicle manufacturers to voluntarily install enhanced seat belt warning systems; providing consumer information on vehicles equipped with enhanced warning systems as part of NCAP; and continued monitoring and assessment of the effectiveness and acceptability of enhanced seat belt warnings through research.

In response to the 2005 SAFETEA–LU mandate, NHTSA undertook a multi-phase research study of seat belt warnings. NHTSA published several reports. Three are particularly relevant to today's ANPRM. The first is a large-sample national observational study on the effectiveness of front seat belt warnings.[47] The study covered several states in different parts of the country. The vehicles in the study sample had a wide variety of seat belt warning systems. These included warning systems that had only the minimum features required by FMVSS No. 208, as well as twenty different enhanced warning systems. Because of the detail of the data gathered (*e.g.,* occupant demographic and vehicle-specific information), the analysis was able to control for confounding factors. The second study used an experimental or focus-group-based approach to study consumer acceptance as well as effectiveness.[48] The third report summarized and extended the analyses from the previous two reports.[49] This series of research studies showed, among other things, that the presence of an enhanced front seat belt reminder system increased front outboard passenger seat belt use by about 3 to 4 percentage points more than in vehicles with only a driver seat belt warning system meeting the minimum requirements in S7.3.

NHTSA continued and expanded on this work several years later. In 2015 the agency completed an additional report on the effectiveness and consumer acceptance of rear seat belt warnings, based on a consumer survey.[50] This study utilized a telephone survey of the drivers of vehicles with and without rear seat belt warning systems. The study found that overall, drivers of vehicles with a rear seat belt warning system were satisfied with the system and noticed an increase in rear seat belt use. For example, among drivers of vehicles with a rear seat belt warning, approximately 80 percent were satisfied with the system and 65 percent reported that the rear seat belt warning made it easier to encourage rear seat passengers to buckle up.

The results of NHTSA's research are discussed in more detail in Section VI.A and VI.C–D. The relevant research reports have also been placed in the docket for this rulemaking.

V. NHTSA's Statutory Authority

Under 49 U.S.C. Chapter 301, Motor Vehicle Safety (49 U.S.C. 30101 *et seq.*), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms.[51] ''Motor vehicle safety'' is defined in the Motor Vehicle Safety Act as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' [52] ''Motor vehicle safety standard'' means a minimum performance standard for motor vehicles or motor vehicle equipment.[53] When prescribing such standards, the Secretary must consider all relevant, available motor vehicle safety information.[54] The Secretary must also consider whether a proposed standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths.[55] The responsibility for promulgation of Federal motor vehicle safety standards is delegated to NHTSA.[56]

MAP–21 requires the Secretary to initiate a rulemaking proceeding to amend FMVSS No. 208 to provide a safety belt use warning system for designated seating positions in the rear seat.[57] It directs the Secretary to either issue a final rule, or, if the Secretary determines that such an amendment does not meet the requirements and considerations of 49 U.S.C. 30111, to submit a report to Congress describing the reasons for not prescribing such a standard.

VI. Issues on Which NHTSA Seeks Information From the Public

As it continues with the proceeding required to be initiated by MAP–21, NHTSA seeks comment on a variety of issues related to amending FMVSS No. 208 to require a rear seat belt warning system. These include: The types of seat belt warning system requirements the agency should propose; the effectiveness of such systems at increasing rear seat belt use; the degree to which consumers would accept such systems; the associated benefits and costs; and the vehicles to which any proposed requirements should apply.

A. Potential Specifications for a Required Rear Belt Warning System

NHTSA is considering proposing any of a variety of minimum requirements for a rear seat belt warning system. There are a variety of aspects of the possible proposed requirements that we seek comment on. NHTSA especially seeks any data related to these issues.

1. *Should the warning be visual-only, audible-only, or audio-visual?* If NHTSA were to propose requirements for a warning that is similar to existing seat belt warnings, should the warning be visual-only (*e.g.,* a telltale displaying text or icons), audio-only, or audio-

[45] *See* 68 FR 46262 (Aug. 5, 2003).

[46] U.S. Department of Transportation, National Highway Traffic Safety Administration. July 2003. Initiatives to Address Safety Belt Use, available at *www.regulations.gov* (docket NHTSA–2003–14621).

[47] Mark Freedman *et al.* The Effectiveness of Enhanced Seat Belt Reminder Systems Draft Report: Observational Field Data Collection Methodology and Findings. 2007. DOT HS–810–844. Washington, DC: National Highway Traffic Safety Administration.

[48] N. Lerner *et al.* 2007. Acceptability and Potential Effectiveness of Enhanced Seat Belt Reminder System Features. DOT HS 810 848. Washington, DC: National Highway Traffic Safety Administration [hereinafter DOT 2007 Acceptability Study].

[49] DOT 2009 Belt Warning Study, *supra.*

[50] Paul Schroeder & Melanie Wilbur. 2015. Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration. [Found in the docket for this ANPRM.]

[51] 49 U.S.C. 30111(a).

[52] 49 U.S.C. 30102(a)(8).

[53] 30102(a)(9).

[54] 30111(b)(1).

[55] 30111(b)(3)–(4).

[56] *See* 49 CFR part 1.95.

[57] Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, 31503 (2012).

visual? (Below we also seek comment on alternative non-traditional approaches.) FMVSS No. 208 requires the driver's seat belt warning to be audio-visual. Seat belt warnings for front outboard passenger seats (which are not required by FMVSS No. 208) currently on the market are also typically audio-visual. NHTSA's research suggests that audible warnings in conjunction with visual warnings are generally more effective than text or icons alone, but are also more intrusive.[58] However, research has not yet firmly established which system characteristics are optimal.[59] Neither Euro NCAP or the ECE regulation require an audible warning for rear seats.

➢ Below we ask specific questions about potential specifications for visual and audible warnings, and, more generally, which of these NHTSA should propose for the rear seat belt warning system minimum requirements. Should whether the warning is visual or audible depend on when the warning is given and what it is for (*e.g.,* a visual warning at the beginning of the trip and an audible warning during the trip if a buckled belt becomes unfastened)? Should it also depend on the recipient of the warning (for example, driver versus rear passenger)?

NHTSA also seeks comment on whether an audible warning alone, without a visual warning, would be an effective way to alert the driver to the status of the rear seat belts and increase rear seat belt use. For example, would an audible notification (*e.g.,* a chime) indicating that a rear-seat occupant had buckled the belt effectively inform the driver (or facilitate the driver in determining) whether there were any unbuckled rear-seat occupants? We also seek comment on the costs and benefits of different types of warnings.

2. *Triggering conditions.* Since seat belt warning systems are generally initiated at the beginning of a trip (*i.e.,* when the ignition switch is moved to the ''on'' or ''start'' position) so as to assure that occupants are safely restrained prior to any potential vehicle crash, this is perhaps the most intuitive approach for rear seat belt warnings as well. However, might it be preferable to delay the warning to a time when the warning could be given greater attention and, perhaps, the driver (or other occupant) is less distracted? Would delaying the warning until the vehicle is placed in gear make it more likely that the occupants fasten their belts before the vehicle is in motion? Are there other triggering conditions for the start of a trip NHTSA should consider, and what would be the justification for choosing them? Would the triggering condition necessitate occupant detection? Should the warning be required/allowed/disallowed if the/a belt is buckled?

In addition to a warning at the beginning of a trip, should there be a warning if a seat belt becomes unbuckled in the course of a trip (a change-of-status warning)? Such a warning may reduce the risk of injury to children by alerting the driver that a child has unbuckled his or her seat belt, providing the driver an opportunity to direct the child to re-buckle the belt. The signal may also potentially prevent children from unbuckling their seat belts. The agency's 2015 Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System found that a change of status warning is effective in getting passengers to refasten their seat belt.[60] Volvo and Jaguar Land Rover vehicles sold in the United States and equipped with rear seat belt warnings provide a change-of-status warning. In addition, a change-of-status warning is required by the new ECE regulation No. 16 and is also required to obtain bonus points for a seat belt reminder system by Euro NCAP.[61]

If NHTSA should propose a change-of-status warning, what should the triggering condition(s) be? Should it be linked to the vehicle's speed and/or transmission position (*e.g.,* forward or reverse, or other criteria), and if so, what should the criteria be, and why? Similarly, should there be criteria for the duration of the warning? In order to earn bonus points, Euro NCAP requires the system to activate the change of status warning immediately at vehicle speeds over 25 km/h. If the change of status occurs below 25 km/h and no doors are opened, the signal may be delayed until the vehicle has been in motion for 500 meters.[62] The ECE regulation uses similar thresholds, but lets the manufacturer choose either a speed, distance traveled, or a duration threshold.[63] Are there situations when the warning at a low speed would result in an unnecessary or unwanted warning, and how frequently would such situations occur?

3. *Alternative warning systems.* NHTSA also seeks comment on whether it should require or specify as a compliance option a rear seat belt warning that differs from the type of audio-visual warning that is currently required for the driver's seat belt. Alternatives to a visual warning (telltale) on vehicle start-up could include an audible signal, either electronic or mechanical, or a haptic warning (*e.g.,* steering wheel or seat vibration). Similarly, an audible or visual warning of a change in the status of rear seat belts could be either electronic or mechanical and could include a haptic signal. For example, to what extent does the sound of the latch plate clicking into the buckle when a belt is fastened currently serve as an indication of seat belt use? Would that sound, perhaps augmented, serve as an effective notice to the driver that a rear-seat occupant had buckled the belt, or the lack of such sound indicate that a rear-seat occupant had not buckled the belt? To facilitate an effective warning that advances safety and is appropriate for diverse vehicle types and uses, NHTSA seeks comment on alternative cost-effective solutions that would alert the driver when a rear seat passenger buckles and/or unbuckles. For any alternative warning systems/signals that are identified, NHTSA seeks information on the issues we identify below. For example, how would such an alert function if there were multiple rear-seat occupants? Would the warning be distinguishable from other alerts that are provided to the driver? How would the costs and benefits of such a warning compare to more traditional types of warnings?

4. *Occupant detection technology.* NHTSA also seeks comment on warning systems that utilize occupant detection.

Rear seat warning systems that employ occupant detection have potential advantages over systems that do not utilize it. With occupant detection, a warning system can provide more informative warnings. The system can determine whether any seats are occupied by an unbelted occupant, as opposed to simply notifying the driver which or how many belts, if any, are fastened. Such systems are also better able to appropriately target audible warnings or longer-duration visual warnings (enhanced warnings). Having an audible or longer-duration visual warning activate for an unoccupied seat (such as might be the case if the system did not have occupant detection) could be a nuisance for the driver and might either desensitize the occupants to the

[58] DOT 2009 Belt Warning Study, *supra,* p. 39 (drivers); p. 45 (passengers).

[59] DOT 2009 Belt Warning Study, p. 1.

[60] Paul Schroeder & Melanie Wilbur. 2015. Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration, [Found in the docket for this ANPRM.]

[61] ECE Regulation No. 16, Revision 9 § 8.4.3.3 and 8.4.4.5; European New Car Assessment Programme Assessment Protocol—Safety Assist, § 3.1.5.

[62] European New Car Assessment Programme Assessment Protocol—Safety Assist, § 3.3.2.

[63] ECE Regulation No. 16, Revision 9 § 8.4.2.4.1.1. to 8.4.2.4.1.3.

warning signal, or lead them to circumvent or defeat the system.

However, occupant detection for the rear seats may present both technical and cost challenges.[64] Rear seats are used in ways that complicate occupant detection. Rear seats may frequently be used to transport cargo such as groceries, pets, and other heavy objects, which could be mistaken for an occupant. Rear seats are frequently used for child restraint systems attached by a child restraint anchorage system, or LATCH.[65] An occupant detection system in the rear seat may have difficulty detecting a child restraint system. In addition, rear seats may be less well-defined than most front seats, which could make it more challenging for a sensor to define seat occupancy accurately. For example, it may be technically challenging for an occupant detection system to recognize a large occupant spanning multiple seating positions as a single occupant rather than two occupants. These challenges may be greater or lesser depending on the rear seat configuration of the vehicle. A seat belt warning system utilizing occupant detection technology could provide false reminders if the occupant detection were inaccurate. A problem with false reminders is that they can lead occupants to disregard or attempt to circumvent the system, defeating the purpose of such systems. Occupant detection is also likely to add cost to a rear sear warning system. Euro NCAP does not specify that occupant detection for rear seats is needed in order to obtain bonus points.[66] The ECE regulations do not require occupant detection.

We seek comment on whether NHTSA should propose warning system requirements that would necessitate occupant detection for the rear seats, and the technical and cost feasibility of doing so.

NHTSA also seeks comment on proposing multiple compliance options for the warning system requirements. Should all the compliance options require occupant detection, or should there be some compliance options that do not require occupant detection? To what extent should we expect increased effectiveness and benefits for a system utilizing occupant detection compared to a system without such technology? What would be the increased cost associated with such a system (on a per seat and per vehicle basis), and how would it compare to the increased benefits (if any)?

5. *Enhanced warning systems.* Enhanced warning systems utilize warnings that are relatively longer-lasting or have an audible component beyond the minimum FMVSS No. 208 requirements for the driver's seat warning. Research by NHTSA and others suggests that audible warnings in conjunction with visible warnings are potentially more effective than visible warnings alone.[67] As noted above, an enhanced warning that activates for an unoccupied seat could be a nuisance that either desensitizes the occupants to the warning signal or leads them to circumvent or defeat the warning. Enhanced warnings therefore generally need to work in conjunction with an occupant detection system, and even this might not completely eliminate the possibilities of false warnings (for example, if a rear seat is occupied by a pet or groceries).

In addition to this, while enhanced warnings are potentially more effective due to their persistence and annoyance,[68] they also present potential consumer acceptance challenges for the same reasons. Considering the history in this area as described above, the agency is particularly concerned with striking the right balance. NHTSA's research suggests that there is an inherent trade-off between effectiveness and acceptability.[69] The agency's research has noted that no clear consensus exists about which warning system features are most acceptable,[70] and that the data regarding acceptance so far are ''limited, subjective, and anecdotal.'' [71] It has also been pointed out that the research on seat belt use and acceptability among drivers may not be representative of situations where multiple passengers are present and that further evaluation is warranted on the annoyance and acceptance of seat belt warnings.[72] Euro NCAP specifies that, if there is no occupant detection, only a 60 second visual signal is needed for the rear warning in order to earn bonus points, and the new ECE regulation also only requires a 60 second visual signal for the rear warning.[73] We seek comment on whether the rear warning system should be required to include audible or visual warning features exceeding those currently required for the driver's seat belt warning (including the costs and benefits) and if so, what those features should be.

6. *Belt use criteria.* The current driver's belt warning requirements specify that a belt is ''not in use'' when, at the option of the manufacturer, either the seat belt latch mechanism is not fastened or the belt is not extended at least 10.16 centimeters (cm) (4 inches (in)) from its stowed position.[74] Should NHTSA retain these criteria to determine if a rear seated occupant is belted, and if not, what should the criteria be, and why?

7. *Seat occupancy criteria.* If NHTSA were to propose system requirements for occupant detection (either mandatory or as a compliance option), seat occupancy criteria might be necessary to objectively specify when a seat is occupied for the purposes of NHTSA's compliance testing. Because the existing seat belt warning requirements in S7.3 apply only to the driver seat, they do not contemplate an occupant detection system (because, traditionally, driver seat occupancy could be assumed).

Accordingly, NHTSA might need to propose seat occupancy criteria. If so, what should the criteria be? First, what type of occupants should the criteria be based on; *e.g.,* should they be based on a mid-size male, small-size female, or a child? Should the system be required to register small children that would presumably be placed in a child restraint system? Should the criteria

[64] In the U.S., occupant detection is widely used in existing vehicles in the front outboard designated seating positions, either as part of an advanced air bag system, or as part of a voluntary seat belt warning system. Occupant detection is utilized by the advanced air bags to properly classify the occupant in the seat (*e.g.,* child, adult, small-statured adult) so that the advanced frontal air bag systems can determine if and with what level of power the front air bag will inflate. We believe that occupant detection is voluntarily used in the front passenger seat to avoid having an audible warning activate for an unoccupied seat. Occupant detection systems are practical for the front outboard passenger seating position, as that passenger seat is not typically subject to as many of the potential complications to occupant detection posed by rear seats (such as large occupants spanning multiple seating positions).

[65] Many in the child passenger safety community refer to the child restraint anchorage system as the ''LATCH'' system, an abbreviation of the phrase ''Lower Anchors and Tethers for Children.'' The term was developed by a group of manufacturers and retailers for use in educating consumers on the availability and use of the anchorage system and for marketing purposes.

[66] European New Car Assessment Programme Assessment Protocol—Safety Assist, § 3.3.

[67] *See, e.g.,* DOT 2009 Belt Warning Study, *supra,* pp. 54, 57. *See also* Paul Schroeder & Melanie Wilbur. 2015. Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration, p. 66; and IIHS Status Report Vol. 54, No. 3, April 25, 2019, p. 5. [Found in the docket for this ANPRM.]

[68] *See, e.g.,* DOT 2009 Belt Warning Study, *supra,* p. 54.

[69] *See id.* p. 60.

[70] DOT 2009 Belt Warning Study, *supra,* p. 8; Schroeder & Wilbur, *supra,* p. 33.

[71] DOT 2007 Acceptability Study, *supra,* p. 41.

[72] DOT 2007 Acceptability Study, *supra,* pp. 41–42.

[73] ECE Regulation No. 16, Revision 9 § 8.4.2.3.1; European New Car Assessment Programme Assessment Protocol—Safety Assist, § 3.3.1.1.

[74] S7.3(c).

take into account the presence of child restraint systems?

Next, for the type(s) of occupants upon which the criteria are based, what should the criteria be? Should NHTSA consider the same seat occupancy criteria specified in FMVSS No. 208 for compliance testing of low-risk deployment and suppression air bag systems? To test whether an air bag system either suppresses or properly deploys the front outboard passenger air bag in the presence of a child or small-stature individual, NHTSA tests the air bag system with a variety of different dummies. For example, for the static suppression and low-risk deployment compliance options, FMVSS No. 208 specifies multiple performance tests using 1-, 3-, and 6-year-old Anthropomorphic Test Devices (test dummies) both in and out of a Child Restraint System (CRS). In addition, in order to ensure that the suppression feature does not inappropriately suppress the air bag for small-statured adults, FMVSS No. 208 requires the air bag system to be active during several static tests using a 5th percentile adult female dummy in the right front passenger seat.

In order to perform compliance testing on a rear seat belt warning system that uses occupant detection, should NHTSA use one or more of these dummies, or specify occupancy conditions based on one of these dummies? For example, NHTSA could specify use of the 6-year-old test dummy. Alternatively (or in addition), NHTSA could specify that a rear seat would be considered ''occupied'' when an occupant who weighs at least 21 kg (46.5 lb), and is at least 114 cm (45 in) tall is seated there. These measurements come from FMVSS No. 208, S29.1(e), and correspond to the height and weight requirements for a child who is used as an alternative for the 6-year-old child test dummy for compliance testing of advanced air bag systems utilizing static suppression. Is this an appropriate threshold? NHTSA also seeks comment on the potential for false warnings, and how this might be addressed.

8. *Making the system resistant to intentional and inadvertent defeat.* As part of the agency's seat belt interlock research program, we recently performed research on the development of a seat belt misuse detection system,[75] so we are aware there are a number of ways in which a rear seat belt warning system might be intentionally defeated, as well as potential countermeasures. For example, a warning system could be defeated if:

- The belt was buckled before the occupant sat in the seat. This could be addressed by requiring a sequential logic system. A sequential logic system would require that the belt be buckled after the seat has been occupied in order for the system to recognize the seat belt as being buckled;
- An occupant buckles the seat belt behind themselves. This could be addressed by utilizing seat belt buckle and spool-out sensors and deactivating the warning only if the webbing were spooled out more than a predetermined length. However, even these sensors could be defeated by pulling out additional webbing and clipping it off to prevent retraction; or
- The seat belt and/or occupant detection sensors utilized by the rear warning system in vehicles with removable rear seats are intentionally disconnected.

There are also scenarios involving inadvertent circumvention that could impact the effectiveness and accuracy of a rear belt warning system. One scenario is when the driver uses a remote engine starter so that the initial warning activates before the driver (and perhaps the rear seat occupants) are in the vehicle. This might be addressed by programming the system to require input from door or occupant sensors to verify that the driver is in the vehicle. There are, of course, a variety of other ways the warning system might be intentionally or inadvertently circumvented.

We seek comment on whether NHTSA should propose requirements to address circumvention. We also seek comment on whether we should propose requiring a single-trip manual deactivation of the seat belt warning system once the minimal signal performance requirements are met, which might diminish the likelihood of circumvention.[76] The ECE regulations allow the rear seat belt warning system to incorporate a short-term and/or a long-term deactivation feature for the audible change-of-status warning.[77] Under these regulations, a short-term deactivation may only be effectuated by specific controls that are not integrated in the safety-belt buckle and only when the vehicle is stationary.[78] When the ignition or master control switch is deactivated for more than 30 minutes and activated again, a short-term deactivated safety-belt reminder must reactivate. A long-term deactivation may only be effectuated by a sequence of operations that are detailed only in the manufacturer's technical manual or which require tools that are not provided with the vehicle.[79] To what extent would a deactivation feature reduce the effectiveness of the warning? Would a deactivation feature only be needed for systems with a persistent audible warning?

9. *Electrical Connection Requirements.* A rear seat belt warning system might require an electrical connection between the seat and the vehicle to relay the information gathered by a buckle or webbing spool-out sensor to the rest of the warning system. A rear-belt warning system may therefore present potential wiring complexities, particularly in vehicles with removable, folding, rotating, or stowable seats. These types of seats might present an issue for a rear seat belt warning system because the electrical connection might not be reestablished for these seats when the seat is reinstalled. There could be instances for manual connection seats where the driver either forgets to make the connection or makes an improper connection. Even for seats where the connections are automatically established when the seat is reinstalled, the automatic connectors might malfunction and a proper connection may not be made. If the electrical connection is not reestablished, the warning system could malfunction or provide inaccurate information. This issue might predominantly affect minivans, which make up a small percentage of the fleet. Removable seats are mainly found in the second row of minivans. Foldable, rotating or otherwise stowable seats (*e.g.,* Stow-n-Go, Flip and Fold) are prominent in the third row of minivans or large sport utility vehicles. Foldable or stowable seats in the second row are not as prominent in minivans.

A variety of potential system requirements could be proposed to address this potential issue. The warning system in such vehicles might be required to automatically connect the electrical connections when the seat is put in place or, if a manual electrical connection is required, the connectors might be required to be readily accessible. The system could also provide a warning signal to inform the driver if a proper electrical connection has not been made with respect to an easily removable seat. Euro NCAP and

[75] Mazzae, E.N., Baldwin, G.H.S., & Andrella, A.T. (2018, October). Performance assessment of prototype seat belt misuse detection system (Report No. DOT HS 812 593). Washington, DC: National Highway Traffic Safety Administration.

[76] A single-trip manual activation refers to a feature that allows the driver to acknowledge a visual or audio signal—*e.g.,* with a press of a button—and not continue seeing or hearing it.

[77] § 8.4.5.

[78] § 8.4.5.1.

[79] § 8.4.5.2.

the revised ECE regulations do not have such specifications. The ECE regulations provide that the rear seat belt warning requirements will not apply to removable rear seats or to seats in a row in which there is a suspension seat until September 2022.

NHTSA seeks comment on this issue, particularly on whether such electrical connection requirements should be proposed, and if so what they should be, and what types of seats they should be required for. Are there new and innovative wireless technologies that could reduce or eliminate wiring complexities, such as those used in tire pressure monitoring systems? The agency also seeks comment on the safety need for such warnings and the costs and feasibility of addressing these issues.

10. *Owner's manual/label requirements.* We also seek comment on whether NHTSA should propose that information be provided in the vehicle owner's manual that accurately describes the warning system's features, including the location and format of the visual warnings, in an easily understandable format. Information of this sort is already required by FMVSS No. 208 for the driver's seat belt warning. Owner's manual readership may be relatively low,[80] so we also seek comment on whether we should require that this information be displayed in the vehicle instead of (or in addition to) the owner's manual. Should information about the reconnection of electrical components for any removable/stowable seats be placed in close proximity to the seat's electrical connection?

11. *Interaction with other vehicle warnings.* NHTSA also seeks comment on whether a rear seat belt warning could conflict with other in-vehicle warnings. We seek comment on how NHTSA might specify warning requirements so that any such conflicts are avoided or minimized, and, if a conflict cannot be avoided, which warning, if any, should take precedence.

12. *Harmonization with regulatory requirements or new car assessment programs in other markets.* NHTSA also seeks comment on whether and to what extent any proposed requirements might (or should) be based upon or differ from other regulatory requirements (such as ECE requirements) or consumer information programs (such as Euro NCAP).

[80] The National Child Restraint Use Special Study found that only 13 percent of drivers reported reading the vehicle owner's manual. Nathan K. Greenwell. 2015. DOT HS 812 142. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration, p. 10.

With respect to potential requirements for a *visual* rear seat belt warning, NHTSA seeks comment on the following:

13. *Visual warning location.* Who should the signal warn—the driver, the rear passenger(s), or both? A seat belt warning can function either by alerting the driver that a rear seat belt is unbuckled, leaving it to the driver to request the rear passenger to buckle up; it can warn the rear passenger(s) directly that their belt is unbuckled; or it can warn both the driver and rear passenger(s). Some research may suggest that having the warning visible to the unbelted occupant may increase effectiveness.[81] The new ECE regulation simply requires that the visual warning be visible to the driver when they are facing forward.[82] NHTSA seeks comment on whether the warning should be visible to the driver, the rear passenger(s), or both. To what extent would requiring a warning be visible to rear passengers increase cost and complexity, and would this be justified? Where should the visual warning be located, especially with respect to the rear passenger, if such a telltale were appropriate? To what extent would or should such requirements constrain manufacturers' design choices, and how could such constraints be minimized?

14. *What type of information should the warning convey?* Particularly with respect to a visual warning for the driver, what type of information should a visual warning convey? For example, the system could indicate how many or which rear seat belts are in use (a ''positive-only'' system); how many or which rear seat belts are not in use (a ''negative-only'' system); or how many or which rear seat belts are in use and how many or which rear seat belts are not in use (a ''full-status'' system).

Each of these systems could have strengths and limitations. A positive-only system would be the least technically complex of the three. Since it would only need to detect whether a seat belt is in use, it would require seat belt latch or webbing spool-out sensors (assuming no defeat sensing was required). With a positive-only system, the driver would need to determine how many rear seat occupants there are and then determine if that number equals the number of seat belts that are reported by the warning system as buckled. This compliance option would not necessitate occupant detection.

Negative-only and full-status systems would provide more direct information to the driver, but might be more technically complex. These systems might be more effective than a positive-only system because they would directly inform the driver whether any rear seat occupants were unbuckled, without the driver having to compare the number or location of occupants and fastened belts. In addition, as discussed above, warning systems equipped with occupant detection are more amenable to audible warnings and enhanced warning features. However, such systems might require occupant detection sensors in order to minimize or eliminate false warnings. (Because the negative-only and full-status systems would indicate the presence of an unbuckled belt, they would probably want to avoid giving this warning unless the seat were occupied; if not, such ''false positives'' could lead the driver the disregard the warning or circumvent the system.)

NHTSA seeks comment on the relative merits of such systems. Should NHTSA propose one or more of these systems as requirements or compliance options? How much more effective would the more informative negative-only and full-status systems be? How much more complex or expensive would they be? Would occupant detection be necessary for these systems? NHTSA also seeks comment on whether there are alternative warning systems that would convey alternative or additional information to the driver (or rear passengers). For example, would a less sophisticated warning, such as a specialized system of mirrors, be sufficient to inform the driver about the status of the rear seat belts?

15. *Telltale Characteristics.* If a visual warning system including a telltale were to be required, should NHTSA propose requirements for telltale characteristics, and if so, what should they be? Should the warning be standardized, and would this increase the likelihood that consumers would notice, recognize, and respond to the warnings? For example, should NTHSA propose requirements for the color of the telltale, required text, pictorial vs. alphanumeric, or whether it flashes?

16. *Minimum duration.* What should the minimum duration of a visual warning be? The current driver's seat belt visual warning is required to last at least 60 seconds under the second compliance option. What minimum length of time would be sufficient to capture the driver's (or passenger's) attention for the rear seat belt warning, without becoming a distraction or nuisance for the driver (or passenger)? NHTSA's research (for front seat belt

[81] DOT 2007 Acceptability Study, *supra,* pp. 67–68.

[82] ECE Regulation No. 16, Revision 9 § 8.4.4.2.

warnings) suggests that longer-duration warnings are more effective, but also more annoying.[83] Euro NCAP specifies at least a 90 second visual signal for the front seats and only a 60 second visual signal for the rear seats in order to earn bonus points. The new ECE regulation specifies a first level 30 second visual warning and second level 30 second audiovisual warning for the front seats and a 60 second visual signal for the rear seats.

With respect to *audible* warnings, we seek comment on the following:

17. *Minimum duration.* If an audible warning requirement were adopted for the change-of-status warning, what should the minimum duration of an audible warning be? Because MAP–21 removed the 8-second limitation, NHTSA may require longer-lasting audible warnings. NHTSA is, however, cognizant of the fact that longer warnings lead to annoyance. What duration would appropriately balance effectiveness and annoyance? Euro NCAP specifies that a change-of-status audible warning must be 30 seconds long in order to receive bonus points.[84] The new ECE regulation also specifies that a change-of-status audible warning component be 30 seconds long.[85]

18. *Other audible signal characteristics.* If it mandates an audible warning, should NHTSA specify any additional audible warning characteristics (for example, a minimum/maximum sound level)?

B. Applicability

19. NHTSA seeks comment on the vehicles to which any proposed rear seat belt warning requirements should apply. We also seek comment on whether any vehicles within the broad applicability criteria should be exempt. Rear seat belts are generally required except in certain buses (such as school buses) between 10,000 lb and 26,000 lb, and for school, perimeter, and transit buses over 26,000 lb. (Other exceptions also apply.) We especially seek comment on whether a rear seat belt warning should be required for high-occupancy vehicles such as 15-passenger vans, large sport utility vehicles, school buses, and large trucks and vans with a GVWR less than or equal to 4,536 kg (10,000 lb).[86]

Vehicles with a larger number of rear seats may present visual signal complexities and other challenges. At the same time, such vehicles could be at least as likely, if not more likely, to have rear occupants. With respect to school buses, we acknowledge that a rear seat belt warning requirement might place additional cost burdens on school systems, given that such cost can lead to reductions in school bus service, resulting in greater risk to students.[87] We also note that school buses of all sizes offer passengers compartmentalization protection to reduce the risk of crash injury, even to the unbelted.

We seek comment on what vehicle types should be included and excluded, including the costs and benefits of inclusion. We also seek comment on ways to propose performance requirements that provide manufacturers with the flexibility to design a warning system that is appropriate for each vehicle type.

C. Effectiveness

20. NHTSA seeks comment on the effectiveness of rear seat belt warning systems. NHTSA's research suggests that at least some unbelted rear seat occupants might be amenable to wearing a seat belt. Seat belt non-users are typically categorized as either ''part-time'' non-users or so-called ''hard-core'' non-users.[88] Part-time non-users are those non-users who generally express positive attitudes toward seat belts, but do not always buckle up, due to a range of reasons, such as short trips, forgetfulness, and being in a rush.[89] Hard-core non-users are those who ''generally do not acknowledge the benefits of seat belts and are opposed to their use.'' [90] NHTSA's consumer research shows that part-time non-users make up the majority of non-users (83%), while hard-core non-users make up a smaller proportion of non-users (17%).[91] According to the results of NHTSA's most recent self-reporting survey of seat belt use, the Motor Vehicle Occupant Safety Survey (MVOSS), while more than four-fifths of survey respondents said they always wore their seat belts when driving (88%) or riding as a passenger in the front seat (86%), only 58 percent said they always wore their seat belts when riding as a passenger in the rear seat. [92] Even those who normally wore their seat belts in the front seat were less inclined to wear their seat belts in the rear. Only 66 percent of people who said they always wore seat belts while driving also said they always wore them as rear seat passengers. Of those who wore seat belts ''most of the time'' as drivers, only a small percentage said they wore them always (12%) or most of the time (21%) when riding in the rear.[93] These part-time non-users might be amenable to strategies to increase seat belt use.[94]

A rear seat belt warning system can increase rear seat belt use in two ways: It can remind a rear seat occupant to fasten his or her belt, and it can inform the driver that a passenger is unbuckled, so that the driver can request the occupant to fasten their belt. Without a rear seat belt warning, the driver must turn around to ascertain whether a rear seat occupant is using a seat belt (or ask the occupant); in some vehicles, belt use may not be evident to the driver, even if he or she turned around, due to line-of-sight limitations. In NHTSA's 2015 Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System, 65 percent of drivers of vehicles equipped with rear seat belt reminders reported that the rear seat belt reminder made it easier to encourage the rear seat passengers to buckle up.[95]

NHTSA has conducted a variety of research relating to the effectiveness of in-vehicle seat belt warnings. First, it conducted the multi-phase seat belt

[83] DOT 2009 Belt Warning Study, *supra,* p. 57.

[84] European New Car Assessment Programme Assessment Protocol—Safety Assist, § 3.3.2.

[85] ECE Regulation No. 16, Revision 9 § 8.4.2.4.1.

[86] Fifteen-passenger vans are classified as ''buses'' because they are designed for carrying more than ten persons. *See* S571.3.

[87] *See* 76 FR 53102 (Aug. 25, 2011) (denial of a petition for rulemaking to mandate the installation of three-point seat belts for all seating positions on all school buses).

[88] *See, e.g.,* Transportation Research Board Study, *supra,* p. 3.

[89] John M. Boyle & Cheryl Lampkin. 2008. 2007 Motor Vehicle Occupant Safety Survey, Volume 2, Seat Belt Report. DOT HS 810 975. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration; DOT 2009 Belt Warning Study, *supra,* p. 1.

[90] Transportation Research Board Study, *supra,* p. 40.

[91] Calculated from Boyle & Lampkin, *supra,* p. 11 (Fig. 6). This considers respondents who reported that they ''Never'' or ''Rarely'' used a seat belt to be hard-core nonusers. *See* Transportation Research Board Study, *supra,* p. 31 n.3. This does not include respondents who indicated that they never drive. The number of non-drivers surveyed was relatively small. Boyle & Lampkin, *supra,* p. 75.

[92] Boyle & Lampkin, *supra,* p. iv. This is a national telephone survey periodically conducted by NHTSA. Because, unlike NOPUS, it is not observational, the MVOSS is not the best indicator of national belt use. In addition, because of respondent bias, the large number of part time users, and the tendency for survey respondents to over-report belt use, MVOSS use rates have typically been about 10 percentage points higher than those from NOPUS. MVOSS does, however, provide demographic detail that cannot be observed and insight into the reasons people do and do not use seat belts. *See* Donna Glassbrenner. 2002. Safety Belt and Helmet Use in 2002—Overall Results. DOT HS 809 500. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration.

[93] Boyle & Lampkin, *supra,* p. 41.

[94] Transportation Research Board Study, *supra,* pp. 39–40, 61; Boyle & Lampkin, *supra,* pp. 36, 38.

[95] Paul Schroeder & Melanie Wilbur. 2015. Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration, p. 47. [Found in the docket for this ANPRM.]

warning study that was part of the research program initiated pursuant to SAFETEA–LU. The analysis demonstrated that the presence of an enhanced front seat belt reminder system increased front outboard passenger seat belt use by about 3 to 4 percentage points more than in vehicles with only a driver seat belt warning system meeting the minimum requirements in S7.3.[96]

Second, NHTSA's 2015 Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System studied the effectiveness and acceptability of rear seat belt warnings based on a consumer telephone survey of the drivers of vehicles with and without rear seat belt warning systems.[97] The study found, among other things, that about one quarter of drivers (24%) of vehicles equipped with a rear seat belt warning system noticed an increase in rear seat belt use. When asked about their experience with the change of seat belt buckle status alert, close to half of drivers of vehicles with a rear seat belt warning system (49%) said that their system has indicated that a passenger had unfastened his/her seat belt within the past year. Overall, of those who reported experiencing a change of seat belt status alert (49%), over three-quarters of these drivers (77%) said that the unbuckled passenger eventually did refasten her seat belt, either on her own or at the driver's request.

NHTSA seeks comment on whether, and to what degree, a rear seat belt warning would be effective. We seek comment on specific warning signal attributes that NHTSA could propose (*e.g.,* duration of an audible warning), and how effective they might be, especially as compared to other possible signal attributes.

We also seek comment on how to quantify the effectiveness of a rear seat belt warning system, including data related to this. Because of the low prevalence and limited history with rear seat belt warnings, NHTSA has limited direct data on the effectiveness of rear seat belt warnings. Can we expect more or less of an increase than the 3–4% increase for enhanced front warnings? NHTSA requests any data or studies concerning the effectiveness of rear seat belt warnings. We also seek comment on balancing effectiveness with costs, technological feasibility, and acceptability.

With respect to comments that identify an innovative seat belt warning system differing from the current driver's seat belt warning and current production front and rear passenger seat belt warnings, NHTSA seeks comment on such possibilities, and the effectiveness of any such alternative.

D. Consumer Acceptance

21. NHTSA seeks comment on potential consumer acceptance concerns with a proposed seat belt warning system.

In order for a rear seat belt warning to have an impact on seat belt use, it must balance effectiveness with acceptability. The warning must be noticeable enough to prompt occupants to buckle their seat belts, but not so intrusive that the public does not accept the warning system, that an occupant will circumvent or disable it, or that the warning system could lead to driver distraction that could increase the risk of a crash.[98]

Consumer acceptance of any eventual seat belt warning requirements is an important consideration, given the potential safety benefits of rear seat belt warnings, the history of seat belt warning technologies, and the fact that consumers have not yet had widespread exposure to rear seat belt warnings.

The 2004 Transportation Research Board Report on technologies to increase seat belt use observed that, while limited, ''the data available to date provide strongly converging evidence in support of both the potential effectiveness and consumer acceptance of many new seat belt use technologies[.]'' [99] As part of the research for the report, NHTSA conducted a limited number of focus group interviews with part-time and hard-core non-users. The report noted that ''many part-time users interviewed by NHTSA—the primary target group for the technology—were receptive to the new systems. Nearly two-thirds rated the reminders ''acceptable,'' and approximately 80 percent thought that they would be ''effective.'' [100]

NHTSA's 2015 Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System also investigated the acceptability of rear seat belt warning systems. NHTSA surveyed (by telephone) drivers of vehicles with and without a rear seat belt warning system.[101] The rear warning systems in these vehicles had a visual warning on start-up and an audio-visual change of status warning. The study found, among other things, that 81 percent of drivers of vehicles with a rear seat belt warning were ''very satisfied'' with the system warning at the beginning of a trip; less than 2 percent were dissatisfied. Seventy-eight percent of drivers were satisfied with the change-of-status warning during a trip; about 1 percent were dissatisfied. Among drivers of vehicles without a rear seat belt warning, attitudes towards rear belt warnings were generally positive as well: A majority (55%) indicated that it was important to them that their next vehicle be equipped with a rear belt warning system.

NHTSA seeks comment on what types of rear seat belt warnings consumers would accept. NHTSA seeks comment on specifications that would maximize effectiveness while still being acceptable to the public, as well as the potential for intrusive warnings to lead to driver distraction. NHTSA also seeks comment on how the potential for false positives can be minimized (because false positives can lead occupants to ignore or circumvent the warnings, or lead to driver distraction). NHTSA also seeks comment on the results of the 2015 survey, including whether and to what extent, selection bias might influence the results.

E. Technological and Economic Feasibility

22. NHTSA also seeks comment on the technological and economic feasibility of alternative rear seat belt warning systems.

We seek comment on the technological and economic challenges that might be posed by different types of warning systems, including the type of equipment and re-design they might necessitate. Seat belt latch and webbing spool-out sensors are already used by many manufacturers to comply with the existing driver seat belt requirements. We are aware that implementing a visual warning may require physical redesign of the instrument panel. Such redesign would have to take into account visibility, interaction with existing signals and displays, available space on the instrument panel, and effectiveness, as well as other factors. In some instances, a visual signal might be displayed as a telltale on the instrument panel or on the vehicle's information display screen. Manufacturers would

[96] DOT 2009 Belt Warning Study, *supra,* p. 21.

[97] Paul Schroeder & Melanie Wilbur, Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration (2015). [Found in the docket for this ANPRM.]

[98] DOT 2009 Belt Warning Study, *supra,* p. 2; Transportation Research Board Study, *supra,* p. 8.

[99] Transportation Research Board Study, *supra,* pp. 75–76.

[100] *Id.* p. 10.

[101] The vehicles with seat belt warning systems were Volvos and certain Cadillac and Chevrolet models.

also have to determine whether driver and rear passenger seat belt warning visual signals would be treated the same. Occupant detection might present technological challenges, but would probably not be necessary for a positive-only warning system. We recognize that larger vehicles with many rear designated seating positions may present challenges. We seek comment on these concerns, as well as other concerns.

We also seek comment about whether a rear seat belt warning would reliably detect a child restraint system attached by a child restraint anchorage system, or LATCH.[102]

F. Benefits and Costs

23. The agency has presented a wide variety of different potential alert systems, all with different cost and effectiveness profiles, and is not at this time conducting a cost-benefit analysis on any particular approach. However, many of the technologies discussed in this ANPRM are currently in use, either for front seat passengers or, in more limited models, rear seat passengers. NHTSA, therefore, seeks comment on the potential benefits and costs of the different types of rear seat belt warning system discussed in this notice, including those that provide a warning similar to the kinds of seat belt warnings that are provided in current-production vehicles in the United States or elsewhere in the world, as well as other potentially novel approaches.

G. Safety Act Criteria

24. MAP–21 instructs NHTSA to initiate a rulemaking proceeding for a rear seat belt warning system and to issue a final rule if it would meet the requirements in section 30111 of the Safety Act. NHTSA seeks comment on whether a proposed rear seat belt warning system would meet the requirements and considerations of 49 U.S.C. 30111.

H. Non-Regulatory Alternatives

25. If commenters believe that a proposed seat belt warning system would not meet the requirements and considerations of 49 U.S.C. 30111, NHTSA seeks comment on whether it should consider any non-regulatory approaches to address this issue.

For example, NHTSA might provide recognition through NCAP for vehicles equipped with a rear seat belt warning system. Other international NCAP programs, including Euro NCAP, Japan's New Car Assessment Program (J–NCAP), China NCAP (C–NCAP), Latin NCAP, New Car Assessment Program for Southeast Asia (ASEAN NCAP), Korean NCAP (KNCAP), and Australasian New Car Assessment Program (ANCAP), award bonus points to vehicles that are equipped with seat belt warning systems for passenger seating positions. NHTSA could potentially establish criteria in NCAP for rear seat belt warning systems as it does for other vehicle safety features. For example, NCAP evaluates the ability of an automatic emergency braking system to detect the presence of a vehicle and initiate braking without driver interaction in several different scenarios (*e.g.,* lead vehicle slowing, lead vehicle stopped).

NHTSA could also issue voluntary guidelines for manufacturers. The guidelines could identify best practices for manufacturers who wish to equip vehicles with a rear seat belt warning system. The best practices could include the type of information the warning system should convey and the minimum durations of the warnings. NHTSA also seeks comment on whether there would be any other non-regulatory approaches that would be appropriate.

I. Removing the Driver's Seat Belt Warning Audible Signal Duration Upper Limit

26. NHTSA also seeks comment on removing the driver's seat belt warning audible signal duration upper limit.

FMVSS No. 208 currently requires a driver's seat belt warning with an audible warning lasting between four and eight seconds. Prior to the enactment of MAP–21, the agency could not require the audible warning to operate for more than 8 seconds. As discussed above, Congress enacted this restriction in 1974. The sole basis for the 8-second maximum duration in FMVSS No. 208 is this statutory limitation. In light of Congress's repeal of this restriction, NHTSA seeks comment on removing the corresponding provision in FMVSS No. 208.

Although NHTSA did not previously have the authority to require, or specify as a compliance option, a seat belt warning with an audible signal lasting more than 8 seconds, the agency facilitated the voluntary adoption of enhanced warnings through a series of legal interpretations that determined that the Safety Act did not prohibit manufacturers from using enhanced warning systems (*e.g.,* systems with audible warnings that lasted more than 8 seconds) as long as the manufacturer differentiated the voluntarily-provided signal from the required signal (for example, by a clearly distinguishable lapse in time between the two signals).

Amending FMVSS No. 208 by removing the 8-second limitation would eliminate the need to differentiate between signals and give vehicle manufacturers greater flexibility in designing their seat belt warning systems. It would not affect the minimum required duration for the audible signal (4 seconds) and would not require manufacturers to make any changes to their existing seat belt warnings that comply with the existing requirements of FMVSS No. 208.

We seek comment on this.

VII. Regulatory Notices

This action has been determined to be significant under Executive Order 12866, as amended by Executive Order 13563, and the Department of Transportation (DOT) Order 2100.6, ''Policies and Procedures for Rulemakings.'' It has been reviewed by the Office of Management and Budget under Executive Order 12866. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' Additionally, Executive Orders 12866 and 13563 require agencies to provide a meaningful opportunity for public participation. We have asked commenters to answer a variety of questions to elicit practical information about alternative approaches and relevant technical data. Further, in accordance with DOT Order 2100.6, NHTSA has determined that this rulemaking, should it lead to a mandate of rear seat belt systems, would qualify as an ''economically significant rule,'' as it would likely impose a total annual cost greater than $100 million; accordingly, NHTSA is using this ANPRM to solicit public feedback before proceeding with a proposed rule. This action is not subject to the requirements of E.O. 13771 (82 FR 9339 (Feb. 3, 2017)) because it is an advance notice of proposed rulemaking.

[102] Many in the child passenger safety community refer to the child restraint anchorage system as the ''LATCH'' system, an abbreviation of the phrase ''Lower Anchors and Tethers for Children.'' The term was developed by a group of manufacturers and retailers for use in educating consumers on the availability and use of the anchorage system and for marketing purposes.

VIII. Public Comment

How do I prepare and submit comments?

- To ensure that your comments are correctly filed in the Docket, please include the Docket Number found in the heading of this document in your comments.
- Your comments must not be more than 15 pages long.[103] NHTSA established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments, and there is no limit on the length of the attachments.
- Please organize your comments so they appear in the same order as the topics to which they respond appear in this document. Please identify comments by the number with which the relevant topic is associated in this document.
- If you are submitting comments electronically as a PDF (Adobe) file, NHTSA asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions.
- Please note that pursuant to the Data Quality Act, in order for substantive data to be relied on and used by NHTSA, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, NHTSA encourages you to consult the guidelines in preparing your comments. DOT's guidelines may be accessed at *https://www.transportation.gov/regulations/dot-information-dissemination-quality-guidelines.*

Tips for Preparing Your Comments

When submitting comments, please remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions you make 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.

[103] 49 CFR 553.21.

- To ensure that your comments are considered by the agency, make sure to submit them by the comment period deadline identified in the **DATES** section above.

For additional guidance on submitting effective comments, visit: *https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf.*

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the docket at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512)

Will the agency consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the docket at the address given above under **ADDRESSES**. The hours of the docket are indicated above in the same location. You may also see the comments on the internet. To read the comments on the internet, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material. You can arrange with the docket to be notified when others file comments in the docket. See *www.regulations.gov* for more information.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.5.

James Clayton Owens,

Acting Administrator.

[FR Doc. 2019–20644 Filed 9–26–19; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 580

[Docket No. NHTSA–2019–0092]

Electronic Motor Vehicle Transactions Systems

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

ACTION: Request for comments.

SUMMARY: In a separate **Federal Register** document, NHTSA issued a final rule that will allow for state adoption of electronic odometer disclosure systems without having to petition the agency for approval. NHTSA believes that, with the promulgation of this final rule, there are no longer any Federal disclosure requirements that must be done through paper, rather than electronic, disclosures. Therefore, States now possess the necessary authority to adopt completely paperless vehicle transactions if they choose to do so, and experience in other sectors of the economy suggest that adopting paperless systems generally reduces unnecessary transaction costs and may yield additional efficiency gains as well. In this document, NHTSA requests comment on the nature and scope of these potential benefits for States, consumers, and other stakeholders such as dealers and insurance companies; any interest or plans among States in moving towards paperless systems; and what resources and guidance may be needed to assist States to transition to purely electronic systems.

DATES: You should submit comments early enough to ensure that Docket Management receives them not later than October 28, 2019.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by 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, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. Eastern Standard Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, you should mention the docket number of this document. You may call the Docket at (202) 366–9324.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its decision-making 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 *https://www.transportation.gov/privacy.* Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

Confidential Information: If you wish to submit any information under a claim of confidentiality, you should submit two copies of your complete submission, including the information you claim to be confidential business information, and one copy with the claimed confidential business information deleted from the document, to the Chief Counsel, NHTSA, at the address given below under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should follow the procedures set forth in 49 CFR part 512 and include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and follow the online instructions for accessing the dockets or go to the street address listed above.

FOR FURTHER INFORMATION CONTACT: For policy and technical issues: Mr. David Sparks, Director, Office of Odometer Fraud, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: (202) 366–5953. Email: *David.Sparks@dot.gov.* For legal issues: Mr. Thomas Healy, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: (202) 366–5263.

SUPPLEMENTARY INFORMATION: NHTSA has issued a final rule amending Part 580 to allow for the establishment of electronic odometer disclosure systems allowing odometer disclosures required by the Motor Vehicle Information and Cost Savings Act (Cost Savings Act) to be made electronically (81 FR 16107). The odometer disclosure laws and regulations protect purchasers of motor vehicles from odometer fraud. *See* Public Law 92–513, 86 Stat. 947, 961–63 (1972). NHTSA had previously published a notice of proposed rulemaking (NPRM) for this rulemaking on Friday, March 25, 2016, and the comment period for the NPRM closed on May 24, 2016.

The scope of this rulemaking's cost-benefit analysis was limited to the direct effects of odometer disclosures, and thus the NPRM did not explore broader issues associated with adopting purely paperless transactions for automotive sales, particularly the wider benefits to States, consumers, and other stakeholders that could arise should States adopt such systems. To assist States and other stakeholders in assessing whether to adopt purely paperless procedures, NHTSA now seeks additional comments on these potential benefits and the plans and interest among the States in adopting these systems.

I. Background

There were 17.3 million new vehicles [1] and approximately 40 million used vehicles [2] sold in the U.S. in 2018, but the total number of vehicle transactions is much larger because every consumer purchase and sale may involve multiple wholesale transactions, and because transfers to salvage companies or the scrappage of vehicles necessitates additional transactions by insurance companies and other stakeholders. Until the publication of today's final rule, Federal law prohibited electronic odometer disclosures except in and to the extent that a subset of States that had received specific NHTSA exemptions.

Now that NHTSA has lifted this general prohibition, the Department anticipates that States may be interested in moving towards completely electronic transactions for motor vehicles. As experience in other sectors of the economy has demonstrated, electronic transactions would be expected to lead to many efficiency gains to the significant number of entities involved in motor vehicle transactions, including motor vehicle dealers; motor vehicle auction companies; insurance and casualty companies; banks, credit unions, and finance companies; salvage companies and junk yards; state departments of motor vehicles; and consumers; and all other persons or entities required to make odometer disclosures. For example, stakeholders will no longer be required to scan hard copy documents with wet signatures to retain or manage records electronically. Moreover, reductions in postage and delivery costs, including overnight delivery, will accrue from removing the need to mail hard copy documents with wet signatures. NHTSA also anticipates that paperless transactions will reduce the time needed to complete vehicle transactions, which could lead to substantial additional cost savings. States adopting electronic transaction systems may also see cost savings through reduction in records retention and retrieval costs and by eliminating the need to print titles on secure paper. NHTSA estimates that there are at least 48.5 million transactions involving odometer disclosures completed annually by motor vehicle dealers and private parties through private party

[1] The Year in Auto Sales: Facts, Figures and the Best Sellers from 2018, Automobile, (Jan. 4, 2019), *available at https://www.automobilemag.com/news/year-auto-sales-facts-figures-bestsellers-2018/* (last visited June 19, 2019).

[2] Used Vehicle Outlook 2019, Edmunds, *available at https://www.edmunds.com/industry/insights/* (last visited June 7, 2019).

sales that could potentially be conducted electronically as a result of the final rule if all states that have not already adopted electronic odometer disclosures decide to do so.[3]

Therefore, NHTSA believes that there is strong incentive for States to adopt electronic transaction systems. To assist States in making prudent decisions based on the best available evidence, in this document, NHTSA requests comment on the ways that adopting purely paperless transaction systems may reduce vehicle transaction costs for States, consumers, and other stakeholders. Specifically, can these systems reduce State transaction costs for receiving, processing, and storing odometer disclosures and creating titles? Also, will adopting purely paperless procedures reduce transaction costs for (i) wholesale transactions; (ii) auction transactions; (iii) salvage or junk transactions; or (iv) retail transactions? Moreover, what benefits will purely paperless transactions have for stakeholders, including from the following industries: (i) Insurance; (ii) salvage and whole automobile auctions; (iii) new, used, and wholesale vehicle dealers; (iv) vehicle registration companies; and/or (v) technology companies providing systems for any of the above industries?

NHTSA also requests comment on any plans that States currently have to adopt electronic transaction systems now that the Federal requirement for paper odometer disclosures has been eliminated, as well as the general interest that States may have in adopting these systems even if no specific plans exist yet. In addition, NHTSA requests comment on the steps the agency can take to assist in assisting States in determining whether and how best to implement such procedures. For instance, (i) what questions do States have in determining whether and how to implement these systems and what can NHTSA do to help?; (ii) What can be done to support development of secure odometer disclosure programs and electronic titling systems more generally?; (iii) How can NHTSA support the interoperability of multiple state electronic titling systems?

Instructions for submitting comments are described above.

Issued in Washington, DC, pursuant to authority delegated in 49 CFR 1.81, 1.95, and 501.8(d).

Jonathan Charles Morrison,

Chief Counsel.

[FR Doc. 2019–20454 Filed 9–26–19; 8:45 am]

BILLING CODE 4910–59–P

[3] Virginia, Wisconsin, New York, Florida, Texas and Arizona already have adopted some form of electronic odometer disclosure. These states together account for 5 million new vehicle sales. *See* Auto Retailing: State by State, National Automobile Dealers Association, *https://www.nada.org/statedata/* (last visited Jul. 22, 2019). Because NHTSA was not able to obtain used vehicle sales data by state, we are using vehicle registrations for each state as a percentage of total vehicle registrations as a proxy for used vehicle sales. Together Virginia, Wisconsin, New York, Florida, Texas and Arizona account for 24.9 percent of all vehicle registrations. *See* Highway Statistics Series, Office of Highway Policy Information, Federal Highway Administration, *https://www.fhwa.dot.gov/policyinformation/statistics/abstracts/2015/* (last visited Jul. 22, 2019). Based on this number, we estimate that there are approximately 10.12 million used vehicles sold in states employing some form of electronic odometer disclosure. We subtracted new and used vehicle sales in states already employing electronic odometer disclosure from the total number of new and used vehicle sales in 2018. Of these used vehicle sales, approximately 70 to 75 percent are currently subject to the odometer disclosure requirements of part 580. *See* Used Vehicle Outlook 2019, Edmunds, *available at https://www.edmunds.com/industry/insights/* (last visited June 7, 2019). In 2017, approximately 71 percent of used vehicles were sold by either a franchise or independent dealer. We stated in the final rule that used vehicles sold through dealers will likely involve at least two odometer disclosures, one when the vehicle is wholesaled and again when the vehicle is retitled. We arrived at our estimate by determining the total number of used vehicle sales currently subject to odometer disclosure requirements in states without electronic disclosures and added this number to the number of used vehicles sold by dealers currently subject to the odometer disclosures in states without electronic disclosure. This number was added to the number of new vehicles sold in states without electronic disclosure. The equation is ((29.88 * .70) + (20.9 * .71) + 12.7). NHTSA seeks comment on whether this is a reasonable method of estimating the number of sales-related odometer disclosures in these states.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 190917–0030]

RIN 0648–BJ02

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod Management in the Groundfish Fisheries of the Bering Sea and Aleutian Islands and the Gulf of Alaska

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 120 to the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands (BSAI) Management Area (BSAI FMP) and Amendment 108 to the FMP for Groundfish of the Gulf of Alaska (GOA) (GOA FMP), collectively referred to as Amendments 120/108. If approved, Amendment 120 would limit the number of catcher/processors (C/Ps) eligible to operate as motherships receiving and processing Pacific cod from catcher vessels (CVs) directed fishing in the BSAI non-Community Development Quota Program (CDQ) Pacific cod trawl fishery. This proposed rule is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Amendments 120/108, the BSAI and GOA FMPs, and other applicable laws.

DATES: Submit comments on or before October 28, 2019.

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2019–0060, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0060,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Records Office. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

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), 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 the required fields if you wish to remain anonymous).

Electronic copies of Amendment 120 to the BSAI FMP, Amendment 108 to the GOA FMP, the Regulatory Impact Review (RIR; also referred to as the Analysis) and the draft National Environmental Policy Act (NEPA) Categorical Exclusion evaluation document may be obtained from *www.regulations.gov.* Electronic copies of Amendments 39, 61, 80, 97, and 111 to the BSAI FMP, and the Environmental Assessments (EAs)/RIRs

prepared for those actions may be obtained from *www.regulations.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted by mail to NMFS at the above address; and by email to *OIRA_Submission@omb.eop.gov* or by fax to 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Bridget Mansfield, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Authority for Action

NMFS manages the groundfish fisheries in the exclusive economic zone of the BSAI and GOA under the BSAI and GOA FMPs, respectively. The North Pacific Fishery Management Council (Council) prepared the BSAI and GOA FMPs under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations governing U.S. fisheries and implementing the BSAI and GOA FMPs appear at 50 CFR parts 600 and 679.

This proposed rule would implement Amendments 120/108 to the BSAI and GOA FMPs, respectively. The Council submitted Amendments 120/108 for review by the Secretary of Commerce (Secretary), and a Notice of Availability (NOA) of Amendments 120/108 was published in the **Federal Register** on August 21, 2019, with comments invited through October 21, 2019. Comments submitted on this proposed rule by the end of the comment period (See **DATES**) will be considered by NMFS and addressed in the response to comments in the final rule. Comments submitted on this proposed rule may also address Amendments 120/108. However, all comments addressing Amendments 120/108 must be received by October 21, 2019, to be considered in the approval/disapproval decision on Amendments 120/108. Commenters do not need to submit the same comments on both the NOA and this proposed rule. All relevant written comments received by October 21, 2019, whether specifically directed to the FMP amendments, this proposed rule, or both, will be considered by NMFS in the approval/disapproval decision for Amendments 120/108 and addressed in the response to comments in the final rule.

Background

In April 2019, the Council voted to recommend Amendments 120/108 to require that a C/P acting as a mothership receiving deliveries of BSAI non-CDQ Pacific cod from CVs directed fishing with trawl gear must be designated on a groundfish LLP license with a ''BSAI Pacific cod trawl mothership endorsement.'' Directed fishing is defined as any fishing activity that results in retention of an amount of a species on board a vessel that is greater than the maximum retainable amount for that species (see definition at 50 CFR 679.2). The term ''mothership'', as defined at § 679.2, means a vessel that receives and processes groundfish from other vessels. As included in the regulatory text and discussed in the preamble of this proposed rule, the term ''BSAI Pacific cod trawl mothership endorsement'' refers to an endorsement on a groundfish LLP license that would allow the C/P vessel designated on that groundfish LLP license to operate as a mothership and receive and process catch of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. This proposed rule would establish the eligibility criteria and issuance process for this new endorsement. C/Ps not designated on groundfish LLP licenses will be prohibited from participating in the BSAI non-CDQ Pacific cod trawl directed fishery as a mothership. ''BSAI non-CDQ Pacific cod trawl CV directed fishery'' is defined at § 679.2 as the fishery in which CVs are directed fishing for BSAI non-CDQ Pacific cod allocated to the CV trawl sector, as specified at § 679.20(a)(7)(ii)(A).

To implement Amendments 120/108, NMFS would issue a BSAI Pacific cod trawl mothership endorsement to a groundfish LLP license with Bering Sea or Aleutian Islands area and C/P operation endorsements if the groundfish LLP license had an Amendment 80 or non-Amendment 80 C/P designated on it, and the groundfish LLP license is credited with receiving and processing a mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV fishery in each of the qualifying years 2015 through 2017 (qualifying period). The Council noted its intent, and Section 2.6.10 of the Analysis specifies, that qualification for a C/P to operate as a mothership should be based on the history of that vessel receiving deliveries of targeted non-CDQ BSAI Pacific cod harvested by CVs using trawl gear during each year in the qualifying period. This proposed rule defines the term ''mothership trip target'' as, in the aggregate, the groundfish species that is delivered by a CV to a given C/P operating as a mothership in an amount greater than the retained amount of any other groundfish species delivered by the same CV to the same C/P for a given week. For those C/Ps that received and processed at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV fishery in each year of the qualifying period, only one groundfish LLP license on which the vessel was designated during the qualifying period would be eligible to receive the BSAI Pacific cod trawl mothership endorsement. Further, Amendments 120/108, if approved by the Secretary, would prohibit all Amendment 80 C/Ps not designated on an Amendment 80 QS permit and an Amendment 80 LLP license, or not designated on an Amendment 80 LLP/QS license, from receiving and processing Pacific cod harvested in directed fishing for Pacific cod in the BSAI and GOA.

The following sections of this preamble provide a brief description of (1) the LLP, the BSAI Pacific cod trawl CV fishery, and related management programs; (2) the need for this proposed rule; (3) the proposed eligibility criteria and process for obtaining the new endorsement authorizing receipt and processing of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery; and (4) the prohibition on replaced Amendment 80 C/Ps from receiving and processing Pacific cod harvested by directed fishing in the BSAI and GOA Pacific cod fisheries.

Description of the License Limitation Program, the BSAI Pacific Cod Trawl Catcher Vessel Fishery, and Related Management Programs

License Limitation Program (LLP)

The Council and NMFS have long sought to control the amount of fishing effort in the BSAI groundfish fisheries to ensure that the fisheries are sustainably managed and do not exceed established biological thresholds. One of the measures used by the Council and NMFS to control fishing effort is the LLP, which limits access to the groundfish fisheries in the BSAI. The LLP is intended to prevent unlimited entry into groundfish fisheries managed under the BSAI FMP. With some limited exceptions, the LLP requires that persons hold a groundfish LLP license and have designated on a groundfish LLP license each vessel that is used to fish in federally managed groundfish fisheries.

NMFS published the final rule to implement the LLP for BSAI groundfish fisheries on October 1, 1998 (63 FR 52642), and fishing under the requirements of the LLP began on January 1, 2000. The preamble to the final rule implementing the BSAI groundfish LLP and the EA/RIR prepared for that action describe the

rationale and specific provisions of the LLP in greater detail (see **ADDRESSES**) and are not repeated here.

The key components of the LLP are briefly summarized as follows. The BSAI groundfish LLP established specific criteria to allow a vessel to receive a groundfish LLP license and continue to be eligible to fish in groundfish directed fisheries managed under the BSAI FMP. Vessels under 32 feet length overall (LOA) in the BSAI, and vessels using jig gear in the BSAI that are less than 60 feet LOA and that deploy no more than five jigging machines are exempt from the requirements to have a groundfish LLP license.

Under the LLP, NMFS issued licenses that (1) endorse fishing activities in specific regulatory areas in the BSAI; (2) restrict the length of the vessel on which the LLP license may be used; (3) designate the fishing gear that may be used on the vessel (*i.e.,* trawl or non-trawl gear designations); and (4) designate the type of vessel operation permitted (*i.e.,* specify whether the vessel designated on the LLP license may operate as a CV, a C/P, or as a mothership). LLP licenses are issued so that the endorsements for specific regulatory areas, gear designations, and vessel operational types are non-severable from the LLP license (*i.e.,* once issued, the components of the LLP license cannot be transferred independently). Individual LLP licenses are derived from historical fishing activity in one area with a specific fishing gear or operational type. By creating LLP licenses with these characteristics, the Council and NMFS limited the ability of a person to use an assigned LLP license in other areas, with other gear, or for other operational types. The Council's intent in applying such limitations was to curtail the ability of the LLP license holder to expand fishing capacity, which could decrease the benefits derived by the existing participants from those other fisheries.

In order to receive a BSAI groundfish LLP license, a vessel owner had to meet minimum landing requirements with the vessel during a specific time frame. Specifically relevant to this proposed rule, a vessel owner received a BSAI groundfish LLP license endorsed for a specific regulatory area in the BSAI, if that vessel met specific harvesting and landing requirements for that specific regulatory area during the qualifying periods established in the final rule implementing the LLP (63 FR 52642, October 1, 1998). A groundfish LLP license with a CV operation endorsement allows a vessel to catch but not process its catch at-sea; a groundfish LLP license with a C/P endorsement allows a vessel to harvest and process its own catch at-sea or to act as a mothership to process catch harvested and delivered by a CV. As an example, in order to receive a groundfish LLP endorsed for trawl gear in the Aleutian Islands with a C/P designation, a vessel must have met the minimum groundfish harvesting and landing requirements for the Aleutian Islands using trawl gear during the qualifying period, and must have processed the qualifying catch on board the vessel. Section 2.6.9 of the Analysis provides additional details on the LLP.

Effects of the American Fisheries Act, Amendment 80, and Amendment 85 on BSAI Pacific Cod Fisheries

This proposed rule would modify regulations governing the deliveries of Pacific cod in the BSAI to vessels operating as motherships. The vessels primarily affected by this proposed rule are managed under three management regimes, the American Fisheries Act (AFA) Program, the Amendment 80 Program, and the allocation of Pacific cod to the BSAI trawl catcher vessel sector that was implemented under Amendment 85 to the BSAI FMP. Each of these three management regimes is described in additional detail below.

NMFS published the final rule to implement the American Fisheries Act (AFA) (BSAI FMP Amendment 61), on December 30, 2002 (67 FR 79691). The preamble to the final rule implementing the AFA and the EA/RIR prepared for that action describe the rationale and specific provisions of the AFA in greater detail (see **ADDRESSES**) and are not repeated here. Along with other measures, implementation of the AFA granted AFA vessel owners fixed percentages of the available BSAI pollock TAC after deductions for the CDQ fishery and the incidental catch allowances for other fisheries. The allocation of pollock provided the AFA fleet the ability to effectively consolidate and improve the efficiency of their Bering Sea pollock operations. Opportunities for these vessel owners to expand into other fisheries that would not otherwise have been available were a potential result. To limit these expansions, the AFA created harvesting limits, known as sideboards, on AFA vessels in non-pollock fisheries to protect vessels and processors in other, non-pollock fisheries from spillover effects resulting from the rationalization and privatization of the BSAI pollock fishery. One of the groundfish directed fisheries limited by the sideboard limits was Pacific cod. The original Pacific cod sideboards applicable to AFA vessels have been revised, beginning in 2008 with the implementation of the Amendment 80 Program.

The Amendment 80 Program was implemented in 2008 (72 FR 52668, September 14, 2007). The preamble to the final rule implementing the Amendment 80 Program and the EA/RIR prepared for that action describe the rationale and specific provisions of Amendment 80 in greater detail (see **ADDRESSES**) and are not repeated here. Amendment 80 identified groundfish trawl C/Ps that were not covered by the AFA (*i.e.,* the head-and-gut fleet or Amendment 80 vessels) and established a framework for future fishing by this fleet. Along with other measures, Amendment 80 allocated six BSAI non-pollock groundfish species among two trawl fishery sectors. The six species, known as ''Amendment 80 species,'' include Aleutian Islands Pacific ocean perch, BSAI Atka mackerel, BSAI flathead sole, BSAI Pacific cod, BSAI rock sole, and BSAI yellowfin sole. These species are allocated for harvest among the Amendment 80 sector's participants, comprised of specific trawl vessels identified under Amendment 80, and all other BSAI trawl fishery participants not in the Amendment 80 sector. The other BSAI trawl fishery participants include AFA C/Ps, AFA CVs, and non-AFA CVs. Collectively, this group of other, or non-Amendment 80, BSAI trawl fishery participants comprises the BSAI trawl limited access sector (TLAS), defined at 50 CFR 679.2.

Each year, NMFS allocates the initial total allowable catch (ITAC) of the six Amendment 80 species, as well as crab and halibut prohibited species catch (PSC) limits, between the Amendment 80 sector and the BSAI TLAS. Allocations made to the Amendment 80 sector are exclusive to the Amendment 80 sector and not subject to harvest in other fishery sectors. The Amendment 80 sector is precluded from harvesting Amendment 80 species allocated to the BSAI TLAS. The Council's intent in establishing the BSAI TLAS was to provide harvesting opportunities for AFA C/Ps, AFA CVs, and non-AFA CVs. The ITAC represents the amount of total allowable catch (TAC) for each Amendment 80 species that is available for harvest after allocations to the CDQ Program and the incidental catch allowance (ICA) have been subtracted.

The ICA is an amount set aside for the incidental harvest of each Amendment 80 species by non-Amendment 80 vessels targeting other groundfish species in non-trawl fisheries and in the BSAI TLAS fisheries. BSAI Pacific cod ITAC (non-CDQ) for trawl gear is

allocated to the Amendment 80, AFA C/P, and trawl CV sectors separately, which is why the Pacific cod AFA C/P and trawl CV sector allocations are not collectively referred to as the BSAI TLAS fishery. The annual proportion of BSAI Pacific cod ITAC (non-CDQ) allocated to the sectors depends on the amount at which the Pacific cod ITAC is set. The Pacific cod ITAC allocated to the trawl CV sector is divided between the Aleutian Islands subarea and the Bering Sea subarea. An allocation to a non-CDQ fishery sector may be harvested in either the Bering Sea or the Aleutian Islands, subject to the Pacific cod ITAC specified for the Bering Sea or the Aleutian Islands. If the Pacific cod ITAC is or will be reached in either the Bering Sea or Aleutian Islands, NMFS will prohibit directed fishing for Pacific cod in that subarea for all non-CDQ fishery sectors.

Although the Council was clear in its intent to prohibit Amendment 80 vessels from harvesting Amendment 80 species allocated to the BSAI TLAS, the Council did not specifically address during its development of Amendment 80 whether Amendment 80 vessels should be eligible to serve as processing platforms for other fishery sectors. As noted earlier in this preamble, a vessel that receives and processes groundfish from other vessels is referred to as a ''mothership.'' Although Amendment 80 vessels operate as C/Ps (*i.e.,* the vessels catch and process their own catch) in the Amendment 80 sector, Amendment 80 vessels meet the regulatory definition of a mothership when they receive and process catch from CVs fishing in other fisheries.

The final rule implementing Amendment 80 clarified that Amendment 80 vessels could be used as motherships for CVs fishing in other BSAI trawl fisheries, based on public comments received on the proposed rule (72 FR 30052, May 30, 2007), further analysis by NMFS, and the lack of clearly stated Council intent to the contrary. The final rule implementing Amendment 80 modified the proposed regulations to permit this activity, noted that this revision accommodated one Amendment 80 C/P that had historically been used as a mothership, and acknowledged that the revision provided for potential future growth in the use of Amendment 80 vessels as motherships in the BSAI TLAS fisheries. A detailed description of the Council's intent and NMFS' actions regarding limitations of Amendment 80 vessels catching, receiving, and processing fish assigned to the BSAI TLAS fisheries is provided in the proposed and final rules implementing Amendment 80.

Under Pacific cod allocations prior to the final rule implementing BSAI FMP Amendment 85 (72 FR 50787, September 4, 2007), one or more harvest sectors were often unable to harvest their annual allocation of the BSAI non-CDQ Pacific cod TAC. To provide opportunities for full harvest, NMFS annually reallocated Pacific cod projected to be unharvested by some sectors to other sectors. To reduce or eliminate the need for such reallocations, Amendment 85 established direct allocations and seasonal apportionments of BSAI Pacific cod TAC for each specified sector in the BSAI Pacific cod fishery. This change reduced annual uncertainty about harvest availability within sectors and increased stability among sectors in the fishery. Because the allocation to each sector is fixed, and NMFS does not reallocate unused catch to trawl CPs in most cases, trawl C/Ps may have an incentive to engage in mothership operations to increase Pacific cod processing.

Increased Mothership Activity in the BSAI Non-CDQ Pacific Cod Trawl CV Directed Fishery

In 2017 the Council noted an increase in mothership activity since 2016 in the BSAI non-CDQ Pacific cod trawl CV directed fishery. This increased mothership activity was linked to trawl CVs delivering to C/Ps operating as motherships thereby decreasing Pacific cod landings at BSAI shoreside processing facilities. Table 2–29 in the Analysis for this action shows the rapid increase of the amount of Pacific cod harvested in the BSAI non-CDQ Pacific cod trawl CV directed fishery and delivered to C/Ps acting as motherships in recent years. Section 2.7.1 of the Analysis noted that, from 2003 through 2015, four unique C/Ps operated as motherships in the fishery, with one to three such vessels participating in any one year. One of the four C/Ps participating from 2003 through 2015 acted as a mothership in the fishery during one of those 13 years, and one acted as mothership in the fishery during three of the 13 years. Of the remaining two C/Ps, one participated as a mothership in the fishery 10 of 13 years, and the other participated as a mothership in the fishery 12 of 13 years. In 2016 and 2017, the number of C/Ps acting as motherships in the fishery jumped substantially to eight vessels, and increased again to nine vessels in 2018.

Section 2.7.1 of the Analysis noted that in 2018, 174 groundfish LLP licenses had a trawl endorsement for either the Bering Sea area or the Aleutian Islands area. A C/P endorsement is assigned to 59 of those licenses, and a CV endorsement is assigned to the remaining 115 licenses. The groundfish LLP licenses also identify whether the groundfish LLP license is associated with either the Amendment 80 or AFA programs. Twenty-six of the C/P groundfish LLP licenses are associated with Amendment 80, while 27 groundfish LLP licenses are associated with AFA C/Ps. Under current regulations, any of the 50 C/Ps not currently active in the fishery with a trawl endorsement for either the Bering Sea area or the Aleutian Islands area could enter the fishery as a mothership, if they have the proper Federal Fisheries Permit and endorsement and meet any other regulatory requirement to act as a mothership. The nine Amendment 80 C/Ps and AFA C/Ps that are active as motherships in the fishery could maintain or increase the percentage of the trawl CV sector allocation they process.

The Council noted that, as a result of increased mothership availability, the number of trawl CVs in the offshore fishery has increased. This is true particularly in the fishery's A season, when the majority of BSAI non-CDQ Pacific cod trawl CV allocation is harvested. Table 2–29 in Section 2.7.1 of the Analysis indicates that an average of 4.7 CVs in this fishery delivered Pacific cod to C/Ps acting as motherships from 2006 through 2014, compared to an average of 9 CVs from 2015 through 2017. The number of CVs in the fishery delivering to C/Ps acting as motherships continued to increase in the A season in 2018 and 2019, with 11 and 13 CVs, respectively.

A corresponding decline in deliveries to shoreside processors occurred during the same period. Eighteen different shoreside or floating processing entities took deliveries of Pacific cod from either the Bering Sea or Aleutian Islands during 2009 through 2018 (Section 2.6.14.4 of the Analysis). In any one year the number of shoreside processors that operated ranged from 10 to 13. Just under 93 percent of non-CDQ Pacific cod targeted in the Bering Sea was delivered to shoreside and other non-C/P processors from 2008 through 2018 by trawl CVs. Deliveries to that sector decreased to approximately 87 percent in 2017 and 79 percent in 2018, which the Council noted represented a substantial departure from historical delivery patterns. In comparison, in the Bering Sea from 2008 through 2018 deliveries to C/Ps acting as motherships

averaged 7.2 percent of overall landings including deliveries to shoreside and floating processors. The proportion of CV deliveries to C/Ps operating as motherships was much higher than that average in 2017 (12.7 percent) and higher yet in 2018 (20.8 percent). In the 2019 A season, the proportion of CV deliveries to C/Ps operating as motherships was 30.5 percent. These increases are occurring as the overall BSAI TAC is declining, contributing to a faster-paced fishery.

The potential exists for additional motherships and CVs delivering to motherships to participate in the BSAI non-CDQ Pacific cod trawl CV directed fishery. There are no current constraints on C/Ps operating as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery as long as they hold the required permits or licenses. Section 2.7.1 of the Analysis provides information indicating that up to 46 additional Amendment 80 or AFA C/Ps could enter the BSAI non-CDQ Pacific cod trawl CV directed fishery as motherships based on a range of factors. These motherships could provide processing capacity for a substantial number of additional CVs. CVs are not limited in the amount of Pacific cod from the available allocation to the BSAI non-CDQ Pacific cod trawl CV directed fishery that they can delivery to C/Ps. These estimates likely represent the maximum potential expansion of mothership processing capacity in the BSAI non-CDQ Pacific cod trawl CV directed fishery, although that maximum would likely not be realized for a number of reasons. Section 2.7.1 of the Analysis provides additional details on the potential for new C/Ps operating as motherships and for CVs to enter the BSAI non-CDQ Pacific cod trawl CV directed fishery.

Need for Action

Given the recent sharp increases in offshore deliveries in the BSAI non-CDQ Pacific cod trawl CV directed fishery to C/Ps operating as motherships and the potential for future growth in offshore deliveries, the Council identified two primary management concerns that it wanted to address with Amendments 120/108: (1) The likelihood of decreasing benefits from the fishery for long-time participants, including some C/Ps, shoreside processors, and communities dependent on those shoreside processors; and (2) negative impacts of a faster paced fishery, such as the increased risk of a ''race for fish.'' The Council noted the increase in mothership deliveries in the fishery was disrupting historical distribution patterns resulting in, and increasing the potential to have further, negative impacts on long-time participants with sustained activity in the fishery, including C/Ps operating as motherships, shoreside processors, and communities with local economies dependent on revenue and jobs created by the shoreside processors. The Council was concerned that the increase in offshore deliveries may have resulted in slightly shorter fishing seasons due to the faster pace of the fishery, negatively affecting PSC rates and vessel safety.

The Analysis (Section 2.8.2) noted that safety issues associated with compressed seasons and crowding of premium fishing areas could be made worse as more vessels enter the fishery. Public testimony has indicated that crowding may already be occurring on Bering Sea fishing grounds, where vessels are required to queue up to begin fishing for Pacific cod. Additional effort in the fishery could increase queue times and increase the risks that vessel operators are willing to take. Shorter fishing seasons may affect vessel safety as the race for fish intensifies; fish quality may suffer as Pacific cod is rushed through factory processing; global markets may respond with lower prices if large volumes of lower quality Pacific cod oversaturate markets; and local economies may receive less revenue as landings to shoreside processors, upon which associated communities have historically been dependent, continue to erode. The Council also expressed concern that recent declines in available trawl CV sector allocations of BSAI Pacific cod, noted in Section 2.6.2 of the Analysis and potential future declines could exacerbate these other problems in the fishery.

In order to address these concerns, the Council determined, and NMFS agrees, that management measures are needed to limit the offshore processing capacity in the BSAI non-CDQ Pacific cod trawl CV directed fishery. The Council also determined that any Amendment 80 C/P that was replaced under BSAI Amendment 97 (77 FR 59852; October 1, 2012) should be prohibited from operating as a mothership in the fishery. The Council recommended, and NMFS proposes two preferred alternatives for Amendment 120 and one for Amendment 108 to implement those management measures. The first preferred alternative under Amendment 120 would implement eligibility criteria for a groundfish LLP license to receive a mothership endorsement authorizing a C/P designated on that groundfish LLP license to operate in the BSAI non-CDQ Pacific cod trawl CV directed fishery as a mothership and receive and process deliveries of Pacific cod from CVs using trawl gear in the fishery. The Council considered two separate eligibility options: One for groundfish LLP licenses on which Amendment 80 C/Ps are designated and one for groundfish LLP licenses on which non-Amendment 80 C/Ps are designated. For groundfish LLP licenses on which Amendment 80 C/Ps are designated, the Council recommended the most restrictive sub-option of the three evaluated in the Analysis. This sub-option stipulates that groundfish LLP licenses on which Amendment 80 C/Ps are designated would be eligible for a mothership endorsement only if the groundfish LLP license has been credited with receiving at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year from 2015 through 2017.

The second option, addressing eligibility for groundfish LLP licenses on which non-Amendment 80 C/Ps are designated, was evaluated in Section 2.4.2 of the Analysis. Because only one groundfish LLP license on which a non-Amendment 80 C/P is designated would qualify under any of the eligibility sub-options considered for groundfish LLP licenses on which Amendment 80 C/Ps are designated, the Council initially noted that sub-options need not be considered for groundfish LLP licenses on which non-Amendment 80 C/Ps are designated in the Analysis. As a result, the Council recommended adopting the only option for eligibility for groundfish LLP licenses on which non-Amendment 80 C/P are designated. That option specified that ''a catcher/processor may take directed fishery deliveries of Pacific cod from catcher vessels participating in the Bering Sea (BSAI) non-CDQ Pacific cod trawl CV fishery if the catcher/processor acted as a mothership and received targeted Pacific cod deliveries as follows: Non-Amendment 80 vessels acting as a mothership during 2015–2017.'' However, in discussion during final action, the Council clarified its intent that a groundfish LLP license on which a non-Amendment 80 C/P is designated would be eligible for a mothership endorsement only if the C/P was designated on a groundfish LLP license that has been credited with receiving and processing at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year from 2015 through 2017. The Council made this clarification to ensure that eligibility criteria for groundfish LLP licenses on which Amendment 80 and non-Amendment 80 C/Ps are designated are

consistent. The Council also clearly understood that this approach would not change the number of non-Amendment 80 C/Ps that could operate as a mothership for BSAI Pacific cod in the future. This proposed rule would implement eligibility criteria for groundfish LLP licenses on which non-Amendment 80 C/Ps are designated, as clarified by the Council.

The second preferred alternative that would be implemented under Amendment 120 would also be implemented under Amendment 108. This preferred alternative would eliminate the ability of any Amendment 80 C/P replaced under BSAI Amendment 97 from operating as a mothership in the fishery. Thus, any Amendment 80 sector C/P not designated on an Amendment 80 QS permit and an Amendment 80 LLP license, or not designated on an Amendment 80 LLP/QS license, would be prohibited from receiving and processing Pacific cod harvested in directed fishing for Pacific cod in the BSAI or GOA.

The Council determined, and NMFS agrees, that limiting the number of C/Ps operating as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery is necessary to restore historical patterns of harvest delivery distribution between processing sectors. Reducing recent levels of deliveries to offshore processors and increasing deliveries to shoreside processors will ease the likelihood of harvesting pressure further shortening the fishing season, and mitigate the risk that a ''race for fish'' could continue to develop and accelerate. The Council also determined, and NMFS agrees, that this proposed rule would reasonably balance the need to limit the number of C/Ps operating as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery with the need to provide continued access and benefits to long time participants with sustained activity in the fishery, including C/Ps operating in the fishery as motherships, shoreside processors, and fishery-dependent communities.

The Council determined, and NMFS agrees, that the proposed action would likely prevent the fishing season from shortening further, because it removes the ability for additional offshore processing capacity to enter the fishery and accelerate TAC harvest or reach PSC limits more quickly. Reaching the halibut PSC limit or harvesting Pacific cod allocations increasingly quickly results in increasingly earlier fishery closures. The Council noted, and NMFS agrees, that this proposed rule could ease NMFS's inseason management challenges in gathering effort information to project when the seasonal allocations will be harvested. As described in Section 2.6.3 and 2.7.1 of the Analysis, the lengths of the A seasons in 2017 through 2019, when the bulk of the fishery's annual allocation is harvested, were the shortest on record for this fishery, and this trend was coincident with the highest numbers of C/Ps operating as motherships and highest levels of offshore deliveries compared to shoreside deliveries. The pace of fishing during those fishing seasons may have increased in part due to additional speculative entry and concerns by current participants about the increasing competition.

This proposed rule could help lengthen the fishing season and mitigate a ''race for fish'' by limiting the eligible groundfish LLP licenses for C/Ps operating as motherships, such that participation is generally representative of the levels seen from 2008 through 2015, when the A season lasted five weeks or longer. This proposed rule also would allow more flexibility in fishing operations by ensuring predictable levels of competition. That flexibility may help reduce PSC in the fishery and improve vessel safety, by allowing vessels to implement fishing practices known to reduce PSC and improve vessel safety. At a minimum, the proposed action is expected to minimize further negative impacts on C/Ps with long-term, sustained participation operating as motherships, as well as shoreside processors and associated fishery-dependent communities.

Under the LLP, a license can be transferred to a different vessel that is eligible to be designated on that LLP license. Although a vessel may be designated on more than one LLP license at one time, only one vessel can be designated on each LLP license at any given time. Therefore, the number of eligible groundfish LLP licenses presented in this proposed rule and the Analysis represents the maximum number of C/Ps that NMFS has determined would be eligible to receive and process Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. If Amendments 120/108 are approved and this rule is implemented, fewer and/or different C/Ps designated on groundfish LLP licenses with a BSAI Pacific cod trawl fishery mothership endorsement may be used to receive and process Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. The Analysis uses the current groundfish LLP license vessel designations to describe the likely impacts of the proposed action, because it is not possible to know how the vessel designations on groundfish LLP licenses may change in the future or how those groundfish LLP licenses will be used in the fishery.

The Council considered a range of factors and options in determining what criteria would qualify a groundfish LLP license for a BSAI Pacific cod trawl CV fishery mothership endorsement, including: (1) How eligible mothership trip targets would be determined; (2) the range of years during which eligible mothership trip targets would need to be made (*i.e.,* qualifying period); (3) the number of years during the qualifying period in which eligible mothership trip targets would need to be made; (4) sideboards; and (5) a prohibition on replaced Amendment 80 C/Ps operating as motherships to receive and process Pacific cod deliveries harvested in directed fishing in the Pacific cod fisheries in the BSAI and GOA. In addition to other factors considered and addressed in the Analysis, the Council and NMFS considered the proposed action's consistency with allocations initially made under the Amendment 80 Program, and the proposed action's potential impacts on the BSAI AFA C/P and trawl CV Pacific cod fisheries. The following discussion briefly summarizes these options and key considerations.

Why is the qualification for a BSAI Pacific cod trawl CV fishery mothership endorsement based on mothership trip targets rather than directed fishing?

At its June 2018 meeting, the Council clarified that eligibility criteria should be based on mothership trip targets rather than directed fishing landings. Directed fishing is defined as any fishing activity that results in retention of an amount of a species on board a vessel that is greater than the maximum retainable amount for that species (see definition at 50 CFR 679.2). Under this definition of directed fishing, a vessel may be targeting and retaining yellowfin sole but also retaining incidentally caught Pacific cod at an amount that exceeds the maximum retainable amount for Pacific cod. NMFS would consider the vessel to be directed fishing for yellowfin sole and directed fishing for Pacific cod in such a situation. Thus, limiting access of C/Ps acting as motherships to the BSAI directed non-CDQ Pacific cod trawl CV fishery based on a history of receiving and processing directed fishing landings of Pacific cod could result in C/Ps meeting eligibility criteria based on receiving and processing incidental catch of Pacific cod from trawl CVs.

Under this proposed rule, ''mothership trip target'' is defined as,

in the aggregate, the groundfish species that is delivered by a CV to a given C/P acting as a mothership in an amount greater than the retained amount of any other groundfish species delivered by the same CV to the same C/P for a given week. The Council's intent with this action is to provide endorsements to those C/Ps acting as motherships receiving and processing deliveries from trawl CVs that were intentionally targeting Pacific cod in the BSAI trawl CV fishery. The Council did not intend for this action to provide endorsements to C/Ps acting as motherships receiving and processing deliveries from trawl CVs that were intentionally targeting other groundfish species, but retaining their incidental catch of Pacific cod. Using mothership trip targets to determine eligibility would limit the potential for a C/P to qualify for participation in the BSAI non-CDQ Pacific cod trawl CV directed fishery as a mothership based on the vessel receiving and processing incidental catch of Pacific cod. This is consistent with previous uses of trip targets, rather than directed fishing activity, as eligibility criteria for limiting access to fisheries (*e.g.,* BSAI FMP Amendment 116; 83 FR 49994, October 4, 2018).

The Analysis presented to the Council explained that different numbers of groundfish LLP licenses would qualify for a BSAI Pacific cod trawl mothership endorsement depending on whether weekly production reports or fish tickets are used to determine which C/Ps received deliveries of targeted Pacific cod during the qualifying period. If weekly production reports from the qualifying period are used to determine receipt of targeted Pacific cod deliveries, then two groundfish LLP licenses would qualify for a BSAI Pacific cod trawl mothership endorsement. If fish ticket data are used, then three groundfish LLP licenses would be eligible to receive a BSAI Pacific cod trawl mothership endorsement. The record demonstrates that the Council understood that two groundfish LLP licenses would qualify for the endorsement under the preferred alternative. This suggests to NMFS that only weekly production reports should be used in determining qualification. Further, relying on weekly production report data would qualify the two C/Ps that have long-term, sustained participation as motherships in the fishery, which is also consistent with the Council's intent.

Why was the range of qualifying years selected?

The Council considered one range of years, 2015 through 2017, to define the qualifying period in which mothership trip targets of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery delivered to C/Ps operating as motherships would qualify a groundfish LLP license on which the C/P was designated for a mothership endorsement. This range includes the years directly before and after 2016, which was the year that five additional Amendment 80 C/Ps entered the BSAI non-CDQ Pacific cod trawl CV directed fishery as motherships, more than doubling the number of participating C/Ps operating as motherships in the fishery. There has not been the same increase in non-Amendment 80 C/P participation as motherships in the BSAI Pacific cod fishery during this same period. The increase in Amendment 80 C/Ps operating as motherships resulted in the Council expressing concern about the increased amount of BSAI non-CDQ Pacific cod delivered offshore in the fishery, and the corresponding decrease in the amount delivered onshore. The Council considered including participation in the fishery prior to 2015, but determined that participation prior to 2015 was stable and represented sustained effort. The Council chose to end the qualifying period with 2017, because the Council initiated the Analysis for Amendments 120/108 in 2017 and announced its intent to limit the number of C/Ps operating as motherships based on activity occurring prior to December 31, 2017. Thus, the Council considered participation after 2017 to represent speculative entry into the fishery. Finally, these were the most recent three years of data available at the time the Council signaled its intent to limit the number of C/Ps operating as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery, and a three-year qualifying period is consistent with the length of qualifying periods set in similar Council actions (*e.g.,* BSAI FMP Amendment 116; 83 FR 49994, October 4, 2018).

The Council was aware of the potential for additional effort to enter the BSAI non-CDQ Pacific cod trawl CV directed fishery while the Council developed and considered Amendments 120/108. The Council was also aware that additional or speculative effort could enter the fishery to establish some history in it, potentially impacting existing participants in the fishery by further shortening the fishing season and increasing the ''race for fish'' (see Section 2.6.3 of the Analysis for a description of fishing patterns and seasons), and further shifting the historical delivery patterns in this fishery from shoreside processors to offshore processors. To dampen the effect of additional or speculative entry into the BSAI non-CDQ Pacific cod trawl CV directed fishery, on December 9, 2017, the Council signaled its intent to establish eligibility criteria based on activity occurring prior to December 31, 2017. Although this date was not binding on future Council actions, the Council clearly indicated at its December 2017 meeting that December 31, 2017 could be used as a reference date for a future management action to limit C/Ps from acting as motherships in the BSAI trawl catcher vessel Pacific cod fishery. In taking such action, the Council intended to promote awareness that the Council may develop a future management action; to provide notice to the public that any current or future mothership operations in the offshore sector of the BSAI non-CDQ Pacific cod trawl CV directed fishery may be affected or restricted; and to discourage speculative participation and behavior in the fishery while the Council considered whether to initiate a management action to further limit mothership participation in the fishery.

After the Council noted the recent increase of C/Ps operating as motherships in the fishery from three C/Ps in 2015 to eight C/Ps in 2016 and 2017, and signaled its intent to limit this activity in December 2017, the number of participating C/Ps acting as motherships increased to nine in 2018. The 2018 level was triple the maximum level of participation by C/Ps acting as motherships during any year from 2003 through 2015, and over four times the average level from 2003 through 2015. Because the Council identified in 2017 the recent increase in C/Ps acting as motherships in the fishery as a contributing factor to the increased pace of the fishery and shortened fishing seasons, the Council was concerned that the even greater increase in participation by C/Ps acting as motherships after 2017 would further shorten the fishing season. The Council believed that this would decrease the Council's ability to maximize the value of the fishery, and would negatively impact fishery participants and threaten the viability of the fishery. The selection of the 2015 through 2017 qualifying period is consistent with the Council's clearly stated policy objectives for this action.

Why select a qualifying period of three years, not one or two years, for participation for Amendment 80 and non-Amendment 80 C/Ps acting as motherships?

In selecting the years 2015 through 2017 as the qualifying period, the

Council considered the potential for future entry of capacity into the fishery, while also recognizing existing participation. For Amendment 80 C/Ps, the Council evaluated three levels of participation during the selected qualifying period to determine eligibility of groundfish LLP licenses on which Amendment 80 C/Ps are designated for the BSAI Pacific cod trawl mothership endorsement. The three sub-options considered by the Council required Amendment 80 C/Ps to receive and process a legal mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in either: (1) One of the three years during the qualifying period, (2) two of three years, or (3) each of three years. The Council considered only one level of participation for non-Amendment 80 C/Ps during the selected qualifying period to determine eligibility for the BSAI Pacific cod trawl mothership endorsement, because a single groundfish LLP license on which only one non-Amendment 80 C/P is designated would qualify under any of the sub-options considered for Amendment 80 C/Ps. That level of participation was receiving and processing a legal mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in any one of the three years. However, as noted above, the Council amended the recommended eligibility level of participation for non-Amendment 80 C/Ps to be consistent with the preferred sub-option for eligibility for a groundfish LLP license on which Amendment 80 C/Ps are designated to simplify regulations.

Section 2.7.2 of the Analysis details the number of groundfish LLP licenses that would and would not qualify for a BSAI Pacific cod trawl mothership endorsement for each of the options described above. Under the first sub-option described above, seven groundfish LLP licenses on which an Amendment 80 C/P was designated would be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year of the qualifying period and therefore would be eligible to receive a BSAI Pacific cod trawl mothership endorsement. Twelve groundfish LLP licenses on which an Amendment 80 C/P was designated would not qualify for the endorsement under this sub-option. Under the second sub-option, six groundfish LLP licenses on which an Amendment 80 C/P was designated would be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year of the qualifying period, and therefore would be eligible to receive the endorsement. Thirteen groundfish LLP licenses on which an Amendment 80 C/P was designated would not qualify for the endorsement under the second sub-option. Under the third sub-option, selected by the Council as its preferred sub-option, one groundfish LLP license on which an Amendment 80 C/P was designated would be eligible to receive the endorsement. Eighteen groundfish LLP licenses on which an Amendment 80 C/P was designated would not qualify for the endorsement under the third sub-option.

Since only one non-Amendment 80 C/P received deliveries of BSAI directed, non-CDQ Pacific cod from trawl CVs in each year from 2015 through 2017, the groundfish LLP license on which that vessel was designated during the qualifying period is the only one that would be eligible for the BSAI Pacific cod trawl mothership endorsement under the terms of all of the sub-options established for the Amendment 80 C/Ps. The Council selected the one non-Amendment 80 option, Alternative 2, Option 2, as its preferred option to provide eligibility for the groundfish LLP license on which the one non-Amendment 80 C/P that operated in the fishery as a mothership was designated. The Council decided to exclude non-Amendment 80 true motherships from this action based on information showing minimal participation taking deliveries from the BSAI cod target fishery from 2008 through 2018, as noted in Section 2.6.14.5 of the Analysis.

The Council determined, and NMFS agrees, that the selected sub-option 3 for Amendment 80 C/Ps, and the selected option, as clarified by the Council, for non-Amendment 80 C/Ps would allow the fishery to be fully prosecuted without the risk of a continued increase in harvest pressure that could continue to shorten the fishing season or decrease deliveries to the shoreside processors. The Council did not choose the sub-options for one- or two-year participation requirements for groundfish LLP licenses on which Amendment 80 C/Ps were designated, because either option would have allowed participation in a manner that is not reflective of the historical harvest patterns in the fishery prior to the recent increase in Amendment 80 C/Ps acting as motherships. The selected eligibility criteria for groundfish LLP licenses are consistent with the Council's intent to provide continued access and benefits to C/Ps that had sustained participation operating as a mothership, as well as shoreside processors that historically accepted higher levels of Pacific cod deliveries in the fishery.

Why restrict Amendment 80 C/Ps acting as motherships to only those designated on an Amendment 80 QS permit and an Amendment 80 LLP license or on an Amendment 80 LLP/QS license?

Restricting Amendment 80 C/Ps operating as motherships in directed Pacific cod fisheries in the BSAI and GOA to only those designated on an Amendment 80 QS permit and an Amendment 80 LLP license or on an Amendment 80 LLP/QS license is intended to ensure that Amendment 80 C/Ps that are replaced under regulations promulgated under BSAI Amendment 97 (77 FR 59852; October 1, 2012) cannot be used to circumvent the intent of the proposed action. This ensures that both current and replaced Amendment 80 C/Ps are subject to the limitations placed on the fleet under this proposed rule. If an Amendment 80 C/P designated on a groundfish LLP license that qualifies for the BSAI Pacific cod trawl mothership endorsement is replaced, the endorsement transfers with the Amendment 80 QS permit and LLP license or the combined QS permit/LLP license to the replacement vessel designated on the license and permit. This proposed provision thus eliminates the opportunity for both the replacement vessel and the replaced vessel to be used as a mothership in the BSAI non-CDQ Pacific cod trawl CV fishery. This provision expands the limitations of this proposed rule, which is otherwise focused on the BSAI non-CDQ Pacific cod trawl CV directed fishery, to include all mothership activity in the BSAI and GOA Pacific cod fisheries. This expansion reflects the Council's intent to prohibit the expanded use of those C/Ps once they exit the Amendment 80 program. If this proposed provision were not included in this proposed rule, a replaced Amendment 80 C/P would continue to be allowed to operate as a mothership and receive and process Pacific cod harvested by vessels directed fishing for Pacific cod, in addition to the C/P that replaced it. This proposed provision closes that potential loophole in the regulations and therefore meets the Council's intent of allowing only one Amendment 80 C/P and one non-Amendment 80 C/P to operate as a mothership in the BSAI non-CDQ Pacific cod trawl directed fishery in the future. Further, this approach is consistent with the Council's practice of limiting the ability of catch share program participants to increase

participation in non-catch share fisheries and disadvantage historical participants in those fisheries. As discussed in Section 2.6.4 of the Analysis, AFA vessel replacement regulations prohibit replaced AFA vessels from operating as a mothership in the Pacific cod fisheries. Therefore, it is not necessary to include those vessels under this restriction.

Why are no options needed to impose sideboards on C/Ps that qualify to operate as motherships in the BSAI non-CDQ directed fishery?

As noted in the Analysis in Section 2.7.3.2, the Council determined that establishing a limit on the amount of Pacific cod the two eligible C/Ps operating as motherships could receive, commonly known as a ''sideboard,'' would: Increase management costs, increase management complexity for the Council and NMFS, and potentially increase the incidental catch of Pacific cod delivered to C/Ps that qualify for the BSAI Pacific cod trawl mothership endorsement. The Council and NMFS determined that these potential costs outweigh the benefits of implementing a sideboard. Further, public testimony indicated that there are operational constraints on a C/P's ability to accept increases in Pacific cod deliveries, making sideboards unnecessary for limiting offshore deliveries. These constraints include space limitations, limits on freezing and processing capacity, and regulatory prohibitions on mixing tows in single tanks.

Section 2.7.3.2. of the Analysis states that without a sideboard, it would be possible for the C/Ps designated on a groundfish LLP license that qualifies under this proposed rule for an endorsement to operate as a mothership in this fishery to increase the amount of Pacific cod they accept from CVs in this fishery, but the potential amount of increase cannot be known with any certainty. This concern was expressed by the Council and some members of the public. However, because the C/Ps designated on a groundfish LLP license that would be eligible for a BSAI Pacific cod trawl mothership endorsement have been operating in a fishery where participants compete for a portion of the sector allocation, incentives exist to operate at capacity and as efficiently as possible. These incentives will remain in place under the proposed rule, since the C/Ps designated on an eligible groundfish LLP license will still compete with the shoreside and floating processors for a share of the fishery. Further, the Analysis (Section 2.10) and public testimony received on this issue clearly stated that imposing a sideboard would increase the complexity of the action and could result in a sideboard limit that would be confidential or too small to allow NMFS to open the fishery at the start of the A season. NMFS could deem a sideboard to be too small to open the fishery if the sideboard amount could be harvested before NMFS received data in time to close the fishery before the sideboard was exceeded.

There is also the potential for negative impacts of a Bering Sea sideboard on both the Bering Sea and Aleutian Islands directed Pacific cod trawl fisheries. Under certain conditions a relatively small sideboard in the Bering Sea could result in increased effort in the Aleutian Islands, resulting in negative impacts on the shoreside processors in the Aleutian Islands. The Council determined, and NMFS agrees, that it was neither necessary nor appropriate to establish a sideboard in the Bering Sea for the two C/Ps designated on a groundfish LLP license that qualify for the BSAI Pacific cod trawl mothership endorsement. The impact in the Bering Sea of implementing a Bering Sea sideboard would primarily be a change in the distribution of harvest effort, but would be tempered because only two groundfish LLP licenses will qualify for the BSAI Pacific cod trawl mothership endorsement. Tightly limiting the number of C/Ps that qualify to operate as a mothership in the BSAI non-CDQ Pacific cod trawl CV directed fishery and not implementing a sideboard was the preferred management approach.

How would this proposed action affect shoreside processors and associated communities?

The increase in deliveries of BSAI non-CDQ Pacific cod from the trawl CV directed fishery to C/Ps operating as motherships has resulted in a corresponding decline in the amount of Pacific cod delivered to onshore processing facilities. The Council determined, and NMFS agrees, that these Pacific cod deliveries are an important financial component to Bering Sea inshore processing operations and fishery dependent communities in the BSAI: Dutch Harbor/Unalaska, King Cove, Akutan, Sand Point, St. Paul, Adak, Atka, and the Aleutians East Borough. For shoreside processing operations, Pacific cod is second only to pollock in terms of volume, and these high-volume fisheries help ensure a more stable workforce in these remote communities and increase economic activity, as described in Sections 2.8.3 through 2.8.5 of the Analysis. Limiting the C/Ps that can operate as a mothership to only the historical participants is consistent with the objectives of this action to address the recent and rapid increase in deliveries of Pacific cod offshore and the resulting negative impacts to the shoreside processors and fishery-dependent communities, consistent with National Standard 8. The Council has utilized the best available economic and social data to evaluate the sustained participation of fishing communities.

How would this action help reduce PSC rates?

In fisheries where circumstances motivate fishermen to race against each other to harvest as much fish as they can before the annual catch limit or the PSC limit is reached and the fishery closes for the season, participants can have a substantial disincentive to take actions to reduce bycatch use and waste, particularly if those actions could reduce groundfish catch rates. In a ''race for fish,'' participants who choose not to take actions to reduce bycatch and waste stand to gain additional groundfish catch by continuing to harvest at a higher bycatch rate, at the expense of any vessels engaged in bycatch avoidance. By limiting processing capacity in the offshore sector of the BSAI non-CDQ pacific cod trawl CV directed fishery and reducing pressure to harvest the BSAI Pacific cod trawl CV allocation quickly, this proposed action would help to reduce incentives for a ''race for fish'' and provide participating CVs more flexibility in fishing operations, because participation in the fishery would be more stable and predictable over the long term, thereby allowing them to choose fishing operations that better avoid PSC (Section 2.7.1 and 2.8.2 of the Analysis).

This proposed rule would not affect annual halibut PSC limits, but it could help maintain or reduce halibut PSC rates in the fishery. While such savings are not guaranteed or predictable, due to the suite of variables that can affect PSC rates, the proposed action addresses concerns that increases in the number of C/Ps operating as motherships could increase PSC rates during shorter fishing seasons at a time when Pacific cod Allowable Biological Catch (ABC) is declining in the Bering Sea, thus creating incentives to abandon fishing practices that have reduced halibut PSC (Section 2.8.2 of the Analysis). Additionally, PSC limits for this fishery would continue to be established each year under the process analyzed in the EA/RIR/IRFA for Amendment 111 (80 FR 71649, November 16, 2015) to the BSAI FMP (see **ADDRESSES**). The fishery would be closed if NMFS determines

that any PSC limits will be reached before the Pacific cod allocation for this fishery is reached.

Why change the policy on C/Ps operating as motherships as implemented under the Amendment 80 Program?

As explained earlier in this preamble, the Council and NMFS recognized at the time Amendment 80 was implemented that participation by Amendment 80 vessels as motherships in the offshore BSAI TLAS fisheries could continue or even increase. However, the proportion of the BSAI non-CDQ Pacific cod trawl CV directed fishery catch now being harvested and delivered to Amendment 80 C/Ps operating as motherships is substantially greater than it was at the time the Amendment 80 Program was implemented.

The final rule for the Amendment 80 Program (72 FR 52668, September 14, 2007) that allowed Amendment 80 C/Ps to operate as motherships noted that only one Amendment 80 C/P was receiving and processing catch delivered from one non-Amendment 80 CV using trawl gear in the BSAI TLAS fishery prior to the implementation of the Amendment 80 Program. The 2008 final rule noted the practice of delivering unsorted catch from non-Amendment 80 CVs to Amendment 80 C/Ps was not widespread at that time. The final rule also noted that permitting this practice was unlikely to create a significant shift in processing patterns away from shoreside processors based on data available at that time, particularly if then-current rates of delivery of unsorted BSAI TLAS catch from CVs to C/Ps operating as motherships for processing continued. Importantly, the final rule noted that NMFS could not predict the extent to which that practice might increase in the future or whether the practice would have adverse effects on existing processing operations (*i.e.,* shoreside processors). NMFS also stated that a review of processing operations by shoreside processors and Amendment 80 vessels could provide the basis for a future regulatory amendment should the Council identify and recommend additional changes to the Amendment 80 Program to address potential conflicts.

From 2003 through 2015, no more than two Amendment 80 C/Ps participated as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery in any one year (Section 2.7.1 of the Analysis), and this participation rate was more or less in line with NMFS's previous expectations. However, in each year from 2016 through 2018, the practice of trawl CVs delivering non-Amendment 80 catch to Amendment 80 C/Ps operating as motherships expanded significantly, with six to seven Amendment 80 C/Ps and two AFA C/Ps operating as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery.

The Council determined, and NMFS agrees, that it is appropriate to review the policies adopted for the BSAI TLAS fisheries under the Amendment 80 Program and the fishing operations in those fisheries, and take action, if necessary, as fishing patterns change from those observed at the time the Amendment 80 Program was implemented. As a result, the Council concluded, and NMFS agrees, at this time it is necessary to limit activity of C/Ps operating as motherships receiving and processing BSAI non-CDQ Pacific cod from CVs using trawl gear in the directed fishery.

Proposed Action

This proposed rule would implement Amendment 120 to the BSAI FMP and Amendment 108 to the GOA FMP. This proposed rule would establish eligibility criteria for, and a process to issue, a new endorsement to groundfish LLP licenses that would authorize C/Ps designated on those licenses to operate as a mothership and receive and process deliveries of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. Regulations at 50 CFR 679.2 define a mothership as a vessel that receives and processes groundfish from other vessels. Any C/P that meets the mothership definition at § 679.2 or has a mothership designation on its Federal Fisheries Permit will be considered a mothership under this action. However, true motherships, other at-sea processors, and shoreside processors would not be restricted by this action.

Under this proposed action, NMFS would issue a BSAI Pacific cod trawl mothership endorsement to an Amendment 80 or non-Amendment 80 groundfish LLP license with Bering Sea or Aleutian Islands area and C/P operation endorsements if the groundfish LLP license is credited with receiving and processing at least one legal mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year of the qualifying period from 2015 through 2017. Further, under this proposed rule, any Amendment 80 vessel not designated on an Amendment 80 QS permit and Amendment 80 LLP license or on an Amendment 80 LLP/QS license would be prohibited from receiving and processing Pacific cod harvested in the Pacific cod directed fishery in the BSAI and the GOA.

Based on the information provided in the Analysis and the official record, NMFS has determined that two groundfish LLP licenses would be eligible to be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year of the qualifying period and receive a BSAI Pacific cod trawl mothership endorsement. One is an Amendment 80 groundfish LLP license and one is an AFA groundfish LLP license. Therefore, under this proposed rule, those two groundfish LLP licenses would be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year of the qualifying period and receive a BSAI Pacific cod trawl mothership endorsement. Based on NMFS's catch records, both were the sole groundfish LLP license on which a C/P that received and processed at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery in each year of the qualifying period was designated during the qualifying period. As a result, NMFS anticipates that a total of two groundfish LLP licenses would receive a BSAI Pacific cod trawl mothership endorsement, resulting in up to two C/Ps that could operate as a mothership authorized to receive and process Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery.

This proposed rule would not preclude a vessel without a BSAI Pacific cod trawl mothership endorsement from receiving and processing incidental catch of Pacific cod that is caught while participating in other directed fisheries. For example, a C/P without a BSAI Pacific cod trawl mothership endorsement could participate in the BSAI TLAS yellowfin sole directed fishery and receive and process directed catch of BSAI TLAS yellowfin sole with incidental catch of BSAI Pacific cod, provided that the vessel has met all applicable requirements to participate in the BSAI TLAS yellowfin sole directed fishery and the incidental catch of BSAI Pacific cod is at or under the maximum retainable amount (MRA) for Pacific cod. This proposed action would not preclude an Amendment 80 or a non-Amendment 80 vessel from participating as a C/P and processing its own catch in the BSAI non-CDQ Pacific cod trawl CV directed fishery. As noted above, it would not preclude a true mothership, other at-sea processor, or shoreside processor from receiving and processing Pacific cod harvested by a CV using trawl gear in the BSAI non-

CDQ Pacific cod directed fishery. Under this proposed rule, a C/P that does not have a BSAI Pacific cod trawl mothership endorsement would be prohibited from acting as a mothership and receiving and processing Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. The following sections of this preamble describe how NMFS proposes to determine a mothership trip target, credit trip targets to a groundfish LLP license, and issue BSAI Pacific cod trawl mothership endorsements.

Determining and Crediting Mothership Trip Targets

NMFS can determine which and how many landings were received by a vessel designated on a specific groundfish LLP license during a particular timeframe. ''Landing'' means offloading fish (see 50 CFR 679.2), and is used interchangeably with ''deliveries'' in the preamble of this proposed rule. Regulations at 50 CFR 679.4(k) require an LLP license holder to designate a specific vessel on which the license will be used. This requirement allows NMFS to credit vessel deliveries to a specific LLP license. NMFS also collects vessel delivery data in the form of weekly production reports from C/Ps operating as motherships, which include information on the species and amounts received. From these data, NMFS has created an official record with all relevant information necessary to determine legal mothership trip targets that can be credited to groundfish LLP licenses with a C/P designation.

The official record created by NMFS contains vessel delivery data and the groundfish LLP licenses to which those deliveries are credited. The official record includes the documentation of specific groundfish LLP licenses, including vessels designated on them, and other relevant information necessary to credit vessel deliveries to specific groundfish LLP licenses. NMFS presumes the official record is correct, and a person wishing to challenge the presumptions in the official record would bear the burden of proof through an evidentiary and appeals process. Evidence of the number of mothership trip targets of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery is based on legally required production reports submitted to NMFS by C/Ps, as required by 50 CFR 679.5(c)(6).

In order for a groundfish LLP license to receive a BSAI Pacific cod trawl mothership endorsement and thus be authorized to receive and process deliveries of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery, NMFS must first determine that the groundfish LLP license is an eligible license, and then must determine that the eligible license can be credited with one or more mothership trip targets of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery for each year during the qualifying period. Under this proposed rule, NMFS would identify as eligible those groundfish LLP licenses with Bering Sea or Aleutian Islands area and C/P operation endorsements on which an Amendment 80 or non-Amendment 80 C/P was designated when the groundfish LLP license was used to receive and process at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery during each year from 2015 through 2017.

Based on the official record, NMFS has identified two groundfish LLP licenses that would be eligible to be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery for each year during the qualifying period. Neither of these groundfish LLP licenses had more than one C/P designated on it during the qualifying period. Therefore, NMFS would credit these two groundfish LLP licenses with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery for each year during the qualifying period under this proposed rule. NMFS proposes to list these two groundfish LLP licenses in Table 57 to part 679 to facilitate the public's ability to review their catch records and determine if additional groundfish LLP licenses may be eligible to receive the endorsement. Additional groundfish LLP licenses may qualify for an endorsement through the proposed administrative adjudicative process described below. If a holder of a groundfish LLP license believes the groundfish LLP license would meet the eligibility criteria described above, but the license is not listed in proposed Table 57 to part 679, or if a license holder disagrees with a groundfish LLP license to which NMFS would assign the BSAI Pacific cod trawl mothership endorsement, the holder would have the opportunity to challenge NMFS's determination as described in the following section of this preamble.

Proposed Notification and Appeals Processes for Issuing BSAI Pacific Cod Trawl Mothership Endorsements

NMFS has determined the groundfish LLP licenses identified in proposed Table 57 can be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery for each year during the qualifying period, based on the official record, and those groundfish LLP licenses would receive a BSAI Pacific cod trawl mothership endorsement. If BSAI Amendment 120 is approved and this action is implemented in a final rule, then, in accordance with the regulatory text of the final rule, NMFS would issue a notification of eligibility and a revised groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement to the holders of the groundfish LLP licenses identified in proposed Table 57, using the address on record at the time the notification is sent.

For all those groundfish LLP licenses with an Amendment 80 or AFA, Bering Sea or Aleutian Islands area, and C/P operation endorsements, but not listed in proposed Table 57, NMFS would notify the holders that the groundfish LLP license is not eligible for a BSAI Pacific cod trawl mothership endorsement based on the official record, using the address on record at the time the notification is sent. NMFS would provide the holder with an opportunity to submit information to NMFS to rebut the official record. NMFS would provide a single, 30-day evidentiary period, beginning on the date that notification is sent, for a groundfish LLP license holder to submit any information or evidence to demonstrate that the information contained in the official record is inconsistent with the holder's records.

A groundfish LLP license holder who submits claims that are inconsistent with information in the official record would have the burden of proving that the submitted claims are correct. NMFS would not accept claims that are inconsistent with the official record, unless they are supported by clear, written documentation. NMFS would evaluate all additional information or evidence submitted within the 30-day evidentiary period. If NMFS determines that the additional information or evidence proves that the groundfish LLP license holder's claims are correct, NMFS would amend the official record in accordance with that information or evidence. However, if, after the 30-day evidentiary period, NMFS determines that the additional information or evidence does not prove that the groundfish LLP license holder's claims were correct, NMFS would deny the claim. NMFS would notify the applicant that the additional information or evidence did not meet the burden of proof to overcome the official record through an initial administrative determination (IAD).

NMFS's IAD would indicate the deficiencies and discrepancies in the information or evidence that is submitted in support of the claim. NMFS's IAD would indicate which claims could not be approved based on the available information or evidence, and provide information on how an applicant could appeal an IAD. The procedure for appealing an IAD through NMFS's National Appeals Office is described at 15 CFR part 906 (79 FR 7056, February 6, 2014). During the pendency of an administrative adjudication leading to a final agency action, NMFS would issue an interim (temporary, non-transferable) license to an applicant who was authorized to participate in the fishery as a mothership in the year before the IAD is issued and who makes a credible claim to eligibility for a BSAI Pacific cod trawl mothership endorsement. Such an applicant would be eligible for a non-transferable interim license pending the resolution of his or her claim pursuant to the license renewal provisions of 5 U.S.C. 558. The non-transferable, interim license would authorize the applicant to operate as a mothership and receive and process Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery, and would be effective until final agency action on the appeal. At that time, the person who appealed would receive either a transferable license with the endorsement or a transferrable license without the endorsement, depending on the final agency action.

Regulatory Changes Made by This Proposed Rule

The following provides a brief summary of the regulatory changes that would be made by this proposed rule. In order to implement Amendments 120/108, this proposed rule would:

(1) Add § 679.4(k)(15) to include the provisions that are necessary to qualify for and receive a BSAI Pacific cod trawl mothership endorsement;

(2) Add § 679.7(i)(12) to prohibit the receipt and processing by a C/P operating as a mothership of Pacific cod harvested by CVs directed fishing for Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery without a copy of a valid groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement;

(3) Add § 679.7(o)(3)(v) to prohibit the use of an Amendment 80 C/P to receive and process Pacific cod harvested from directed fishing in Pacific cod fisheries in the BSAI or GOA, if that C/P is not designated on an Amendment 80 QS permit and an Amendment 80 LLP license or on an Amendment 80 LLP/QS license; and

(4) Add Table 57 to part 679 to list those groundfish LLP licenses NMFS has determined would be eligible, would be credited with at least one mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery for each year of the qualifying period, and would receive a BSAI Pacific cod trawl mothership endorsement.

Classification

Pursuant to sections 304(b)(1)(A) and 305(d) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendments 120/108 to the BSAI and GOA FMPs, respectively, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration of comments received during the public comment period.

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

Regulatory Impact Review (RIR)

An RIR was prepared to assess all costs and benefits of available regulatory alternatives. A copy of this analysis is available from NMFS (see **ADDRESSES**). NMFS is recommending Amendments 120/108 and the regulatory revisions in this proposed rule based on those measures that maximized net benefits to the Nation. Specific aspects of the economic analysis are discussed below in the IRFA section.

Initial Regulatory Flexibility Analysis (IRFA)

This IRFA was prepared for this proposed rule, as required by section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603), to describe the economic impact this proposed rule, if adopted, would have on small entities. An IRFA describes why this action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities. Descriptions of this proposed rule, its purpose, and the legal basis are contained earlier in this preamble and are not repeated here.

Number and Description of Small Entities Regulated by This Proposed Rule

This proposed rule would directly regulate the owners and operators of certain Amendment 80 and AFA C/Ps operating as motherships when receiving Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. The proposed action would also directly regulate the owners of Amendment 80 C/Ps that have been replaced under BSAI Amendment 97 (77 FR 59852, October 1, 2012) by prohibiting such vessels from operating as a mothership in the BSAI or GOA Pacific cod fisheries.

The thresholds applied to determine if an entity or group of entities are ''small'' under the RFA depend on the industry classification for the entity or entities. Businesses classified as primarily engaged in commercial fishing are considered small entities if they have combined annual gross receipts not in excess of $11.0 million for all affiliated operations worldwide (50 CFR 200.2). The nine C/Ps that operated as motherships in 2018 (the most recent year of complete data) during some part of the BSAI non-CDQ Pacific cod trawl CV directed fishery operate primarily as C/Ps throughout the year in either AFA pollock fisheries or Amendment 80 fisheries; they are considered C/Ps for purposes of classification under this IRFA. Though C/Ps engage in both fish harvesting and fish processing activities, since at least 1993 NMFS Alaska Region has considered C/Ps to be predominantly engaged in fish harvesting rather than fish processing. Under this classification, the threshold of $11.0 million in annual gross receipts is the appropriate threshold to apply to identify any C/Ps that are small entities.

This proposed rule would directly regulate the activities of 19 Amendment 80 vessels owned by five companies. One of the 19 Amendment 80 C/Ps qualified for both the Amendment 80 and AFA programs. Additionally this proposed rule directly regulates the 21 AFA C/Ps that are eligible to fish for pollock under the provisions of the AFA. Not all of the 21 eligible AFA vessels participate in the harvesting of the Bering Sea pollock allocation. The 2018 Pollock Conservation Cooperative report indicates that 14 vessel owned by seven firms harvested the cooperative's pollock allocation in 2018. The owners of the remaining vessels leased their allocation within the cooperative. This action does not directly regulate three true AFA motherships that are defined under the AFA.

Analysis of directly regulated entity revenue to determine entity size as measured against the commercial fishing threshold of $11.0 million must also consider ownership affiliations and other contractual affiliations of the entities, worldwide. This proposed rule directly regulates C/Ps in the Amendment 80 fleet and the AFA fleet. At present five firms are operating a total of 19 vessels in the Amendment 80 fleet. All five firms have revenue in excess of the small entity threshold based on ownership affiliations between vessels, and therefore are considered large entities for RFA purposes. All Amendment 80 firms owning permitted vessels are members in an Amendment 80 fishing cooperative, which is a cooperative affiliation via contractual arrangements. Similarly, 14 active AFA C/P vessels are owned by 7 firms and all are large entities. Additionally, the remaining AFA eligible entities are affiliated with participating AFA firms via contractual leasing agreements. The RFA requires consideration of affiliations between entities for the purpose of assessing whether an entity is classified as small. The AFA pollock and Amendment 80 cooperatives are types of affiliation between entities. All of the AFA and Amendment 80 cooperatives have gross annual revenues that are substantially greater than $11 million. Therefore, NMFS considers members in these cooperatives to be ''affiliated'' large (non-small) entities for RFA purposes. The eligible Amendment 80 and AFA entities are large entities based on those affiliations.

Impacts of This Action on Small Entities

Under this proposed rule, C/Ps acting as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery would be limited to two vessels, and all remaining AFA and Amendment 80 C/Ps would not be permitted to operate as a mothership in this fishery even if retired from and/or replaced in either the AFA or Amendment 80 Programs. However, all of the directly regulated entities have been determined to be large entities via ownership, cooperative, or contractual affiliations. Thus there are no adverse impacts on directly regulated small entities.

Trawl CVs operating in the BSAI non-CDQ Pacific cod trawl CV directed fishery are not directly regulated by this action. However, limiting the mothership markets available to CVs could negatively impact the ex-vessel price some CVs receive and impact the profitability of the vessel and firm. Due to data limitations, definitive statements on overall net revenue of the CVs in the various sectors are not available, because they would be speculative given the available information. Furthermore, indirect adverse effects on participating CVs will be somewhat offset by improved vessel safety associated with reduced crowding in highly fished areas.

Shoreside processors are not directly regulated by this action but could be indirectly affected, as they would likely benefit from limits imposed on C/Ps. The intent of this action is to implement regulations that would limit the number of C/Ps acting as a mothership in the BSAI non-CDQ Pacific cod trawl CV directed fishery and limit the amount of directed fishing deliveries of Pacific cod that can be processed by those C/Ps. These limitations on mothership activities will likely result in greater directed fishing deliveries to shoreside processing facilities. The communities that are home to these shoreside processors derive multiple benefits from economic activity related to vessel and processor activities, such as employment and income provided by the various sectors, business activity generated at fishery support services providers in the communities, and public revenues that derive from taxes on fishery related activities in the communities. Thus, indirect effects of this proposed rule on shoreside processing facilities and the communities they operate within are expected to be beneficial. However, we note that communities in which C/Ps have a strong presence could experience indirect negative effects, due to the proposed rule's limitations on motherships.

NMFS has determined that all directly regulated entities are large because of their ownership affiliations or contractual affiliations. Nonetheless, NMFS has prepared this IRFA, which provides potentially affected small entities, including those that are indirectly affected, with an opportunity to provide comments on this IRFA. NMFS will evaluate any comments received on the IRFA and may consider certifying under section 605 of the RFA (5 U.S.C. 605) that this action will not have a significant economic impact on a substantial number of small entities prior to publication of the final rule.

Description of Significant Alternatives Considered

The RFA requires identification of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities. The Council considered a status quo alternative and three action alternatives with several options and sub-options. The combination of options and sub-options under the action alternatives provided a reasonable range of potential alternative approaches to status quo management.

No significant alternatives were identified that would accomplish the stated objectives for limiting mothership activity in the BSAI non-CDQ Pacific cod trawl CV directed fishery consistent with applicable statutes, and that would minimize costs to potentially affected small entities more than the approaches of the preferred alternatives adopted in this proposed rule. NMFS and the Council considered four alternatives for action in this proposed rule. Alternative 1 is the no action alternative. This alternative would continue to allow non-Amendment 80 and Amendment 80 C/Ps to operate as motherships in the BSAI non-CDQ Pacific cod trawl CV directed fishery, and is inconsistent with the Council's purpose and need statement.

Alternative 2, along with Options 1, Sub-option 1.3, and Option 2, would provide the greatest limit on mothership activity, while recognizing historical participation. This alternative (and its options and sub-options), selected as the Council's preferred alternative, would allow one Amendment 80 C/P and one AFA C/P to act as a mothership to receive and process Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery.

Alternative 3 would require a sideboard on the amount of Pacific cod delivered to C/Ps operating as motherships and only applies to the Bering Sea. The Council determined that the increased management costs, increased management complexity for the Council and NMFS, limited constraints a sideboard would have on the Bering Sea directed fishery, and the potential for increases in the incidental catch of Pacific cod delivered to C/Ps that do not qualify for a mothership endorsement outweighed the benefits of implementing a sideboard. As a result the Council determined that the preferred management approach would be to tightly limit the number of C/Ps that qualify to operate as a mothership rather than implementing a sideboard.

Alternative 4, also selected as the preferred alternative, is consistent with the intent of the Council to ensure that no loophole exists to allow Amendment 80 C/Ps replaced under BSAI Amendment 97 to operate as a mothership in the BSAI non-CDQ Pacific cod trawl CV directed fishery. Alternative 4 would also clarify the intent of the Council to prevent

Amendment 80 C/Ps replaced under BSAI Amendment 97 from operating as a mothership by receiving and processing Pacific cod harvested by CVs directed fishing for Pacific cod in the BSAI or GOA. Not selecting Alternative 4 would have allowed expanded use of replaced Amendment 80 C/Ps to receive and process Pacific cod harvested by CVs directed fishing for Pacific cod in the BSAI or GOA.

Federal Rules That May Duplicate, Overlapping, or Conflict With the Proposed Action

No duplication, overlap, or conflict between this proposed action and existing Federal rules has been identified.

Projected Recordkeeping and Reporting Requirements

This proposed rule does not add additional reporting or recordkeeping requirements for the vessels that choose to submit an appeal. An appeal process exists for groundfish LLP license endorsement issuance. No small entity is subject to reporting requirements that are in addition to or different from the requirements that apply to all directly regulated entities. No unique professional skills are needed for the groundfish LLP license or vessel owners or operators to comply with the reporting and recordkeeping requirements associated with this proposed rule. This proposed rule would not implement or increase any fees that NMFS collects from directly regulated entities. The Analysis prepared for this action identifies no operational costs of the endorsement (see **ADDRESSES**).

Collection-of-Information Requirements

This proposed rule contains collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). These requirements have been submitted to OMB for approval under a temporary new information collection, to be merged, after OMB approval, with existing OMB Control Number 0648–0334. The public reporting burden for the collection-of-information requirements in this proposed rule is estimated to average 4 hours per response to submit an appeal, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding (1) whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the burden estimate; (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, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Alaska Region at the **ADDRESSES** above, and by email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Notwithstanding any other provision of law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number. All currently approved NOAA collections of information may be viewed at *http://www.cio.noaa.gov/services_programs/prasubs.html.*

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: September 18, 2019.

Samuel D. Rauch III,

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

For reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447; Pub. L. 111–281.

■ 2. In § 679.4, add paragraph (k)(15) to read as follows:

§ 679.4 Permits.

* * * * *

(k) * * *

(15) *BSAI Pacific cod trawl mothership endorsement*—(i) *General.* In addition to other requirements of this part, a vessel must be designated on a groundfish LLP license that has a BSAI Pacific cod trawl mothership endorsement in order to receive and process Pacific cod harvested and delivered by a catcher vessel directed fishing using trawl gear in the BSAI non-CDQ Pacific cod fishery as specified in § 679.20(a)(7)(ii)(A). A vessel designated on a groundfish LLP license with Bering Sea or Aleutian Islands area, catcher/processor operation, and BSAI Pacific cod trawl mothership endorsements may operate as a mothership, as defined at § 679.2, to receive and process Pacific cod harvested by a catcher vessel fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel directed fishery as specified in § 679.20(a)(7)(ii)(A).

(ii) *Eligibility requirements for a BSAI Pacific cod trawl mothership endorsement.* A groundfish LLP license is eligible to receive a BSAI Pacific cod trawl mothership endorsement if the groundfish LLP license:

(A) Has Bering Sea or Aleutian Islands area and catcher/processor operation endorsements;

(B) Had a vessel designated on it that received and processed at least one legal mothership trip target of Pacific cod delivered by catcher vessels directed fishing using trawl gear in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery as specified in § 679.20(a)(7)(ii)(A) in each of the three years of the qualifying period of 2015 through 2017, inclusive, where a mothership trip target is, in the aggregate, the groundfish species that is delivered by a catcher vessel to a given catcher/processor acting as a mothership in an amount greater than the retained amount of any other groundfish species delivered by the same catcher vessel to the same catcher/processor for a given week; and

(C) Is credited by NMFS with receiving a legal mothership trip target specified in paragraph (k)(15)(ii)(B) of this section.

(iii) *Explanations for BSAI Pacific cod trawl mothership endorsement.* (A) NMFS will determine whether a groundfish LLP license is eligible to receive a BSAI Pacific cod trawl mothership endorsement under paragraph (k)(15)(ii) of this section based only on information contained in the official record described in paragraph (k)(15)(iv) of this section.

(B) NMFS will credit a groundfish LLP license with a legal mothership trip target specified in paragraph (k)(15)(ii)(B) of this section if that groundfish LLP license was the only groundfish LLP license on which the vessel that received and processed legal mothership trip targets was designated from 2015 through 2017.

(C) Mothership trip targets will be determined based on round weight equivalents.

(iv) *Official record of participation in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery.*

(A) The official record will contain all information used by the Regional Administrator that is necessary to administer the requirements described in paragraph (k)(15) of this section.

(B) The official record is presumed to be correct. A groundfish LLP license holder has the burden to prove otherwise.

(C) Only legal landings as defined in § 679.2 and documented on NMFS production reports will be used to determine legal mothership trip targets under paragraph (k)(15)(ii)(B) of this section.

(v) *Process for issuing BSAI Pacific cod trawl mothership endorsements.* (A) NMFS will issue to the holder of each groundfish LLP license with Bering Sea or Aleutian Islands area and catcher/processor operation endorsements, and specified in Column A of Table 57 of this part, a notice of eligibility to receive a BSAI Pacific cod trawl mothership endorsement and a revised groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement.

(B) NMFS will issue to the holder of a groundfish LLP license with Bering Sea or Aleutian Islands area and catcher/processor operation endorsements, and that is not listed in Table 57 of this part, a notice informing that holder that the groundfish LLP license is not eligible to be credited with at least one legal mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery for each year during the qualifying period or receive a BSAI Pacific cod trawl mothership endorsement based on the official record, using the address on record at the time the notice is sent. The notice specified in this paragraph will inform the holder of the groundfish LLP license of the timing and process through which the holder can provide additional information or evidence to amend or challenge the information in the official record of this section, as specified in paragraphs (k)(15)(v)(C) and (D) of this section.

(C) The Regional Administrator will specify by notice a 30-day evidentiary period during which an applicant may provide additional information or evidence to amend or challenge the information in the official record. A person will be limited to one 30-day evidentiary period. Additional information or evidence received after the 30-day evidentiary period specified in the letter has expired will not be considered for purposes of the initial administrative determination (IAD).

(D) The Regional Administrator will prepare and send an IAD to the applicant following the expiration of the 30-day evidentiary period, if the Regional Administrator determines that the information or evidence provided by the person fails to support the person's claims and is insufficient to rebut the presumption that the official record is correct, or if the additional information, evidence, or revised application is not provided within the time period specified in the letter that notifies the applicant of his or her 30-day evidentiary period. The IAD will indicate the deficiencies with the information or evidence submitted. The IAD will also indicate which claims cannot be approved based on the available information or evidence. A person who receives an IAD may appeal pursuant to 15 CFR part 906. NMFS will issue a non-transferable interim license that is effective until final agency action on the IAD to an applicant who avails himself or herself of the opportunity to appeal an IAD and who has a credible claim to eligibility for a BSAI Pacific cod trawl mothership endorsement.

* * * * *

■ 3. In § 679.7, add paragraphs (i)(12) and (o)(3)(v) to read as follows:

§ 679.7 Prohibitions.

* * * * *

(i) * * *

(12) *Prohibitions specific to directed fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery as specified at § 679.20(a)(7)(ii)(A).* Receive and process Pacific cod harvested and delivered by a catcher vessel directed fishing using trawl gear in the BSAI non-CDQ Pacific cod fishery without a legible copy on board of a valid groundfish LLP license with Bering Sea or Aleutian Islands area, catcher/processor operation, and BSAI Pacific cod trawl mothership endorsements.

* * * * *

(o) * * *

(3) * * *

(v) Use an Amendment 80 catcher/processor, as defined at § 679.2 of this part, to receive and process Pacific cod harvested by vessels directed fishing for Pacific cod in the BSAI or GOA, if that catcher/processor is not designated on:

(A) An Amendment 80 QS permit and an Amendment 80 LLP license; or

(B) An Amendment 80 LLP/QS license.

* * * * *

■ 4. Adding Table 57 to part 679 to read as follows:

TABLE 57 TO PART 679—GROUNDFISH LLP LICENSES WITH BERING SEA OR ALEUTIAN ISLANDS AREA AND CATCHER/PROCESSOR OPERATION ENDORSEMENTS ELIGIBLE FOR A BSAI PACIFIC COD TRAWL MOTHERSHIP ENDORSEMENT

[X indicates that Column A applies]

Column A	Column B
The Holder of Groundfish License Number . . .	Is eligible under 50 CFR 679.4(k)(15)(ii) to be assigned a BSAI Pacific Cod Trawl Mothership Endorsement.
LLG 5009	X
LLG 4692	X

[FR Doc. 2019–20552 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 84, No. 188
Friday, September 27, 2019

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–LP–19–0069]

Results of Soybean Request for Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The results of the Agricultural Marketing Service's (AMS) Request for Referendum indicate that too few soybean producers wanted a referendum on the Soybean Promotion and Research Order (Order) for one to be conducted. The Request for Referendum was conducted from May 6, 2019, through May 31, 2019, at the U.S. Department of Agriculture's (USDA) Farm Service Agency county offices. To trigger a referendum, 51,501 soybean producers, 10 percent of the total nationwide soybean producers, needed to complete a valid Request for Referendum. The total number of soybean producers participating in the referendum was 794. The number of valid petitions received was 708.

FOR FURTHER INFORMATION CONTACT: Sarah Aswegan, Research and Promotion Division, Livestock and Poultry Program, AMS, USDA, Room 2610–S, STOP 0251, 1400 Independence Avenue SW, Washington, DC 20250–0251; Telephone (515) 201–5190; Fax (202) 720–1125; or email to *Sarah.Aswegan@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Soybean Promotion, Research, and Consumer Information Act (Act) (7 U.S.C. 6301 *et seq.*), every 5 years the Secretary of Agriculture (Secretary) gives soybean producers the opportunity to request a referendum on the Order. If the Secretary determines that at least 10 percent of U.S. producers engaged in growing soybeans (not in excess of one-fifth of which may be producers in any one State) support the conduct of a referendum, the Secretary must conduct a referendum within 1 year of that determination. If these requirements are not met, a referendum is not conducted.

A notice of opportunity to Request a Soybean Referendum was published in the **Federal Register**(84 FR 9743) on March 18, 2019. To be eligible to participate in the Request for Referendum, producers or the producer entity that they are authorized to represent must provide supporting documentation showing that they or the producer entity they represent paid an assessment sometime during the representative period between January 1, 2017, and December 31, 2018. Based on USDA data, there are 515,008 soybean producers in the United States.

A total of 794 producers participated in the Request for Referendum. Only 708 valid requests for a referendum were completed by eligible soybean producers. This number does not meet the requisite number of 51,501. Therefore, based on the results, a referendum will not be conducted. In accordance with the provisions of the Act, soybean producers will be provided another opportunity to request a referendum in 5 years.

The following are the State-by-State results of the Request for Referendum:

State	Valid ballots
Alabama	1
Alaska	0
Arizona	0
Arkansas	7
California	0
Colorado	1
Connecticut	0
Delaware	3
Florida	0
Georgia	1
Hawaii	0
Idaho	0
Illinois	177
Indiana	97
Iowa	94
Kansas	39
Kentucky	5
Louisiana	0
Maine	0
Maryland	10
Massachusetts	0
Michigan	5
Minnesota	38
Mississippi	5
Missouri	31
Montana	0
Nebraska	17
Nevada	0
New Hampshire	0
New Jersey	0
New Mexico	0
New York	1
North Carolina	3
North Dakota	15
Ohio	117
Oklahoma	0
Oregon	0
Pennsylvania	8
Rhode Island	0
South Carolina	0
South Dakota	18
Tennessee	2
Texas	0
Utah	0
Vermont	0
Virginia	2
Washington	0
West Virginia	1
Wisconsin	10
Wyoming	0

Authority: 7 U.S.C. 6301–6311.

Dated: September 20, 2019.

Bruce Summers,

Administrator.

[FR Doc. 2019–21027 Filed 9–26–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Application for Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comment from all interested individuals and organizations on the extension with no revisions of a currently approved information collection, OMB 0596–0016), Application for Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order (form FS–7700–40). The Forest Service is also seeking renewal of an associated existing, form FS–7700–48, Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order, and renewal of an associated existing information collection, form FS–7700–41, Non-Federal Commercial Road Use Permit.

DATES: Comments must be received in writing by November 26, 2019 to be considered.

ADDRESSES: Comments concerning this notice should be addressed to USDA Forest Service, Director, Engineering Staff, RPC5, 201 14th Street SW, Mail Stop 1101, Washington, DC 20024–1101. Comments also may be submitted via facsimile to 703–605–1542 or by email to *david.b.payne@usda.gov*.

The public may inspect comments received at the Office of the Director of Engineering, USDA Forest Service, 201 14th Street SW, Mail Stop 1101, Washington, DC 20024–1101 during normal business hours. Visitors are encouraged to call ahead at 202–205–0963 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: David Payne, Engineering Staff, 202–205–0963. Individuals who use telecommunication devices for the deaf may call the Federal Relay Service at 1–800–877–8339 twenty four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Application for Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order.

OMB Number: 0596–0016.

Expiration Date of Approval: November 30, 2019.

Type of Request: Extension of a currently approved information collection.

Abstract: Authority for permits for use of National Forest System (NFS) roads, NFS trails, and areas on NFS lands restricted by order or regulation derives from the National Forest Roads and Trails Act (16 U.S.C. 532–538). This statute authorizes the Secretary of Agriculture to promulgate regulations regarding use of NFS roads, NFS trails, and areas on NFS lands; establish procedures for sharing investments in NFS roads; and require commercial users to perform road maintenance commensurate with their use of NFS roads. Forest Service regulations implementing this authority are found in 36 CFR 212.5, 212.9, 212.51, 261.10, 261.12, 261.13, 261.54, and 261.55.

In particular, 36 CFR 212.5 and 212.9 authorize the Chief of the Forest Service to establish procedures for investment sharing and to require commercial users to perform maintenance commensurate with their road use. Section 261.10 contains a national prohibition against constructing or maintaining an NFS road or NFS trail without a written authorization. Section 212.12 contains a national prohibition against violating the load, weight, height, length, or width limitations of State law when using NFS roads without a written authorization. Section 212.13 contains a national prohibition against possessing or operating a motor vehicle on NFS roads, NFS trails, or areas on NFS lands that are not designated for motor vehicle use on a motor vehicle use map, unless the use is authorized by a written authorization. Section 261.54 authorizes issuance of an order prohibiting use of an NFS road in a manner prohibited by the order without a written authorization, including commercial hauling without a permit or written authorization when required by order. Section 261.55 authorizes issuance of an order prohibiting use of an NFS trail in a manner prohibited by the order without a written authorization.

Forest Service directives implementing the regulations are found in Forest Service Manual 2350, 7710, and 7730 and Forest Service Handbook 7709.59, chapter 20. These directives provide for the size and weight limits under State traffic law to apply on NFS roads and require the responsible official to designate NFS roads, NFS trails, and areas on NFS lands for motor vehicle use; enter into appropriate investment sharing arrangements, require commercial users of NFS roads to perform maintenance commensurate with their road use; and issue orders that implement the authority in 36 CFR261.54. The permits road users obtain contain appropriate requirements for implementation of applicable regulations and directives.

Form FS–7700–40, Application for Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order. This form will be used by individuals and entities that apply for a permit to use NFS roads, NFS trails, or areas on NFS lands that are subject to a restriction established by regulation or order. Examples of restrictions requiring permits are motor vehicle use on NFS roads and NFS trails that are not designated for that purpose; operating trucks that exceed size limits established by State traffic law on NFS roads; area closures during periods of high fire danger; and non-Federal commercial use of NFS roads.

The following information is collected: (1) The applicant's name, address, and telephone number; (2) identification of the NFS roads, NFS trails, and areas on NFS lands proposed for use (NFS roads and NFS trails are identified by Forest Service route number, and areas on NFS lands are identified using a map); (3) purpose of use; and (4) the proposed use schedule. The applicant is asked to provide explanatory information specific to the proposed use, including information on the types and size of vehicles, through attachments and remarks. There are standard attachments available for use when the application requests oversize vehicle use or commercial use of roads. The application is submitted to the Forest Supervisor or District Ranger responsible for the NFS roads, NFS trails, or areas on NFS lands for which a permit is requested.

When applications for commercial use of roads restricted by order are received, the information is used to identify maintenance commensurate with the applicant's road use. The information is also used to calculate the proportion of acquisition, construction, and maintenance costs associated with the NFS roads proposed for use that is assignable to the applicant for purposes of investment sharing. When requests are for oversize vehicle use, the information is used to evaluate the structural capacity of bridges and potential adverse effects on the safety of other traffic on the roads proposed for use. When the application requests use of NFS roads, NFS trails, or areas on NFS lands that are not designated for motor vehicle use or are restricted by order, the information is used to decide whether and, if appropriate, when the use should be permitted.

The identifying information collected on form FS–7700–40, Application for Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order, is used on form FS–7700–41, Non-Federal Commercial Road Use Permit, and form FS–7700–48, Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order, to identify the permit holder and the routes or areas requested for use. When form FS–7700–41 is issued, road maintenance requirements, road use schedules, and any necessary payments to be made in lieu of performance of maintenance developed from the data submitted on or with form FS–7700–40 are included in form FS–7700–41. When form FS–7700–48 is issued, requirements resulting from data submitted with form FS–7700–40, such as requirements for signs and pilot cars when moving oversize vehicles, are included. A copy of form FS–7700–41 or form FS–7700–48 must be carried in the holder's motor vehicle during use of the NFS roads, NFS trails, or areas on NFS lands covered by the permit.

Forms FS–7700–41, Non-Federal Commercial Road Use Permit, and FS–7700–48, Permit for Use of Roads, Trails, or Areas Restricted by Regulation or Order. Form FS–7700–40, FS–7700–41, and FS–7700–48 have been approved by the Office of Management and Budget (OMB). The Forest Service is seeking renewal of this approval. No

information beyond that collected on form FS–7700–40 will be collected on forms FS–7700–41 and FS–7700–48.

Estimate of Annual Burden: 15 minutes per application.

Type of Respondents: All those who need to use NFS roads, NFS trails, or areas on NFS lands that are restricted by regulation or order.

Estimated Annual Number of Respondents: 20,000.

Estimated Annual Number of Responses per Respondent: One.

Estimated Total Annual Burden on Respondents: 5,000 hours.

Public Comment: Public comment is invited on (1) whether this information collection is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the information collection, 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 information collection on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for OMB approval of the information collection.

Dated: September 13, 2019.

Richard A. Cooksey,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2019–21024 Filed 9–26–19; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–191–2019]

Foreign-Trade Zone 158—Vicksburg, Mississippi; Application for Subzone; United Furniture Industries, Inc.; Nettleton and Amory (Monroe County), Mississippi

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Greater Mississippi Foreign-Trade Zone, Inc., grantee of FTZ 158, requesting subzone status for the facilities of United Furniture Industries, Inc., located in Nettleton and Amory, Mississippi. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on September 23, 2019.

The proposed subzone would consist of the following sites in Monroe County: *Site 1* (52.8 acres)—30440 Old Highway 41, Nettleton; and, *Site 2* (10.5 acres)—61312 Highway 278 East, Amory. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 158.

In accordance with the FTZ Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is November 6, 2019. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to November 21, 2019.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: September 23, 2019.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2019–21009 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–37–2019]

Foreign-Trade Zone (FTZ) 230—Piedmont Triad Area, North Carolina; Authorization of Production Activity MVP International Group, Inc. (Candles, Reed Diffusers, Wax Melts) Elkin and Boonville, North Carolina

On May 24, 2019, the Piedmont Triad Partnership, grantee of FTZ 230 submitted a notification of proposed production activity to the FTZ Board on behalf of MVP International Group, Inc., within FTZ 230, in Elkin and Boonville, North Carolina.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (84 FR 25521, June 3, 2019). On September 23, 2019, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: September 23, 2019.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2019–21008 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–836]

Dried Tart Cherries From the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of dried tart cherries (cherries) from the Republic of Turkey (Turkey). The period of investigation is January 1, 2018 through December 31, 2018. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable September 27, 2019.

FOR FURTHER INFORMATION CONTACT: Ajay Menon or Maria Tatarska, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1993 or (202) 482–1562, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 20, 2019.[1] On July 3, 2019, Commerce postponed the preliminary determination of this investigation and the revised deadline is now September

[1] *See Dried Tart Cherries from the Republic of Turkey: Initiation of Countervailing Duty Investigation,* 84 FR 22813 (May 20, 2019) (*Initiation Notice*).

20, 2019.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is cherries from Turkey. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.*

Methodology

Commerce is conducting this investigation in accordance with section 701 of the Act. For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[6]

Commerce notes that, in making these findings, we relied in total on facts available and, because we find that neither the Government of Turkey nor the mandatory respondents acted to the best of their ability to respond to Commerce's requests for information, we drew an adverse inference in selecting from among the facts otherwise available.[7] For further information, *see* ''Use of Facts Otherwise Available and Adverse Inferences'' in the Preliminary Decision Memorandum.

All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act.

Pursuant to section 705(c)(5)(A)(ii) of the Act, if the individual estimated countervailable subsidy rates established for all exporters and producers individually examined are zero, *de minimis* or determined based entirely on facts otherwise available, Commerce may use any reasonable method to establish the estimated subsidy rate for all other producers or exporters. In this investigation, we preliminarily determined the individually estimated subsidy rate for each of the individually examined respondents based entirely on facts available under section 776 of the Act. Consequently, pursuant to sections 703(d) and 705(c)(5)(A)(ii) of the Act, we have established the all-others rate by applying the countervailable subsidy rate assigned to the mandatory respondents.

Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent)
Isik Tarim Urunleri Sanayi ve Ticaret A.S	204.93
Yamanlar Tarim Urunleri	204.93
All Others	204.93

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date of this notice in accordance with 19 CFR 351.224(b).

Verification

Because the examined respondents in this investigation did not provide information requested by Commerce and Commerce preliminarily determines each of the examined respondents to have been uncooperative, it will not conduct verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than 30 days after the date of publication of the preliminary determination. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[8] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401

[2] *See Dried Tart Cherries from the Republic of Turkey: Postponement of Preliminary Determination in the Countervailing Duty Investigation,* 84 FR 31840 (July 3, 2019).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination of the Countervailing Duty Investigation of Dried Tart Cherries from the Republic of Turkey,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* sections 776(a) and (b) of the Act.

[8] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

Constitution Avenue NW, Washington, DC 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

International Trade Commission Notification

In accordance with section 703(f) of the Act, we will notify the International Trade Commission (ITC) of our determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination.

Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: September 20, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation covers dried tart cherries, which may also be referred to as, *e.g.,* dried sour cherries or dried red tart cherries. Dried tart cherries may be processed from any variety of tart cherries. Tart cherries are generally classified as *Prunus cerasus.* Types of tart cherries include, but are not limited to, Amarelle, Kutahya, Lutowka, Montmorency, Morello, and Oblacinska. Dried tart cherries are covered by the scope of this investigation regardless of the horticulture method through which the cherries were produced (*e.g.,* organic or not), whether or not they contain any added sugar or other sweetening matter, whether or not they are coated in oil or rice flour, whether infused or not infused, and regardless of the infusion ingredients, including sugar, sucrose, fruit juice, and any other infusion ingredients. The scope includes partially rehydrated dried tart cherries that retain the character of dried fruit. The subject merchandise covers all shapes, sizes, and colors of dried tart cherries, whether pitted or unpitted, and whether whole, chopped, minced, crumbled, broken, or otherwise reduced in size. The scope covers dried tart cherries in all types of packaging, regardless of the size or packaging material.

Included in the scope of this investigation are dried tart cherries that otherwise meet the definition above that are packaged with non-subject products, including, but not limited to, mixtures of dried fruits and mixtures of dried fruits and nuts, where the smallest individual packaging unit of any such product contains a majority (*i.e.,* 50 percent or more) of dried tart cherries by dry net weight. Only the dried tart cherry components of such products are covered by this investigation; the scope does not include the non-subject components of such products.

Included in the scope of this investigation are dried tart cherries that have been further processed in a third country, including but not limited to processing by stabilizing, preserving, sweetening, adding oil or syrup, coating, chopping, mincing, crumbling, packaging with non-subject products, or other packaging, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the dried tart cherries.

Excluded from the scope of this investigation are dried tart cherries that have been incorporated as an ingredient in finished bakery and confectionary items (cakes, cookies, candy, granola bars, *etc.*).

The subject merchandise is currently classifiable under 0813.40.3000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise may also enter under subheadings 0813.40.9000, 0813.50.0020, 0813.50.0060, 2006.00.2000, 2006.00.5000, and 2008.60.0060. The HTSUS subheadings set forth above are provided for convenience and U.S. customs purposes only. The written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Investigation
IV. Injury Test
V. Use of Facts Otherwise Available and Adverse Inferences
VI. Analysis of Programs
VII. Recommendation

[FR Doc. 2019–21006 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–051]

Hardwood Plywood Products From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review; 2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce is rescinding the new shipper review of the antidumping duty order on hardwood plywood products from the People's Republic of China for the period January 1, 2019, through June 30, 2019, based on the timely withdrawal of the request for review.

DATES: Applicable September 27, 2019.

FOR FURTHER INFORMATION CONTACT: Jasun Moy, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–8194.

Background

On January 4, 2018, the Department of Commerce (Commerce) published the antidumping duty order on hardwood plywood products (plywood) from the People's Republic of China (China).[1] On July 30, 2019, Commerce received a timely new shipper review (NSR) request from Xuzhou Constant Forest Industry Co., Ltd. (Constant Forest), in accordance with section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(c).[2] On August 27, 2019, in accordance with section 751(a)(2)(B) of the Act, and 19 CFR 351.214(b), Commerce initiated a NSR of the antidumping duty order on plywood from China with respect to Constant Forest.[3] On September 12, 2019, Constant Forest timely withdrew its request for a NSR.[4]

Rescission of Review

Pursuant to 19 CFR 351.214(f)(1), Commerce will rescind a NSR, in whole or in part, if the party that requested the review withdraws its request within 60 days of the publication date of the notice of initiation of the requested review. Constant Forest withdrew its request for review within the 60-day deadline. Because Commerce received no other requests for review of Constant Forest, we are rescinding the NSR covering the period January 1, 2019 through June 30, 2019, in full, in accordance with 19 CFR 351.214(f)(1). Consequently, we will continue to treat Constant Forest as part of the China-wide entity.

Assessment

Because we are rescinding the NSR of Constant Forest, we are not making a determination as to whether Constant Forest qualifies for a separate rate. Therefore, we will continue to treat Constant Forest a part of the China-wide entity and any entries covered by this NSR will be assessed at the China-wide rate. The China-wide entity is not under

[1] *See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018).

[2] *See* Constant Forest's Letter, ''Certain Hardwood Plywood Products from the People's Republic of China—Request for New Shipper Review,'' dated July 30, 2019.

[3] *See Hardwood Plywood Products from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review; 2019,* 84 FR 44862 (August 27, 2019).

[4] *See* Constant Forest's Letter, ''Certain Hardwood Plywood Products from the People's Republic of China—Withdrawal of Request for New Shipper Review,'' dated September 12, 2019.

review in the ongoing administrative review covering the 2016–2018 period of review, and therefore, Constant Forest is not under review in the concurrent administrative review.[5] Accordingly, Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of plywood from China during the period of review made by Constant Forest. For this company, antidumping duties shall be assessed at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as the only reminder to importers whose entries will be liquidated as a result of this rescission notice, of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751 and 777(i)(l) of the Act and 19 CFR 351.214(f)(3).

[5] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 12200 (April 1, 2019).

Dated: September 23, 2019.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–21004 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–835]

Dried Tart Cherries From the Republic of Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that dried tart cherries (cherries) from the Republic of Turkey (Turkey) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2018 through March 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable September 27, 2019.

FOR FURTHER INFORMATION CONTACT: Alex Wood or Alice Maldonado, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–1959 or (202) 482–4682, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 20, 2019.[1] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[2] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

[1] *See Dried Tart Cherries from the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigation,* 84 FR 22809 (May 20, 2019) (*Initiation Notice*).

[2] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Dried Tart Cherries from the Republic of Turkey,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Scope of the Investigation

The products covered by this investigation are dried tart cherries from Turkey. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[3] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[4] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.* Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available with adverse inferences for Isik Tarim Urunleri Sanayi ve Ticaret A.S. (Isik Tarim) and Yamanlar Tarim Urunleri (Yamanlar). For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any

[3] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[4] *See Initiation Notice,* 84 FR at 22810.

margins determined entirely under section 776 of the Act. We cannot apply the methodology described in section 735(c)(5)(A) of the Act to calculate the all-others rate, as the margins in this preliminary determination were calculated entirely under section 776 of the Act.

Pursuant to section 735(c)(5)(B) of the Act, if the estimated weighted-average dumping margins established for all exporters and producers individually examined are zero, *de minimis* or determined based entirely on facts otherwise available, Commerce may use any reasonable method to establish the estimated weighted-average dumping margin for all other producers or exporters. In cases where dumping margins are determined entirely under section 776 of the Act for individually examined entities, Commerce's normal practice under these circumstances is to calculate the all-others rate as a simple average of the alleged dumping margin(s) from the petition.[5] Therefore, as the all-others rate, we are assigning the simple average of the dumping margins alleged in the Petition, which is 541.29 percent. For a full description of the methodology underlying Commerce's analysis, *see* the Preliminary Decision Memorandum.

Preliminary Determination

Commerce preliminarily determines that the following estimated dumping margins exist during the period April 1, 2018 through March 31, 2019:

Producer/exporter	Margin (percent)
Isik Tarim Urunleri Sanayi ve Ticaret A.S.	**648.35
Yamanlar Tarim Urunleri	**648.35
All Others	541.29

**Adverse Facts Available (AFA)

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated simple-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. However, in this investigation, we made no adjustments to the all-others antidumping cash deposit rates because Commerce made no findings in the companion CVD investigation that any of the subsidies in question are export subsidies.[6]

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with a preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of preliminary determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because Commerce preliminarily applied AFA to the individually examined companies, Isik Tarim and Yamanlar, in this investigation, in accordance with section 776 of the Act, and the applied AFA rate is based solely on the petition, there are no calculations to disclose.

Verification

Because the examined respondents in this investigation did not respond to the antidumping questionnaire, we will not conduct verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than 30 days after the date of publication of the preliminary determination. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[7] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Final Determination

Section 735(a)(1) of the Act and 19 CFR 351.210(b)(1) provide that Commerce will issue the final determination within 75 days after the date of its preliminary determination. Accordingly, Commerce will make its final determination no later than 75 days after the signature date of this preliminary determination.

[5] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 21909, 21912 (April 23, 2008), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2; *see also Notice of Final Determination of Sales at Less Than Fair Value: Raw Flexible Magnets from Taiwan,* 73 FR 39673, 39674 (July 10, 2008); and *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances,* 78 FR 79670, 79671 (December 31, 2013), unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 79 FR 14476, 14477 (March 14, 2014).

[6] *See Dried Tart Cherries from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination* (signed on July 31, 2019);*see also Circular Welded Carbon-Quality Steel Pipe from Pakistan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures,* 81 FR 36867 (June 8, 2016) and accompanying Preliminary Decision Memorandum at page 13, unchanged in *Circular Welded Carbon-Quality Steel Pipe from Pakistan: Final Affirmative Determination of Sales at Less Than Fair Value,* 81 FR 75028 (October 28, 2016).

[7] *See* 19 CFR 351.309; *see also,* 19 CFR 351.303 (for general filing requirements).

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: September 20, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation covers dried tart cherries, which may also be referred to as, *e.g.,* dried sour cherries or dried red tart cherries. Dried tart cherries may be processed from any variety of tart cherries. Tart cherries are generally classified as Prunus cerasus. Types of tart cherries include, but are not limited to, Amarelle, Kutahya, Lutowka, Montmorency, Morello, and Oblacinska. Dried tart cherries are covered by the scope of this investigation regardless of the horticulture method through which the cherries were produced (*e.g.,* organic or not), whether or not they contain any added sugar or other sweetening matter, whether or not they are coated in oil or rice flour, whether infused or not infused, and regardless of the infusion ingredients, including sugar, sucrose, fruit juice, and any other infusion ingredients. The scope includes partially rehydrated dried tart cherries that retain the character of dried fruit. The subject merchandise covers all shapes, sizes, and colors of dried tart cherries, whether pitted or unpitted, and whether whole, chopped, minced, crumbled, broken, or otherwise reduced in size. The scope covers dried tart cherries in all types of packaging, regardless of the size or packaging material.

Included in the scope of this investigation are dried tart cherries that otherwise meet the definition above that are packaged with non-subject products, including, but not limited to, mixtures of dried fruits and mixtures of dried fruits and nuts, where the smallest individual packaging unit of any such product contains a majority (*i.e.,* 50 percent or more) of dried tart cherries by dry net weight. Only the dried tart cherry components of such products are covered by this investigation; the scope does not include the non-subject components of such products.

Included in the scope of this investigation are dried tart cherries that have been further processed in a third country, including but not limited to processing by stabilizing, preserving, sweetening, adding oil or syrup, coating, chopping, mincing, crumbling, packaging with non-subject products, or other packaging, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the dried tart cherries.

Excluded from the scope of this investigation are dried tart cherries that have been incorporated as an ingredient in finished bakery and confectionary items (cakes, cookies, candy, granola bars, *etc.*).

The subject merchandise is currently classifiable under 0813.40.3000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise may also enter under subheadings 0813.40.9000, 0813.50.0020, 0813.50.0060, 2006.00.2000, 2006.00.5000, and 2008.60.0060. The HTSUS subheadings set forth above are provided for convenience and U.S. customs purposes only. The written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope of the Investigation
V. Scope Comments
VI. Product Characteristics
VII. Application of Facts Available and Use of Adverse Inference
VIII. All Others Rate
IX. Verification
X. Recommendation

[FR Doc. 2019–21003 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Certain Frozen Warmwater Shrimp From India: Notice of Final Results of Antidumping Duty Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 12, 2019, the Department of Commerce (Commerce) published the preliminary results of the changed circumstances review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from India. For these final results, Commerce continues to find that Sunrise Seafoods India Private Limited (SSIPL) is the successor-in-interest to Sunrise Aqua Food Exports (SAFE).

DATES: Applicable September 27, 2019.

FOR FURTHER INFORMATION CONTACT: Brittany Bauer, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3860.

SUPPLEMENTARY INFORMATION:

Background

On October 31, 2018, SSIPL requested that Commerce conduct an expedited changed circumstances review, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216(b), and 19 CFR 351.221(c)(3), to confirm that SSIPL is the successor-in-interest to SAFE for purposes of determining antidumping duty cash deposits and liabilities. In its submission, SSIPL explained that SAFE undertook a business reorganization and transferred its shrimp business to SSIPL.[1]

On December 26, 2018, Commerce initiated this changed circumstances review, and on August 12, 2019, Commerce published the notice of preliminary results, determining that SSIPL is the successor-in-interest to SAFE.[2] In the *Preliminary Results,* we provided all interested parties with an opportunity to comment and request a public hearing regarding our preliminary finding that SSIPL is the successor-in-interest to SAFE.[3] We received no comments or requests for a public hearing from interested parties within the time period set forth in the *Preliminary Results.*[4]

Scope of the Order

The merchandise subject to the order is certain frozen warmwater shrimp.[5] The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and

[1] *See* SSIPL's Letter, ''Frozen Warmwater Shrimp from India: Request to Initiate a Successor-in-Interest Changed Circumstances Review,'' dated October 31, 2019.

[2] *See Certain Frozen Warmwater Shrimp from India: Initiation of Antidumping Duty Changed Circumstances Review,* 83 FR 66244 (December 26, 2018); *see also Certain Frozen Warmwater Shrimp from India: Preliminary Results of Antidumping Duty Changed Circumstances Review,* 84 FR 39809 (August 12, 2019) (*Preliminary Results*).

[3] *See Preliminary Results,* 84 FR at 39810.

[4] *Id.*

[5] For a complete description of the Scope of the Order, *see Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 32835 (July 16, 2018) (*12th AR of Shrimp from India*), and accompanying Issues and Decision Memorandum at ''Scope of the Order'' section.

1605.29.10.10. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description remains dispositive.

Final Results of Changed Circumstances Review

For the reasons stated in the *Preliminary Results,* and because we received no comments from interested parties to the contrary, Commerce continues to find that SSIPL is the successor-in-interest to SAFE. As a result of this determination and consistent with established practice, we find that SSIPL should receive the cash deposit rate previously assigned to SAFE. Consequently, Commerce will instruct U.S. Customs and Border Protection to suspend liquidation of all shipments of subject merchandise produced or exported by SSIPL and entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register** at 1.35 percent, which is the current antidumping duty cash-deposit rate for SAFE.[6] This cash deposit requirement shall remain in effect until further notice.

Notification to Interested Parties

We are issuing this determination and publishing these final results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Act and 19 CFR 351.216(e), 351.221(b), and 351.221(c)(3).

Dated: September 23, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019–21011 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW009

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Pacific Coast Groundfish Fishery; Application for an Exempted Fishing Permit

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, West Coast Region, NMFS, has made a preliminary determination that an exempted fishing permit application titled, ''Annual Vessel Limit Pooling for Groundfish IFQ Vessels Operating Under a Collective Enforcement Agreement in 2019–2020,'' contains all of the required information and warrants further consideration. The application, submitted by the Fort Bragg Association and the Half Moon Bay Groundfish Marketing Association, requests approval to test the use of a voluntary collective agreement to manage a pool of annual vessel limits of cowcod quota pounds using a risk pooling model. This exempted fishing permit project would allow individual vessels participating in the California Groundfish Collective to exceed their annual vessel limit for cowcod, however the collective pooled annual vessel limit would not be exceeded. The primary goal of this exempted fishing permit project is to reduce the operational risk of catching cowcod for participating vessels, while allowing participating vessels to increase landings of more abundant groundfish stocks. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed exempted fishing permit projects.

DATES: Comments must be received no later than 5 p.m., local time on October 15, 2019.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2019–0101, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0101,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments. The EFP application will be available under ''Supporting Documents'' through the same link.
- *Mail:* Submit written comments to Lynn Massey, West Coast Region, NMFS, 501 W Ocean Blvd., Ste. 4200, Long Beach, CA 90802–4250.

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 would 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 would be publicly accessible. NMFS would accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments would be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Lynn Massey, West Coast Region, NMFS, at (562) 436–2462, *lynn.massey@noaa.gov*.

SUPPLEMENTARY INFORMATION: This action is authorized under Magnuson-Stevens Conservation and Management (Magnuson-Stevens Act) regulations at 50 CFR 600.745, which allow NMFS Regional Administrators to issue exempted fishing permits (EFP) to test fishing activities that would otherwise be prohibited.

The California Groundfish Collective (CGC) is comprised of fishing associations from Fort Bragg and Half Moon Bay, and includes fishermen from three ports along the California Coast. CGC fishermen collect and share information about where, when, and what type of fish they catch, and use this information to adaptively manage fishing strategies to reduce bycatch of overfished groundfish stocks (*i.e.,* yelloweye rockfish and cowcod) and increase catch of healthy target groundfish stocks (*e.g.,* chilipepper rockfish, bocaccio, and petrale sole).

CGC vessels participate in the Trawl Rationalization Program's Shorebased Individual Fishing Quota (IFQ) Program. Annual vessel limits are used in the Shorebased IFQ Program to restrict the consolidation of quota pounds among vessels in the fishery, particularly for constraining stocks and stock complexes (*e.g.,* overfished stocks). Vessels may not purchase or fish quota pounds in excess of the annual vessel limit. For example, if a vessel owns 100 quota pounds of a stock, and the annual vessel limit is 500 quota pounds, the vessel can only purchase 400 additional quota pounds, and fish up to a total of 500 quota pounds. The annual vessel limit for stocks or stock complexes is calculated as a fixed percentage of the Shorebased IFQ allocation.

The region where the CGC operates off the coast of California (south of the 40°10′ North latitude (N lat.) management line) is the only area where cowcod are encountered and managed as an individual IFQ species, and few trawl vessels operate in the area. The annual catch limit for cowcod is small due to its overfished stock status. Vessels have historically caught cowcod

[6] *See 12th AR of Shrimp from India,* 83 FR at 32836.

in this region, but were previously able to avoid encounters to limit cowcod catch below the annual vessel limit. However, as the cowcod stock rebuilds, vessels are encountering cowcod more often and in higher numbers. The draft 2019 cowcod stock assessment, which will be reviewed at the September Pacific Fishery Management Council (Council) meeting, indicates that the stock has improved compared to the previous assessment, which projected that the stock would rebuild by 2020. If the Council's Scientific and Statistical Committee determines the draft 2019 cowcod stock assessment is the best scientific information available, the resulting biomass estimates may be used to support adjustments in future catch limits or changes to cowcod's stock status.

At the June 2018, April 2019, and June 2019 Council meetings, the CGC made public comments that annual vessel limits for cowcod have been constraining fishing operations in CGC ports. The CGC reported that in 2017–2019, its participating vessels experienced significant catch increases for cowcod early in the fishing season, and that, if this continues through the 2019 and 2020 fishing years, vessels may attain their cowcod annual vessel limit and be forced to depart fishing grounds early despite not having attained quotas for healthy target stocks. This would reduce economic opportunity for CGC vessels and likely adversely impact other components of the fishing industry (*e.g.,* processors).

On June 18, 2019, the CGC submitted an application for an EFP project to exempt CGC vessels from the Federal regulations at 50 CFR 660.140(b)(1)(iii) through (v), which include requirements applicable to individual vessels with any species deficit in their IFQ account. If NMFS approves this EFP project, CGC vessels fishing on an EFP trip would be permitted to exceed the current annual vessel limit for cowcod (*i.e.,* 858 pounds or 17.7 percent of the 4,850-pound cowcod Shorebased IFQ allocation), however collectively, the CGC vessels' catch would not be permitted to exceed the amount specified for the pool (*i.e.,* 858 pounds x total number of CGC participant vessels). The goals of this EFP project are to:

- Test and evaluate the merits of permitting a regional collective of vessels operating under a Collective Enforcement Agreement, similar to a regional fishery association, to pool constraining species quota pounds, allocate those pounds among members as needed (potentially exceeding annual vessel limits), and stay within a pool limit;
- identify if managing annual vessel limits using a risk pool model can allow additional attainment of target species while mitigating the impact of catching constraining species to the point of ending fishing seasons early;
- establish and share best practices for collectively managing and allocating constraining species quota pounds using a Collective Enforcement Agreement;
- gather and share information that may inform an impact analysis should the Council scope potential changes to the groundfish IFQ vessel limit regulations; and
- gather and share information that may inform an exploration into the types of provisions to include in regional fishery associations as defined in the Magnuson-Stevens Fishery Conservation and Management Act as well as community fishing groups that are already allowed within the current fishery management system.

Currently, there are five CGC vessels. If this EFP project is approved, NMFS would provide EFPs to these five vessels in 2019, and any additional vessels that join the CGC in 2019 or 2020.

NMFS is proposing to approve the 2019–2020 EFP project covering the exemptions stated above, following the conclusion of the public comment period and review of public comment. Pending approval, NMFS would issue the permits for the EFP project to the vessel owner or designated representative as the ''EFP holder.'' NMFS intends to use an adaptive management approach in which NMFS may revise requirements and protocols to improve the program without issuing another **Federal Register** Notice, provided that the modifications fall within the scope of the original EFP project. In addition, the applicants may request minor modifications and extensions to the EFP project throughout the course of research. NMFS may grant EFP modifications and extensions without further public notice if the changes are essential to facilitate completing the proposed research and result in only a minimal change in the scope or impacts of the initially approved EFP request.

All CGC vessels participate in NMFS' electronic monitoring (EM) EFP project, which exempts certain vessels from the requirement to carry a human observer on all IFQ fishing trips. While NMFS has primary jurisdiction over EM EFP management, the Nature Conservancy is an EFP holder that manages CGC vessels operating under the EM EFP pursuant to a Collective Enforcement Agreement, which outlines rules that CGC vessels must follow, including catch requirements and EM system specifications. If NMFS approves this EFP application, the specific terms and conditions of the EFP would be partially managed by the Nature Conservancy via an extended version of the EM EFP Collective Enforcement Agreement. NMFS may adjust these specifics in cooperation with the EFP applicant and following the public comment period.

After publication of this document in the **Federal Register**, NMFS may approve and issue permits for the EFP project after the close of the public comment period. NMFS will consider comments submitted, as well as any discussion that may occur at the September 2019 Council meeting, in deciding whether to approve the application as requested. NMFS may approve the application in its entirety or may make any alterations needed to achieve the goals of the EFP project.

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

Dated: September 24, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–21029 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF362

Notice of Availability of Draft Environmental Assessment on the Effects of Issuing an Incidental Take Permit No. 21316

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

ACTION: Notice; availability of a Draft Environmental Assessment and receipt of revised application; request for comments.

SUMMARY: NMFS announces the availability of the revised application and Draft Environmental Assessment (EA) on the effects of issuing an Incidental Take Permit (ITP) (No. 21316) to Barney M. Davis L.P., pursuant to the Endangered Species Act (ESA) of 1973, as amended, for the incidental take of green (*Chelonia mydas,* North Atlantic Distinct Population Segment) and Kemp's ridley (*Lepidochelys kempii*) sea turtles associated with the otherwise lawful operation of the Barney M. Davis Power Station in Corpus Christi, TX. The facility is requesting the permit be issued for a duration of 10 years.

DATES: Written comments must be received at the appropriate address or fax number (see **ADDRESSES**) on or before October 28, 2019.

ADDRESSES: The revised application and EA are available for download and review at *https://www.fisheries.noaa.gov/action/incidental-take-permit-barney-davis-lp* under the section heading Supporting Materials. The application is also available upon written request or by appointment in the following office: Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13752, Silver Spring, MD 20910; phone (301) 427–8402; fax (301) 713–4060.

You may submit comments, identified by NOAA–NMFS–2017–0104, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0104* click the ''Comment Now'' icon, complete the required fields, and enter or attach your comments.
- *Fax:* (301) 713–4060; Attn: Sara Wissmann.
- *Mail:* Submit written comments to Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13661, Silver Spring, MD 20910; Attn: Sara Wissmann.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. 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. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Sara Wissmann, (301) 427–8402 or *sara.wissmann@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Publication of this notice begins the official public comment period for this draft EA. Per the National Environmental Policy Act (NEPA), the purpose of the draft EA is to evaluate the potential direct, indirect, and cumulative impacts caused by the issuance of Permit No. 21316 to Barney M. Davis L.P. for the incidental take of green (*Chelonia mydas* North Atlantic Distinct Population Segment) and Kemp's ridley (*Lepidochelys kempii*) sea turtles associated with the otherwise lawful activity of operating the Barney M. Davis Power Station. In addition, NMFS is furnishing this notice in order to allow other agencies and the public an opportunity to review and comment on the revised application. All comments received will become part of the public record and will be available for review.

Section 9 of the ESA and Federal regulations prohibit the 'taking' of a species listed as endangered or threatened. The ESA defines ''take'' to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may issue permits, under limited circumstances to take listed species incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA provides a mechanism for authorizing incidental take of listed species. NMFS regulations governing permits for threatened and endangered species are promulgated at 50 CFR 222.307.

Background

Barney M. Davis, L.P. owns Barney M. Davis Power Station (the facility), a natural gas-fired electric power generating facility. The facility is located at 4301 Waldron Road, Corpus Christi, Nueces County, Texas. The facility has approximately 1,992 acres of land between the Laguna Madre and Oso Creek and is comprised of two natural gas-fired combustion turbines.

The facility utilizes a 0.75-mile cooling water intake canal leading to the Cooling Water Intake Structure (CWIS) from the Laguna Madre. Although the facility has been in operation since 1974, the presence of sea turtles in the intake canal has only been documented during the past 10 years and is typically associated with cold-stunning events. During cooler months, sea turtles in the Laguna Madre become ''cold-stunned'' and, therefore, become unable to swim normally. Once the sea turtles are cold-stunned, they float into the facility's intake canal, toward the facility. The facility has experienced an increased occurrence in the number of sea turtles in the intake canal during the winter months (December—March), which coincides with documented cold stunning events in this region of Texas.

The facility currently coordinates with the Texas Sea Turtle Stranding and Salvage Network (STSSN) and the Texas Parks and Wildlife Department in the Coastal Conservation Association Marine Development Center to collect and relocate sea turtles that have migrated into the intake canal. Under the proposed action and conservation plan, facility staff will implement consistent monitoring of the intake canal, and will continue to work with the Texas STSSN on proper animal identification and handling. Although every effort will be made to intercept sea turtles prior to the cooling water intake structure, it is possible that a cold stunned sea turtle may become impinged on the automatic rake prior to entering the structure. Due to the physical characteristics and operations of the structure, any impingement of turtles could be lethal.

The facility is applying for an ITP in accordance with rules established under Section 10(a)(1)(B) of the ESA. The permit application requests authorization for the incidental take of the North Atlantic Distinct Population Segment (DPS) of the ESA-listed threatened green turtle (*Chelonia mydas*) and the endangered Kemp's ridley sea turtle (*Lepidochelys kempii*). Based on data from the facility from 2012–2016, the proposed takes for any three year period for the ten-year duration of the permit is 210 live and 39 dead green sea turtles, and 3 live Kemp's ridley sea turtles.

On September 14, 2017 (82 FR 43224) NMFS announced the availably of the Barney M. Davis Power Station ITP application. At that time, the application was determined to be complete and therefore was provided to the public for review. Based on public comments received and additional discussions between NMFS and Barney M. Davis, L.P., it was decided that Barney M. Davis, L.P. would further revise their application and re-submit to NMFS. The updated and final application was received by NMFS on October 19, 2018. This revised application provides additional necessary details on the protocols and procedures for locating and handling sea turtles during the facility operation, and provides additional information on the historic takes that have been observed at the facility as justification for the requested take necessary for the development of the draft EA and the issuance of the ITP.

Conservation Plan

Section 10 of the ESA specifies that no permit may be issued unless an applicant submits an adequate habitat conservation plan. The conservation plan prepared by Barney M. Davis L.P.

describes measures to minimize and mitigate the impacts of any incidental takes of ESA-listed green and Kemp's ridley sea turtles.

The facility has experienced increased numbers of cold-stunned sea turtles in the intake canal during the winter months over the past several years. The facility currently coordinates with Texas Parks and Wildlife Department's Coastal Conservation Association Marine Development Center to collect and relocate sea turtles that have migrated into the intake canal.

To avoid and minimize take of sea turtles, facility personnel will visually monitor the area immediately surrounding the cribhouse, which includes the bulkhead, trash racks, and intake canal on a seasonal schedule. From December 1st through March 31st, monitoring will be conducted a minimum of four times per twelve hour shift, spaced at approximately three-hour intervals. From April 1st through November 30th, monitoring will be conducted one time per shift, or once approximately every twelve hours. Visual monitoring will last for approximately fifteen minutes during each monitoring event. Facility staff responsible for monitoring the intake canal will be trained upon hiring, and again annually, on the proper procedures required for the collection of turtles. Photos of potentially affected species are available to staff to assist them with species identification. Staff will be required to measure the length of the turtles collected.

Barney M. Davis Power Station is an existing facility. Continued monitoring related to the take of sea turtles will be ongoing and funding provided through the facility's annual operating budget.

National Environmental Policy Act

This notice is provided pursuant to section 10(c) of the ESA and the National Environmental Policy Act (NEPA) regulations (40 CFR 1506.6). The draft EA was prepared in accordance with NEPA (42 U.S.C. 4321, *et seq.*), 40 CFR 1500–1508 and NOAA policy and procedures (NAO 216–6A and the Companion Manual for the NAO 216–6A).

Alternatives Considered

In preparing the Draft EA, NMFS considered the following 2 alternatives for the action.

Alternative 1: No Action. In accordance with the NOAA Companion Manual for NAO 216–6A, Section 6.B.i, NMFS is defining the No Action alternative as not authorizing the incidental take of green (*Chelonia mydas* North Atlantic DPS) and Kemp's ridley (*Lepidochelys kempii*) sea turtles associated with the otherwise lawful operation of the Barney M. Davis Power Station. This is consistent with our statutory obligation under Section 10(a)(1)(B) of the ESA to either: (1) Deny the requested permit or (2) grant the requested permit and prescribe mitigation, monitoring, and reporting requirements. Under the No Action Alternative, NMFS would not issue the ITP, in which case we assume this applicant would proceed with their Power Station activities as described in the application without implementing the full suite of specific mitigation measures and monitoring and reporting included in the Conservation Plan and in the ITP as requirements.

Alternative 2: Issue Permit as Requested in Application (Proposed Action): Under Alternative 2, an ITP would be issued to exempt Barney M. Davis, L.P. from the ESA prohibition on taking of green (*Chelonia mydas* North Atlantic DPS) and Kemp's ridley (*Lepidochelys kempii*) sea turtles during the otherwise lawful operation of the Barney M. Davis Power Station. As required under Section 10(a)(1)(B), the ITP would require the Barney M. Davis Power Station to operate as described in the proposed conservation plan to avoid and minimize take of sea turtles.

The Draft EA presents a comparison of the direct, indirect, and cumulative effects of the alternatives. Regulations for implementing NEPA (42 U.S.C. 4331 *et seq.*) require considerations of both the context and intensity of a proposed action (40 CFR 1508.27). The issuance of the Permit as Requested in the Application (Alternative 2, Proposed Action) would allow Barney M. Davis, L.P. to continue to operate the Barney M. Davis Power Station and would require conservation measures to minimize risk to sea turtles. This would result in less socio-economic costs than the No Action alternative (Alternative 1). The final permit determinations will not be completed until after the end of the 30-day comment period and will fully consider all public comments received during the comment period. NMFS will publish a record of its final action in the **Federal Register**.

Dated: September 23, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–20975 Filed 9–26–19; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR032

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Delaware and Maryland

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received a request from Skipjack Offshore Energy, LLC (Skipjack) for authorization to take marine mammals incidental to marine site characterization surveys offshore of Delaware in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0519) and along potential submarine cable routes to a landfall location in Delaware or Maryland. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in *Request for Public Comments* at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than October 28, 2019.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.carduner@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-

megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: 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

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. 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 incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

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 evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 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 preliminarily determined that the proposed action qualifies to be categorically excluded from further NEPA review.

Information in Skipjack's application and this notice collectively provide the environmental information related to proposed issuance of these regulations and subsequent incidental take authorization for public review and comment. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the request for incidental take authorization.

Summary of Request

On July 1, 2019, NMFS received a request from Skipjack for an IHA to take marine mammals incidental to marine site characterization surveys offshore of Delaware in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0519) and along potential submarine cable routes to a landfall location in Delaware or Maryland. A revised application was received on August 15, 2019. NMFS deemed that request to be adequate and complete. Skipjack's request is for the take of 17 marine mammal species by Level B harassment that would occur over the course of 200 survey days. Neither Skipjack 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

Skipjack proposes to conduct marine site characterization surveys, including high-resolution geophysical (HRG) and geotechnical surveys, in the area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf #OCS–A 0519 (Lease Area) and along potential submarine cable routes to landfall locations in either Delaware or Maryland.

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 Skipjack's proposed site characterization surveys has the potential to result in incidental take of marine mammals in the form of behavioral harassment.

Dates and Duration

The estimated duration of the activity is expected to be up to 200 survey days between October 2019 through September 2020. This schedule is based on 24-hour operations and includes potential down time due to inclement weather.

Specific Geographic Region

Skipjack's survey activities would occur in the Northwest Atlantic Ocean within Federal waters. Surveys would occur in the Lease Area and along potential submarine cable routes to landfall locations in either Delaware or Maryland (see Figure 1 in the IHA application).

Detailed Description of the Specified Activities

Skipjack's proposed marine site characterization surveys include high-resolution geophysical (HRG) and geotechnical survey activities. The Lease Area is approximately 106.6 square kilometers (km) (26,341 acres) and is within the Delaware Wind Energy Area of the Bureau of Ocean Energy Management's Mid-Atlantic planning area. Water depths in the Lease Area range from 16 to 28 meters (m) (52 to 92 feet (ft)). Water depths along the submarine cable corridor in Federal waters range from 12 to 28 m (39 to 92 ft). The closest point to shore is approximately 18 km (11 miles (mi)) due east from Rehoboth Beach, Delaware (see Figure 1 in the IHA application). For the purpose of this IHA the Lease Area and submarine cable

corridor are collectively termed the Project Area.

Geophysical and shallow geotechnical survey activities are anticipated to be supported by as many as five total vessels, with as many as three vessels operating concurrently. Survey vessels would maintain a speed of approximately 4 knots (kn) while transiting survey lines. The proposed HRG and geotechnical survey activities are described below. A maximum of 200 total survey days are expected to be required to complete the site characterization surveys.

Geotechnical Survey Activities

Geophysical and shallow geotechnical survey activities are anticipated to be supported by vessels which will maintain a speed of up to 4 knots (kn) while transiting survey lines. The proposed HRG and geotechnical survey activities are described below.

Geotechnical Survey Activities

Skipjack's proposed geotechnical survey activities would include the following:

- Sample boreholes to determine geological and geotechnical characteristics of sediments;
- Deep cone penetration tests (CPTs) to determine stratigraphy and in situ conditions of the deep surface sediments; and
- Shallow CPTs to determine stratigraphy and in situ conditions of the near surface sediments.

Geotechnical investigation activities are anticipated to be conducted from a drill ship equipped with dynamic positioning (DP) thrusters. Impact to the seafloor from this equipment will be limited to the minimal contact of the sampling equipment, and inserted boring and probes.

In considering whether marine mammal harassment is an expected outcome of exposure to a particular activity or sound source, NMFS considers the nature of the exposure itself (*e.g.,* the magnitude, frequency, or duration of exposure), characteristics of the marine mammals potentially exposed, and the conditions specific to the geographic area where the activity is expected to occur (*e.g.,* whether the activity is planned in a foraging area, breeding area, nursery or pupping area, or other biologically important area for the species). We then consider the expected response of the exposed animal and whether the nature and duration or intensity of that response is expected to cause disruption of behavioral patterns (*e.g.,* migration, breathing, nursing, breeding, feeding, or sheltering) or injury.

Geotechnical survey activities would be conducted from a drill ship equipped with DP thrusters. DP thrusters would be used to position the sampling vessel on station and maintain position at each sampling location during the sampling activity. Sound produced through use of DP thrusters is similar to that produced by transiting vessels and DP thrusters are typically operated either in a similarly predictable manner or used for short durations around stationary activities. NMFS does not believe acoustic impacts from DP thrusters are likely to result in take of marine mammals in the absence of activity- or location-specific circumstances that may otherwise represent specific concerns for marine mammals (*i.e.,* activities proposed in area known to be of particular importance for a particular species), or associated activities that may increase the potential to result in take when in concert with DP thrusters. In this case, we are not aware of any such circumstances. Therefore, NMFS believes the likelihood of DP thrusters used during the proposed geotechnical surveys resulting in harassment of marine mammals to be so low as to be discountable. As DP thrusters are not expected to result in take of marine mammals, these activities are not analyzed further in this document.

Field studies conducted off the coast of Virginia to determine the underwater noise produced by CPTs and borehole drilling found that these activities did not result in underwater noise levels that exceeded current thresholds for Level B harassment of marine mammals (Kalapinski, 2015). Given the small size and energy footprint of CPTs and boring cores, NMFS believes the likelihood that noise from these activities would exceed the Level B harassment threshold at any appreciable distance is so low as to be discountable. Therefore, geotechnical survey activities, including CPTs and borehole drilling, are not expected to result in harassment of marine mammals and are not analyzed further in this document.

Geophysical Survey Activities

Skipjack has proposed that HRG survey operations would be conducted continuously 24 hours per day. Based on 24-hour operations, the estimated duration of the geophysical survey activities would be approximately 200 days (including estimated weather down time). As many as three survey vessels may be used concurrently during Skipjack's proposed surveys. The geophysical survey activities proposed by Skipjack would include the following:

- Shallow Penetration Sub-bottom Profilers (SBP; Chirps) to map the near-surface stratigraphy (top 0 to 5 m (0 to 16 ft) of sediment below seabed). A chirp system emits sonar pulses that increase in frequency over time. The pulse length frequency range can be adjusted to meet project variables. Typically mounted on the hull of the vessel or from a side pole.
- Medium Penetration SBPs (Boomers) to map deeper subsurface stratigraphy as needed. A boomer is a broad-band sound source operating in the 3.5 Hz to 10 kHz frequency range. This system is typically mounted on a sled and towed behind the vessel.
- Medium Penetration SBPs (Sparkers) to map deeper subsurface stratigraphy as needed. Sparkers create acoustic pulses from 50 Hz to 4 kHz omni-directionally from the source that can penetrate several hundred meters into the seafloor. Typically towed behind the vessel with adjacent hydrophone arrays to receive the return signals.
- Parametric SBPs, also called sediment echosounders, for providing high data density in sub-bottom profiles that are typically required for cable routes, very shallow water, and archaeological surveys. Typically mounted on the hull of the vessel or from a side pole.
- Acoustic Cores to provide multi-aspect acoustic intensity imaging to delineate sub-seabed stratigraphy and buried geohazards. Although acoustic cores are used for geotechnical investigations, they operate acoustic sources (chirps and a parametric sonar) to achieve the data collection. They are stationary sourced mounted on the seafloor approximately 3.5 m (11.5 ft) above the seabed.
- Ultra-Short Baseline (USBL) Positioning and Global Acoustic Positioning System (GAPS) to provide high accuracy ranges by measuring the time between the acoustic pulses transmitted by the vessel transceiver and the equipment transponder necessary to produce the acoustic profile. It is a two-component system with a hull or pole mounted transceiver and one to several transponders either on the seabed or on the equipment.
- Multibeam Echosounders (MBES) to determine water depths and general bottom topography. Multibeam echosounder sonar systems project sonar pulses in several angled beams from a transducer mounted to a ship's hull. The beams radiate out from the transducer in a fan-shaped pattern orthogonally to the ship's direction.
- Side-scan Sonar (SSS) for seabed sediment classification purposes and to

identify natural and man-made acoustic targets on the seafloor. The sonar device emits conical or fan-shaped pulses down toward the seafloor in multiple beams at a wide angle, perpendicular to the path of the sensor through the water. The acoustic return of the pulses is recorded in a series of cross-track slices, which can be joined to form an image of the sea bottom within the swath of the beam. They are typically towed beside or behind the vessel or from an autonomous vehicle.

Table 1 identifies the representative survey equipment that may be used in support of planned geophysical survey activities. HRG surveys are expected to use several equipment types concurrently in order to collect multiple aspects of geophysical data along one transect. Selection of equipment combinations is based on specific survey objectives.

TABLE 1—SUMMARY OF GEOPHYSICAL SURVEY EQUIPMENT PROPOSED FOR USE BY SKIPJACK

Equipment	Source type	Operating frequency (kHz)	Sound level (SL_{rms} dB re 1 µPa m)	Sound level (SL_{pk} dB re 1 µPa m)	Pulse duration (width) (millisecond)	Repetition rate (Hz)	Beamwidth (degrees)
Shallow Sub-Bottom Profilers (Chirps)							
Teledyne Benthos Chirp III—TTV 170.	Non-impulsive, mobile, intermittent.	2 to 7	197	-	5 to 60	15	100.
EdgeTech SB 216 (2000DS or 3200 top unit).	Non-impulsive, mobile, intermittent.	2 to 16, 2 to 8	195	-	20	6	24.
EdgeTech 424	Non-impulsive, mobile, intermittent.	4 to 24	176	-	3.4	2	71.
EdgeTech 512	Non-impulsive, mobile, intermittent.	0.7 to 12	179	-	9	8	80.
GeoPulse 5430A	Non-impulsive, mobile, intermittent.	2 to 17	196		50	10	55.
Parametric Sub-Bottom Profilers							
Innomar SES-2000 Medium 100 SBP.	Non-impulsive, mobile, intermittent.	85 to 115	247	-	0.07 to 2	40–100	1–3.5.
Innomar SES-2000 Standard & Plus.	Non-impulsive, mobile, intermittent.	85 to 115	236	-	0.07 to 2	60	1–3.5.
Innomar SES-2000 Medium 70.	Non-impulsive, mobile, intermittent.	60 to 80	241	-	0.1 to 2.5	40	1–3.5.
Innomar SES-2000 Quattro.	Non-impulsive, mobile, intermittent.	85 to 115	245	-	0.07 to 1	60	1–3.5.
Medium Sub-Bottom Profilers (Sparkers & Boomers)							
GeoMarine Geo-Source 800J Sparker.	Impulsive, Mobile	0.05 to 5	203	213	3.4	0.41	Omni.
GeoMarine Geo-Source 600J Sparker.	Impulsive, Mobile	0.2 to 5	201	212	5.0	0.41	Omni.
GeoMarine Geo-Source 400J Sparker.	Impulsive, Mobile	0.2 to 5	195	208	7.2	0.41	Omni.
GeoResource 800J Sparker System.	Impulsive, Mobile	0.05 to 5	203	213	3.4	0.41	Omni.
Applied Acoustics Duraspark 400.	Impulsive, Mobile	0.3 to 1.2	203	211	1.1	0.4	Omni.
Applied Acoustics triple plate S-Boom (700–1000 Joules) [1].	Impulsive, Mobile	0.1 to 5	205	211	0.6	3	80.
Acoustic Corers							
PanGeo (LF Chirp).	Non-impulsive, stationary, intermittent.	2 to 6.5	177.5	-	4.5	0.06	73.

TABLE 1—SUMMARY OF GEOPHYSICAL SURVEY EQUIPMENT PROPOSED FOR USE BY SKIPJACK—Continued

Equipment	Source type	Operating frequency (kHz)	Sound level (SL_{rms} dB re 1 µPa m)	Sound level (SL_{pk} dB re 1 µPa m)	Pulse duration (width) (millisecond)	Repetition rate (Hz)	Beamwidth (degrees)
PanGeo (HF Chirp).	Non-impulsive, stationary, intermittent.	4.5 to 12.5	177.5	-	4.5	0.06	73.
Pangeo Parametric Sonar [5].	Non-impulsive, stationary, intermittent.	90 to 115	239	-	0.25	40	3.5.
Positioning Systems							
Sonardyne Ranger 2—Transponder.	Non-impulsive, mobile, intermittent.	19 to 34	194	-	5	1	Omni.
Sonardyne Ranger 2 USBL HPT 3000/5/7000 Transceiver.	Non-impulsive, mobile, intermittent.	19 to 34	194	-	5	1	Not Reported.
Sonardyne Scout Pro Transponder.	Non-impulsive, mobile, intermittent.	35 to 50	188	-	5	3	Not Reported.
IxSea GAPS Beacon System.	Non-impulsive, mobile, intermittent.	8–16	188	.....	12	1	Omni.
Easytrak Nexus 2 USBL Transceiver.	Non-impulsive, mobile, intermittent.	18 to 32	192	.....	5	2	Omni.
Kongsberg HiPAP 501/502 USBL Tranceiver.	Non-impulsive, mobile, intermittent.	27–30.5	190	.....	2	1	15.
EdgeTech BATS II Transponder.	Non-impulsive, mobile, intermittent.	17 to 30	Not Reported	.....	5	3	Not Reported.
Multi-beam Echosounders and Side Scan Sonar							
Reson SeaBat 7125 Multibeam Echosounder.	Non-impulsive, mobile, intermittent.	200 or 400	220	-	0.03 to 0.3	-	-
RESON 700	Non-impulsive, mobile, intermittent.	200 or 400	162	-	0.33	-	-
R2SONIC	Non-impulsive, mobile, intermittent.	200 or 400	162	-	0.11	-	-
Klein 3900 SSS ...	Non-impulsive, mobile, intermittent.	>445 kHz	242	-	0.025	-	-
EdgeTech 4000 & 4125 SSS.	Non-impulsive, mobile, intermittent.	410 kHz	225	-	10	-	-
EdgeTech 4200 SSS.	Non-impulsive, mobile, intermittent.	>300 kHz	215	-	0.025	-	-

- = not applicable or reportable; dB re 1 µPa m = decibel reference to 1 micropascal meter; GAPS = Global Acoustic Positioning System; HF = high-frequency; LF = low-frequency; omni = omnidirectional source; SL = source level; SL_{pk} = peak source level (expressed as dB re 1 µPa m); SL_{rms} = root-mean-square source level (expressed as dB re 1 µPa m); SSS = side scan sonar; USBL = ultra-short baseline.

[4] Crocker and Fratantonio (2016) provide S-boom measurements using two different power sources (CSP–D700 and CSP–N). The CSP–D700 power source was used in the 700J measurements but not in the 1000J measurements. The CSP–N source was measured for both 700J and 1000J operations but resulted in a lower source levels; therefore the single maximum source level value was used for both operational levels of the S-boom.

[5] The Pangeo acoustic corer parametric sonar was scanned out of further analysis due to high frequency content, operational beam width of less than eight degrees, and stationary operational position of less than 3.5 m above the seabed (Pangeo, 2018).

The deployment of HRG survey equipment, including the equipment planned for use during Skipjack's planned activity, produces sound in the marine environment that has the potential to result in harassment of marine mammals. However, sound propagation is dependent on several factors including operating mode, frequency and beam direction of the HRG equipment; thus, potential impacts to marine mammals from HRG equipment are driven by the specification of individual HRG sources. The specifications of the potential equipment planned for use during HRG survey activities (Table 1) were analyzed to determine which types of

equipment would have the potential to result in harassment of marine mammals. HRG equipment that would be operated either at frequency ranges that fall outside the functional hearing ranges of marine mammals (*e.g.,* above 180 kHz) or that operate within marine mammal functional hearing ranges but have low sound source levels (*e.g.,* a single pulse at less than 200 dB re re 1 μPa) were assumed to not have the potential to result in marine mammal harassment and were therefore eliminated from further analysis.

Of the potential HRG survey equipment planned for use, NMFS determined the following equipment does not have the potential to result in harassment of marine mammals:

- Multibeam echosounders and side-scan sonars: All of the multibeam echosounders and side-scan sonars proposed for use by Skipjack have operating frequencies above 180 kHz. Because these sources operate at frequencies that are outside the functional hearing ranges of all marine mammals, NMFS considers the potential for this equipment to result in the take of marine mammals is to be so unlikely as to be discountable; and
- Unlike the other HRG sources which are mobile sources, acoustic corers are stationary and made up of three distinct sound sources comprised of high frequency parametric sonar, a high frequency chirp sonar, and a low frequency chirp sonar; with each source having its own transducer. The corer is seabed-mounted while the parametric sonar is operated roughly 3.5 m (11.5 ft) above the seabed with the transducer pointed directly downwards toward the seafloor. The beam width of the parametric sonar is very narrow (3.5°–8°), resulting in nominal horizontal propagation. Due to the fact that these sources are stationary, are operated very close to the seafloor, and have very narrow beam widths, NMFS considers the potential for this equipment to result in the take of marine mammals is to be so unlikely as to be discountable.

As the HRG survey equipment listed above was determined to not have the potential to result in the harassment of marine mammals, these equipment types are therefore not analyzed further in this document. All other HRG equipment types planned for use by Skipjack as shown in Table 1 are expected to have the potential to result in the harassment of marine mammals and are therefore carried forward in the analysis.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'').

Description of Marine Mammals in the Area of Specified Activity

Sections 3 and 4 of the 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 (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.fisheries.noaa.gov/find-species*). All species that could potentially occur in the proposed survey areas are included in Table 6 of the IHA application. However, the temporal and/or spatial occurrence of several species listed in Table 6 of the IHA application is such that take of these species is not expected to occur because they have very low densities in the project area and/or are expected to occur further offshore than the proposed survey area. These are: The blue whale (*Balaenoptera musculus*), Bryde's whale (*Balaenoptera edeni*), Cuvier's beaked whale (*Ziphius cavirostris*), four species of Mesoplodont beaked whale (*Mesoplodon* spp.), dwarf and pygmy sperm whale (*Kogia sima* and *Kogia breviceps*), northern bottlenose whale (*Hyperoodon ampullatus*), pygmy killer whale (*Feresa attenuata*), false killer whale (*Pseudorca crassidens*), melon-headed whale (*Peponocephala electra*), striped dolphin (*Stenella coeruleoalba*), white-beaked dolphin (*Lagenorhynchus albirostris*), pantropical spotted dolphin (*Stenella attenuata*), Fraser's dolphin (*Lagenodelphis hosei*), rough-toothed dolphin (*Steno bredanensis*), Clymene dolphin (*Stenella clymene*), spinner dolphin (*Stenella longirostris*), hooded seal (*Cystophora cristata*), and harp seal (*Pagophilus groenlandicus*). As take of these species is not anticipated as a result of the proposed activities, these species are not analyzed further in this document.

Table 2 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 (2018). 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. All values presented in Table 2 are the most recent available at the time of publication and are available in the 2018 Atlantic SARs (Hayes *et al.,* 2019), available online at*: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.*

TABLE 2—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA THAT MAY BE AFFECTED BY SKIPJACK'S PROPOSED ACTIVITY

Common name (scientific name)	Stock	MMPA and ESA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	Predicted abundance (CV) [3]	PBR [4]	Annual M/SI [4]	Expected occurrence in 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	0.8	Rare.
Killer whale (*Orcinus orca*)	W. North Atlantic	-; N	Unknown (n/a; n/a; n/a).	11 (0.82)	Undet.	0	Rare.

TABLE 2—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA THAT MAY BE AFFECTED BY SKIPJACK'S PROPOSED ACTIVITY—Continued

Common name (scientific name)	Stock	MMPA and ESA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	Predicted abundance (CV) [3]	PBR [4]	Annual M/SI [4]	Expected occurrence in survey area
Long-finned pilot whale (*Globicephala melas*).	W. North Atlantic	-; N	5,636 (0.63; 3,464; n/a).	18,977 (0.11) [5].	35	27	Uncommon.
Short-finned pilot whale (*Globicephala macrorhynchus*).	W. North Atlantic	-; N	28,924 (0.24; 23,637; n/a).	18,977 (0.11) [5].	236	168	Rare.
Atlantic white-sided dolphin (*Lagenorhynchus acutus*).	W. North Atlantic	-; N	48,819 (0.61; 30,403; n/a).	37,180 (0.07)	304	30	Common.
Atlantic spotted dolphin (*Stenella frontalis*).	W. North Atlantic	-; N	44,715 (0.43; 31,610;	55,436 (0.32)	316	0	Common.
Bottlenose dolphin (*Tursiops truncatus*).	W. North Atlantic Coastal Migratory.	-; N	6,639 (0.41; 4,759; 2015).	97,476 (0.06) [5].	48	unknown	Common.
Common dolphin [6] (*Delphinus delphis*).	W. North Atlantic	-; N	173,486 (0.55; 55,690; 2011).	86,098 (0.12)	557	406	Common.
Risso's dolphin (*Grampus griseus*)	W. North Atlantic	-; N	18,250 (0.46; 12,619; 2011).	7,732 (0.09)	126	49.9	Rare.
Harbor porpoise (*Phocoena phocoena*).	Gulf of Maine/Bay of Fundy.	-; N	79,833 (0.32; 61,415; 2011).	45,089 (0.12) *.	706	255	Common.
Baleen whales (Mysticeti)							
North Atlantic right whale (*Eubalaena glacialis*).	W. North Atlantic	E; Y	451 (0; 455; n/a)	411 (n/a) [7]	0.9	56	Year round in continental shelf and slope waters, occur seasonally.
Humpback whale [8] (*Megaptera novaeangliae*).	Gulf of Maine	-; N	896 (0.42; 239; n/a)	1,637 (0.07) *	14.6	9.8	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	2.5	Year round in continental shelf and slope waters, occur seasonally.
Sei whale (*Balaenoptera borealis*) ..	Nova Scotia	E; Y	357 (0.52; 236; n/a)	717 (0.30) * ..	0.5	0.6	Year round in continental shelf and slope waters, occur seasonally.
Minke whale [6] (*Balaenoptera acutorostrata*).	Canadian East Coast ..	-; N	20,741 (0.3; 1,425; n/a).	2,112 (0.05) *	14	7.5	Year round in continental shelf and slope waters, occur seasonally.
Earless seals (Phocidae)							
Gray seal [8] (*Halichoerus grypus*)	W. North Atlantic	-; N	27,131 (0.10; 25,908; n/a).	505,000 (n/a)	1,389	5,688	Uncommon.
Harbor seal (*Phoca vitulina*)	W. North Atlantic	-; N	75,834 (0.15; 66,884; 2012).	75,834 (0.15)	2,006	345	Uncommon.

[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.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* 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 2018 draft Atlantic SARs.

[3] This information represents species- or guild-specific abundance predicted by recent habitat-based cetacean density models (Roberts *et al.,* 2016, 2017, 2018) (with the exception of North Atlantic right whales and pinnipeds—see footnotes 7 and 9 below). 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). Annual M/SI, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, subsistence hunting, ship strike). Annual M/SI values often cannot be determined precisely and is in some cases presented as a minimum value. All M/SI values are as presented in the draft 2018 SARs.

[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, 2017, 2018) 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, 2017, 2018) produced density models to genus level for *Globicephala* spp. produced density models for bottlenose dolphins that do not differentiate between offshore and coastal stocks, and produced density models for all seals.

[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 SAR reports the stock abundance estimate for the common dolphin as 70,184; NMFS SAR reports the stock abundance estimate for the fin whale as 1,618; NMFS SAR reports the stock abundance estimate for the minke whale as 2,591.

[7] For the North Atlantic right whale the best available abundance estimate is derived from the 2018 North Atlantic Right Whale Consortium 2018 Annual Report Card (Pettis *et al.,* 2018).

[8] 2018 U.S. Atlantic draft SAR for the Gulf of Maine feeding population lists a current abundance estimate of 896 individuals. However, we note that the estimate is defined on the basis of feeding location alone (*i.e.,* Gulf of Maine) and is therefore likely an underestimate.

[9] The NMFS stock abundance estimate applies to U.S. population only, however the 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.

Below is a description of the species that are both common in the survey area offshore of Delaware and Maryland that have the highest likelihood of occurring, at least seasonally, in the survey area and are thus are expected to potentially be taken by the proposed activities. 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.

North Atlantic Right Whale

The North Atlantic right whale ranges from calving grounds in the southeastern United States to feeding grounds in New England waters and into Canadian waters (Hayes *et al.,* 2018). Surveys have demonstrated the existence of seven areas where North Atlantic right whales congregate seasonally, including north and east of the proposed project area in Georges Bank, off Cape Cod, and in Massachusetts Bay (Hayes *et al.,* 2018). In the late fall months (*e.g.* October), right whales are generally thought to depart from the feeding grounds in the North Atlantic and move south to their calving grounds off Georgia and Florida. However, recent research indicates our understanding of their movement patterns remains incomplete (Davis *et al.* 2017). A review of passive acoustic monitoring data from 2004 to 2014 throughout the western North Atlantic demonstrated nearly continuous year-round right whale presence across their entire habitat range (for at least some individuals), including in locations previously thought of as migratory corridors, suggesting that not all of the population undergoes a consistent annual migration (Davis *et al.* 2017). Movements within and between habitats are extensive, and the area offshore from the Mid-Atlantic states is an important migratory corridor (Waring *et al.,* 2016). The project area is not a known feeding area for right whales and right whales are not expected to be foraging there. Therefore, any right whales in the vicinity of the project area are expected to be transient, most likely migrating through the area.

The western North Atlantic population demonstrated overall growth of 2.8 percent per year between 1990 to 2010, despite a decline in 1993 and no growth between 1997 and 2000 (Pace *et al.* 2017). However, since 2010 the population has been in decline, with a 99.99 percent probability of a decline of just under 1 percent per year (Pace *et al.* 2017). Between 1990 and 2015, calving rates varied substantially, with low calving rates coinciding with all three periods of decline or no growth (Pace *et al.* 2017). On average, North Atlantic right whale calving rates are estimated to be roughly half that of southern right whales (*Eubalaena australis*) (Pace *et al.* 2017), which are increasing in abundance (NMFS 2015). In 2018, no new North Atlantic right whale calves were documented in their calving grounds; this represented the first time since annual NOAA aerial surveys began in 1989 that no new right whale calves were observed. Seven right whale calves were documented in 2019. The current best estimate of population abundance for the species is 411 individuals (Pettis *et al.,* 2018).

Elevated North Atlantic right whale mortalities have occurred since June 7, 2017 along the U.S. and Canadian coast. A total of 29 confirmed dead stranded whales (20 in Canada; 9 in the United States) have been documented. This event has been declared an Unusual Mortality Event (UME), with human interactions, including entanglement in fixed fishing gear and vessel strikes, implicated in at least 13 of the mortalities thus far. More information is available online at: *www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-north-atlantic-right-whale-unusual-mortality-event.*

The proposed survey area is part of an important migratory area for North Atlantic right whales; this important migratory area is comprised of the waters of the continental shelf offshore the East Coast of the United States and extends from Florida through Massachusetts. NMFS' regulations at 50 CFR part 224.105 designated nearshore waters of the Mid-Atlantic Bight as Mid-Atlantic U.S. Seasonal Management Areas (SMA) for right whales in 2008. SMAs were developed to reduce the threat of collisions between ships and right whales around their migratory route and calving grounds. A portion of one SMA, which occurs off the mouth of Delaware Bay, overlaps spatially with a section of the proposed survey area. The SMA which occurs off the mouth of Delaware Bay is active from November 1 through April 30 of each year.

Humpback Whale

Humpback whales are found worldwide in all oceans. Humpback whales were listed as endangered under the Endangered Species Conservation Act (ESCA) in June 1970. In 1973, the ESA replaced the ESCA, and humpbacks continued to be listed as endangered. NMFS recently evaluated the status of the species, and on September 8, 2016, NMFS divided the species into 14 distinct population segments (DPS), removed the current species-level listing, and in its place listed four DPSs as endangered and one DPS as threatened (81 FR 62259; September 8, 2016). The remaining nine DPSs were not listed. The West Indies DPS, which is not listed under the ESA, is the only DPS of humpback whale that is expected to occur in the project area.

A key question with regard to humpback whales off the mid-Atlantic states is their stock identity. Using fluke photographs of living and dead whales observed in the region, Barco *et al.* (2002) reported that 43 percent of 21 live whales matched to the Gulf of Maine, 19 percent to Newfoundland, and 4.8 percent to the Gulf of St. Lawrence, while 31.6 percent of 19 dead humpbacks were known Gulf of Maine whales. Although the population composition of the mid-Atlantic is apparently dominated by Gulf of Maine whales, lack of photographic effort in Newfoundland makes it likely that the observed match rates under-represent the true presence of Canadian whales in the region (Waring *et al.,* 2016). Barco *et al.* (2002) suggested that the mid-Atlantic region primarily represents a supplemental winter feeding ground used by humpbacks.

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine to Florida. Partial or full necropsy examinations have been conducted on approximately half of the 103 known cases. Of the whales examined, about 50 percent had evidence of human interaction, either ship strike or entanglement. While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. NOAA is consulting with researchers that are conducting studies on the humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could

provide additional insight into how these vessel interactions occurred. Three previous UMEs involving humpback whales have occurred since 2000, in 2003, 2005, and 2006. More information is available at: *www.fisheries.noaa.gov/national/marine-life-distress/2016-2019-humpback-whale-unusual-mortality-event-along-atlantic-coast.*

Fin Whale

Fin whales are common in waters of the U.S. Atlantic Exclusive Economic Zone (EEZ), principally from Cape Hatteras northward (Waring *et al.,* 2016). Fin whales are present north of 35-degree latitude in every season and are broadly distributed throughout the western North Atlantic for most of the year, though densities vary seasonally (Waring *et al.,* 2016). Fin whales are found in small groups of up to five individuals (Brueggeman *et al.,* 1987). The main threats to fin whales are fishery interactions and vessel collisions (Waring *et al.,* 2016).

Sei Whale

The Nova Scotia stock of sei whales can be found in deeper waters of the continental shelf edge waters of the northeastern United States and northeastward to south of Newfoundland. The southern portion of the stock's range during spring and summer includes the Gulf of Maine and Georges Bank. Spring is the period of greatest abundance in U.S. waters, with sightings concentrated along the eastern margin of Georges Bank and into the Northeast Channel area, and along the southwestern edge of Georges Bank in the area of Hydrographer Canyon (Waring *et al.,* 2015). Sei whales occur in shallower waters to feed. Sei whales are listed as engendered under the ESA, and the Nova Scotia stock is considered strategic and depleted under the MMPA. The main threats to this stock are interactions with fisheries and vessel collisions.

Minke Whale

Minke whales can be found in temperate, tropical, and high-latitude waters. The Canadian East Coast stock can be found in the area from the western half of the Davis Strait (45° W) to the Gulf of Mexico (Waring *et al.,* 2016). This species generally occupies waters less than 100 m deep on the continental shelf. Little is known about minke whales' specific movements through the mid-Atlantic region; however, there appears to be a strong seasonal component to minke whale distribution, with acoustic detections indicating that they migrate south in mid-October to early November, and return from wintering grounds starting in March through early April (Risch *et al.,* 2014). Northward migration appears to track the warmer waters of the Gulf Stream along the continental shelf, while southward migration is made farther offshore (Risch *et al.,* 2014).

Since January 2017, elevated minke whale mortalities have occurred along the Atlantic coast from Maine through South Carolina, with a total of 66 strandings recorded through August 30, 2019. This event has been declared a UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease, but these findings are not consistent across all of the whales examined, so more research is needed. More information is available at: *www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-minke-whale-unusual-mortality-event-along-atlantic-coast.*

Sperm Whale

The distribution of the sperm whale in the U.S. EEZ occurs on the continental shelf edge, over the continental slope, and into mid-ocean regions (Waring *et al.,* 2014). The basic social unit of the sperm whale appears to be the mixed school of adult females plus their calves and some juveniles of both sexes, normally numbering 20–40 animals in all. There is evidence that some social bonds persist for many years (Christal *et al.,* 1998). This species forms stable social groups, site fidelity, and latitudinal range limitations in groups of females and juveniles (Whitehead, 2002). In winter, sperm whales concentrate east and northeast of Cape Hatteras. In spring, distribution shifts northward to east of Delaware and Virginia, and is widespread throughout the central Mid-Atlantic Bight and the southern part of Georges Bank. In the fall, sperm whale occurrence on the continental shelf south of New England reaches peak levels, and there remains a continental shelf edge occurrence in the Mid-Atlantic Bight (Waring *et al.,* 2015).

Long-Finned Pilot Whale

Long-finned pilot whales are found from North Carolina and north to Iceland, Greenland and the Barents Sea (Waring *et al.,* 2016). In U.S. Atlantic waters the species is distributed principally along the continental shelf edge off the northeastern U.S. coast in winter and early spring and in late spring, pilot whales move onto Georges Bank and into the Gulf of Maine and more northern waters and remain in these areas through late autumn (Waring *et al.,* 2016). Long-finned and short-finned pilot whales overlap spatially along the mid-Atlantic shelf break between New Jersey and the southern flank of Georges Bank (Payne and Heinemann 1993; Rone and Pace 2012). Long-finned pilot whales have occasionally been observed stranded as far south as South Carolina, but sightings of long-finned pilot whales south of Cape Hatteras would be considered unusual (Hayes *et al.,* 2019). The main threats to this species include interactions with fisheries and habitat issues including exposure to high levels of polychlorinated biphenyls and chlorinated pesticides, and toxic metals including mercury, lead, cadmium, and selenium (Waring *et al.,* 2016).

Short-Finned Pilot Whale

As described above, long-finned and short-finned pilot whales overlap spatially along the mid-Atlantic shelf break between New Jersey and the southern flank of Georges Bank (Payne and Heinemann 1993; Rone and Pace 2012). Short-finned pilot whales have occasionally been observed stranded as far north as Massachusetts but north of ~42° N short-finned pilot whale sightings would be considered unusual while south of Cape Hatteras most pilot whales would be expected to be short-finned pilot whales (Hayes *et al.,* 2019). In addition, short-finned pilot whales are documented along the continental shelf and continental slope in the northern Gulf of Mexico (Hansen *et al.* 1996; Mullin and Hoggard 2000; Mullin and Fulling 2003), and they are also known from the wider Caribbean. As with long-finned pilot whales, the main threats to this species include interactions with fisheries and habitat issues including exposure to high levels of polychlorinated biphenyls and chlorinated pesticides, and toxic metals including mercury, lead, cadmium, and selenium (Waring *et al.,* 2016).

Killer Whale

Killer whale distribution in the Atlantic extends from the Arctic ice edge to the West Indies. They are normally found in small groups, although 40 animals were reported from the southern Gulf of Maine in September 1979, and 29 animals in Massachusetts Bay in August 1986 (Katona *et al.,* 1988). In the U.S. Atlantic EEZ, while their occurrence is unpredictable, they do occur in fishing areas, perhaps coincident with tuna, in warm seasons (Katona *et al.,* 1988; NMFS unpublished data). Killer whales are characterized as uncommon or rare

in waters of the U.S. Atlantic EEZ (Katona *et al.* 1988). Sightings within the survey area would be considered very rare; however, due to their wide-ranging habits and a uniform habitat density within the entire U.S. Atlantic coast, there is the potential for killer whales to be present during the proposed surveys.

Atlantic White-Sided Dolphin

White-sided dolphins are found in temperate and sub-polar waters of the North Atlantic, primarily in continental shelf waters to the 100-m depth contour from central West Greenland to North Carolina (Waring *et al.,* 2016). The Gulf of Maine stock is most common in continental shelf waters from Hudson Canyon to Georges Bank, and in the Gulf of Maine and lower Bay of Fundy. Sighting data indicate seasonal shifts in distribution (Northridge *et al.,* 1997). During January to May, low numbers of white-sided dolphins are found from Georges Bank to Jeffreys Ledge (off New Hampshire), with even lower numbers south of Georges Bank, as documented by a few strandings collected on beaches of Virginia to South Carolina. The Virginia and North Carolina observations appear to represent the southern extent of the species range. From June through September, large numbers of white-sided dolphins are found from Georges Bank to the lower Bay of Fundy. From October to December, white-sided dolphins occur at intermediate densities from southern Georges Bank to southern Gulf of Maine (Payne and Heinemann 1990). Sightings south of Georges Bank, particularly around Hudson Canyon, occur year round but at low densities.

Atlantic Spotted Dolphin

Atlantic spotted dolphins are found in tropical and warm temperate waters ranging from southern New England, south to Gulf of Mexico and the Caribbean to Venezuela (Waring *et al.,* 2014). This stock regularly occurs in continental shelf waters south of Cape Hatteras and in continental shelf edge and continental slope waters north of this region (Waring *et al.,* 2014). There are two forms of this species, with the larger ecotype inhabiting the continental shelf and is usually found inside or near the 200 m isobaths (Waring *et al.,* 2014).

Common Dolphin

The common dolphin is found world-wide in temperate to subtropical seas. In the North Atlantic, common dolphins are commonly found over the continental shelf between the 100-m and 2,000-m isobaths and over prominent underwater topography and east to the mid-Atlantic Ridge (Waring *et al.,* 2016). Common dolphins are distributed in waters off the eastern U.S. coast from Cape Hatteras northeast to Georges Bank (35° to 42° N) during mid-January to May and move as far north as the Scotian Shelf from mid-summer to autumn (CETAP, 1982; Hayes *et al.,* 2019; Hamazaki, 2002; Selzer and Payne, 1988).

Bottlenose Dolphin

There are two distinct bottlenose dolphin morphotypes in the western North Atlantic: The coastal and offshore forms (Waring *et al.,* 2016). The offshore form is distributed primarily along the outer continental shelf and continental slope in the Northwest Atlantic Ocean from Georges Bank to the Florida Keys. The coastal morphotype is morphologically and genetically distinct from the larger, more robust morphotype that occupies habitats further offshore. Spatial distribution data, tag-telemetry studies, photo-ID studies and genetic studies demonstrate the existence of a distinct Northern Migratory coastal stock of coastal bottlenose dolphins (Waring *et al.,* 2014). During summer months (July–August), this stock occupies coastal waters from the shoreline to approximately the 25-m isobath between the mouth of the Chesapeake Bay and Long Island, New York; during winter months (January–March), the stock occupies coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia border (Waring *et al.,* 2014). As the offshore stock is primarily found in waters greater than 40 m, while the migratory stock is primarily found in waters less than 25 m, we expect that any bottlenose dolphins encountered by the proposed survey would be from the Western North Atlantic northern migratory coastal stock, as the mean water depth of the wind farm lease area is 28 m and maximum water depth in the cable route corridor survey areas is 28 m.

Harbor Porpoise

In the Lease Area, only the Gulf of Maine/Bay of Fundy stock may be present. This stock is found in U.S. and Canadian Atlantic waters and is concentrated in the northern Gulf of Maine and southern Bay of Fundy region, generally in waters less than 150 m deep (Waring *et al.,* 2016). They are seen from the coastline to deep waters (>1800 m; Westgate *et al.* 1998), although the majority of the population is found over the continental shelf (Waring *et al.,* 2016). The main threat to the species is interactions with fisheries, with documented take in the U.S. northeast sink gillnet, mid-Atlantic gillnet, and northeast bottom trawl fisheries and in the Canadian herring weir fisheries (Waring *et al.,* 2016).

Harbor Seal

The harbor seal is found in all nearshore waters of the North Atlantic and North Pacific Oceans and adjoining seas above about 30° N (Burns, 2009). In the western North Atlantic, harbor seals are distributed from the eastern Canadian Arctic and Greenland south to southern New England and New York, and occasionally to the Carolinas (Hayes *et al.,* 2018). The harbor seals within the Project Area are part of the single Western North Atlantic stock. Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire and Massachusetts. This event has been declared a UME. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated numbers, therefore the UME investigation now encompasses all seal strandings from Maine to Virginia. A total of 1,593 reported strandings (of all species) had occurred as of the writing of this document. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME. Information on this UME is available online at: *www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2019-pinniped-unusual-mortality-event-along.*

Gray Seal

There are three major populations of gray seals found in the world; eastern Canada (western North Atlantic stock), northwestern Europe and the Baltic Sea. Gray seals in the survey area belong to the western North Atlantic stock. The range for this stock is thought to be from New Jersey to Labrador. Though gray seals are not regularly sighted offshore of Delaware their range has been expanding southward in recent years, and they have been observed recently as far south as the barrier islands of Virginia. Current population trends show that gray seal abundance is likely increasing in the U.S. Atlantic EEZ (Waring *et al.,* 2016). Although the rate of increase is unknown, surveys conducted since their arrival in the 1980s indicate a steady increase in abundance in both Maine and Massachusetts (Waring *et al.,* 2016). It is

believed that recolonization by Canadian gray seals is the source of the U.S. population (Waring *et al.,* 2016). As described above, elevated seal mortalities, including gray seals, have occurred from Maine to Virginia since July 2018. This event has been declared a UME, with phocine distemper virus identified as the main pathogen found in the seals. NMFS is performing additional testing to identify any other factors that may be involved in this UME. Information on this UME is available online at: *www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2019-pinniped-unusual-mortality-event-along.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales).	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales).	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals).	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals).	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Seventeen marine mammal species (15 cetacean and 2 pinniped (both phocid species)) have the reasonable potential to co-occur with the proposed activities. Please refer to Table 2. Of the cetacean species that may be present, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), nine are classified as mid-frequency cetaceans (*i.e.,* sperm whale and all delphinid species), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take* section, and the *Proposed Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Description of Sound Sources

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see, *e.g.,* Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983).

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the ''loudness'' of a sound and is typically described using the relative unit of the decibel (dB). A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)), and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa), while the received level is the SPL at the listener's position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they

may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 μPa^2-s) represents the total energy in a stated frequency band over a stated time interval or event, and considers both intensity and duration of exposure. The per-pulse SEL is calculated over the time window containing the entire pulse (*i.e.,* 100 percent of the acoustic energy). SEL is a cumulative metric; it can be accumulated over a single pulse, or calculated over periods containing multiple pulses. Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source, and is represented in the same units as the rms sound pressure.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources). The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 hertz (Hz) and 50 kilohertz (kHz) (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 decibels (dB) from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Sounds are often considered to fall into one of two general types: pulsed and non-pulsed. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts. The distinction between these two sound types is not always obvious, as certain signals share properties of both pulsed and non-pulsed sounds. A signal near a source could be categorized as a pulse, but due to propagation effects as it moves farther from the source, the signal duration becomes longer (*e.g.,* Greene and Richardson, 1988).

Pulsed sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Potential Effects of Underwater Sound—Note that, in the following discussion, we refer in many cases to a review article concerning studies of noise-induced hearing loss conducted from 1996–2015 (*i.e.,* Finneran, 2015). For study-specific citations, please see that work. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Götz *et al.,* 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent

loss of hearing will occur almost exclusively for noise within an animal's hearing range.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. First is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.,* when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

We describe the more severe effects (*i.e.,* certain non-auditory physical or physiological effects) only briefly as we do not expect that there is a reasonable likelihood that HRG surveys may result in such effects (see below for further discussion). Potential effects from impulsive sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.,* change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007; Zimmer and Tyack, 2007; Tal *et al.,* 2015). The activities considered here do not involve the use of devices such as explosives or mid-frequency tactical sonar that are associated with these types of effects.

Threshold Shift—Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.,* tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.,* 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward, 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.,* Southall *et al.* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as impact pile driving pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and three species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, and California sea lion (*Zalophus californianus*)) exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and NMFS (2018).

Animals in the survey area during the proposed survey are unlikely to incur TTS due to the characteristics of the sound sources, which include relatively low source levels and generally very short pulses and duration of the sound. Even for high-frequency cetacean species (*e.g.,* harbor porpoises), which may have increased sensitivity to TTS (Lucke *et al.,* 2009; Kastelein *et al.,* 2012b), individuals would have to make a very close approach and also remain very close to vessels operating these sources in order to receive multiple exposures at relatively high levels, as would be necessary to cause TTS. Intermittent exposures—as would occur

due to the brief, transient signals produced by these sources—require a higher cumulative SEL to induce TTS than would continuous exposures of the same duration (*i.e.,* intermittent exposure results in lower levels of TTS) (Mooney *et al.,* 2009a; Finneran *et al.,* 2010). Moreover, most marine mammals would more likely avoid a loud sound source rather than swim in such close proximity as to result in TTS. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a sub-bottom profiler emits a pulse is small—because if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS and would likely exhibit avoidance behavior to the area near the transducer rather than swim through at such a close range. Further, the restricted beam shape of the majority of the geophysical survey equipment planned for use makes it unlikely that an animal would be exposed more than briefly during the passage of the vessel.

Behavioral Effects—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007). However, many delphinids approach low-frequency airgun source vessels with no apparent discomfort or obvious behavioral change (*e.g.,* Barkaszi *et al.,* 2012), indicating the importance of frequency output in relation to the species' hearing sensitivity.

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, l*et al*one the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.;* 2004; Goldbogen *et al.,* 2013a, 2013b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.;* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005, 2006; Gailey *et al.,* 2007; Gailey *et al.,* 2016).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can

occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from airgun surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

We expect that some marine mammals may exhibit behavioral responses to the HRG survey activities in the form of avoidance of the area during the activity, especially the naturally shy harbor porpoise, while others such as delphinids might be attracted to the survey activities out of curiosity. However, because the HRG survey equipment operates from a moving vessel, and the maximum radius to the Level B harassment threshold is relatively small, the area and time that this equipment would be affecting a given location is very small. Further, once an area has been surveyed, it is not likely that it will be surveyed again, thereby reducing the likelihood of repeated impacts within the survey area.

We have also considered the potential for severe behavioral responses such as stranding and associated indirect injury or mortality from Skipjack's use of HRG survey equipment. Previous commenters have referenced a 2008 mass stranding of approximately 100 melon-headed whales in a Madagascar lagoon system. An investigation of the event indicated that use of a high-frequency mapping system (12-kHz multibeam echosounder) was the most plausible and likely initial behavioral trigger of the event, while providing the caveat that there is no unequivocal and easily identifiable single cause (Southall *et al.,* 2013). The investigatory panel's conclusion was based on (1) very close temporal and spatial association and directed movement of the survey with the stranding event; (2) the unusual nature of such an event coupled with previously documented apparent behavioral sensitivity of the species to other sound types (Southall *et al.,* 2006; Brownell *et al.,* 2009); and (3) the fact that all other possible factors considered were determined to be unlikely causes. Specifically, regarding survey patterns prior to the event and in relation to bathymetry, the vessel transited in a north-south direction on the shelf break parallel to the shore, ensonifying large areas of deep-water habitat prior to operating intermittently in a concentrated area offshore from the stranding site; this may have trapped the animals between the sound source and the shore, thus driving them towards the lagoon system. The investigatory panel systematically excluded or deemed highly unlikely nearly all potential reasons for these animals leaving their typical pelagic habitat for an area extremely atypical for the species (*i.e.,* a shallow lagoon system). Notably, this was the first time that such a system has been associated with a stranding event. The panel also noted several site- and situation-specific secondary factors that may have contributed to the avoidance responses that led to the eventual entrapment and mortality of the whales. Specifically, shoreward-directed surface currents and elevated chlorophyll levels in the area preceding the event may have played a role (Southall *et al.,* 2013). The report also notes that prior use of a similar system in the general area may have sensitized the animals and also concluded that, for odontocete cetaceans that hear well in higher frequency ranges where ambient noise is typically quite low, high-power active sonars operating in this range may be

more easily audible and have potential effects over larger areas than low frequency systems that have more typically been considered in terms of anthropogenic noise impacts. It is, however, important to note that the relatively lower output frequency, higher output power, and complex nature of the system implicated in this event, in context of the other factors noted here, likely produced a fairly unusual set of circumstances that indicate that such events would likely remain rare and are not necessarily relevant to use of lower-power, higher-frequency systems more commonly used for HRG survey applications. The risk of similar events recurring is likely very low, given the extensive use of active acoustic systems used for scientific and navigational purposes worldwide on a daily basis and the lack of direct evidence of such responses previously reported.

Stress Responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

NMFS does not expect that the generally short-term, intermittent, and transitory HRG and geotechnical activities would create conditions of long-term, continuous noise and chronic acoustic exposure leading to long-term physiological stress responses in marine mammals.

Auditory Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995; Erbe *et al.,* 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment if disrupting behavioral patterns. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2009; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency

ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Marine mammal communications would not likely be masked appreciably by the HRG equipment given the directionality of the signals (for most geophysical survey equipment types planned for use (Table 1)) and the brief period when an individual mammal is likely to be within its beam.

Vessel Strike

Vessel strikes of marine mammals can cause significant wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or a vessel's propeller could injure an animal just below the surface. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus 2001; Laist *et al.,* 2001; Vanderlaan and Taggart 2007).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Smaller marine mammals (*e.g.,* bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death (Knowlton and Kraus 2001; Laist *et al.,* 2001; Jensen and Silber 2003; Vanderlaan and Taggart 2007). In assessing records with known vessel speeds, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 24.1 km/h (14.9 mph; 13 knots (kn)). Given the slow vessel speeds and predictable course necessary for data acquisition, ship strike is unlikely to occur during the geophysical and geotechnical surveys. Marine mammals would be able to easily avoid the survey vessel due to the slow vessel speed. Further, Skipjack would implement measures (*e.g.,* protected species monitoring, vessel speed restrictions and separation distances; see *Proposed Mitigation*) set forth in the BOEM lease to reduce the risk of a vessel strike to marine mammal species in the survey area.

Anticipated Effects on Marine Mammal Habitat

The proposed activities would not result in permanent impacts to habitats used directly by marine mammals, but may have potential minor and short-term impacts to food sources such as forage fish. The proposed activities could affect acoustic habitat (see masking discussion above), but meaningful impacts are unlikely. There are no known foraging hotspots, or other ocean bottom structures of significant biological importance to marine mammals present in the project area. Therefore, the main impact issue associated with the proposed activity would be temporarily elevated sound levels and the associated direct effects on marine mammals, as discussed previously. The HRG survey equipment will not contact the substrate and does not represent a source of pollution. Impacts to substrate or from pollution are therefore not discussed further.

Effects to Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick *et al.,* 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012). More commonly, though, the impacts of noise on fish are temporary.

We are not aware of any available literature on impacts to marine mammal prey from sound produced by HRG survey equipment. However, as the HRG survey equipment introduces noise to the marine environment, there is the potential for it to result in avoidance of the area around the HRG survey activities on the part of marine mammal prey. The duration of fish avoidance of an area after HRG surveys depart the area is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the expected short daily duration of the proposed HRG survey, the fact that the proposed survey is mobile rather than stationary, and the relatively small areas potentially affected. The areas likely impacted by the proposed activities are relatively small compared to the available habitat in the Atlantic Ocean. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Based on the information discussed herein, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Because of the temporary nature of the disturbance, and the availability of similar habitat and resources (*e.g.,* prey

species) in the surrounding area, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations. Effects to habitat will not be discussed further in this document.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to HRG sources. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* exclusion zones and shutdown measures), discussed in detail below in Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, 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. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed 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 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.,* 2012). 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 160 dB re 1 μPa (rms) for impulsive and/or intermittent sources (*e.g.,* impact pile driving) and 120 dB rms for continuous sources (*e.g.,* vibratory driving). Skipjack's proposed activity includes the use of impulsive sources (geophysical survey equipment) therefore use of the 120 and 160 dB re 1 μPa (rms) threshold is applicable.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) 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 components of Skipjack's proposed activity that may result in the take of marine mammals include the use of impulsive sources.

These thresholds are provided in Table 4 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	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 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 identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The proposed survey would entail the use of HRG equipment. The distance to the isopleth corresponding to the threshold for Level B harassment was calculated for all HRG equipment with the potential to result in harassment of marine mammals. NMFS has developed an interim methodology for determining the rms sound pressure level (SPL_{rms}) at the 160-dB isopleth for the purposes of estimating take by Level B harassment resulting from exposure to HRG survey equipment. This methodology incorporates frequency and some directionality to refine estimated ensonified zones and is described below:

If only peak source sound pressure level (SPL_{pk}) is given, the SPL_{rms} can be roughly approximated by

$$(1)\ SPL_{rms} = SPL_{pk} + 10\log_{10}\tau$$

where τ is the pulse duration in second. If the pulse duration varies, the longest duration should be used, unless there is certainty regarding the portion of time a shorter duration will be used, in which case the result can be calculated/parsed appropriately.

In order to account for the greater absorption of higher frequency sources, we recommend applying 20 log(r) with an absorption term α·r/1000 to calculate transmission loss (*TL*), as described in Eq.s (2) and (3) below.

$$(2)\ TL = 20\log_{10}(r) + \alpha \cdot r/1000\ (\mathrm{dB})$$

where *r* is the distance in meters, and α is absorption coefficient in dB/km.

While the calculation of absorption coefficient varies with frequency, temperature, salinity, and pH, the largest factor driving the absorption coefficient is frequency. A simple formula to approximate the absorption coefficient (neglecting temperature, salinity, and pH) is provided by Richardson *et al.* (1995):

$$(3)\ \alpha \approx 0.036 f^{1.5}\ (\mathrm{dB/km})$$

where *f* is frequency in kHz. When a range of frequencies, is being used, the lower bound of the range should be used for this calculation, unless there is certainty regarding the portion of time a higher frequency will be used, in which case the result can be calculated/parsed appropriately.

Further, if the beamwidth is less than 180° and the angle of beam axis in respect to sea surface is known, the horizontal impact distance *R* should be calculated using

$$(4)\ R = r\cos\left(\varphi - \frac{\theta}{2}\right)\ (\mathrm{m})$$

where *SL* is the SPL_{rms} at the source (1 m), θ is the beamwidth (in radian), and φ is the angle of beam axis in respect to sea surface (in radian) (Figure 1(a)).

Finally, if the beam is pointed at a normal downward direction, Eq. (4) can be simplified as

$$(5)\ R = r\cos\left(\frac{\pi}{2} - \frac{\theta}{2}\right) = r\sin\frac{\theta}{2}\ (\mathrm{m})$$

The interim methodology described above was used to estimate isopleth distances to the Level B harassment threshold for the proposed HRG survey. NMFS considers the data provided by Crocker and Fratantonio (2016) to represent the best available information on source levels associated with HRG equipment and therefore recommends that source levels provided by Crocker and Fratantonio (2016) be incorporated in the method described above to estimate isopleth distances to the Level B harassment threshold. In cases when the source level for a specific type of HRG equipment is not provided in Crocker and Fratantonio (2016), NMFS recommends that either the source levels provided by the manufacturer be used, or, in instances where source levels provided by the manufacturer are unavailable or unreliable, a proxy from Crocker and Fratantonio (2016) be used instead. Table 1 shows the HRG equipment types that may be used during the proposed surveys and the sound levels associated with those HRG equipment types. Table 4 in the IHA application shows the literature sources for the sound source levels that are shown in Table 1 and that were incorporated into the modeling of Level B isopleth distances to the Level B harassment threshold.

Results of modeling using the methodology described above indicated that, of the HRG survey equipment planned for use by Skipjack that has the potential to result in harassment of marine mammals, sound produced by the AA Dura-Spark 400 sparker and the GeoSource 800 J sparker would propagate furthest to the Level B harassment threshold (Table 5); therefore, for the purposes of the exposure analysis, it was assumed the AA Dura-Spark or the GeoSource 800 J 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 400 and the GeoSource 800 J (estimated at 141 m; Table 5) was used as the basis of the take calculation for all marine mammals. Note that this is conservative as Skipjack has stated that for approximately 120 of the 200 total survey days, neither the AA Dura-Spark nor the GeoSource 800 J would be operated, and the source with the greatest potential isopleth distance to the Level B harassment threshold that would be operated during those 120 days would likely be a USBL, which has a smaller associated isopleth distance to the Level B harassment threshold (Table 5).

TABLE 5—MODELED RADIAL DISTANCES FROM HRG SURVEY EQUIPMENT TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS

Sound source	Radial distance to Level A harassment threshold (m) *				Radial distance to Level B harassment threshold (m)
	Low frequency cetaceans (peak SPL/ SEL_{cum})	Mid frequency cetaceans (peak SPL/ SEL_{cum})	High frequency cetaceans (peak SPL/ SEL_{cum})	Phocid pinnipeds (underwater) (peak SPL/ SEL_{cum})	All marine mammals
Shallow Sub-Bottom Profilers					
TB Chirp III	-/<1	0	-/<1	-/<1	48
ET 216 Chirp	-/<1	-/0	-/<1	-/0	9

TABLE 5—MODELED RADIAL DISTANCES FROM HRG SURVEY EQUIPMENT TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS—Continued

Sound source	Radial distance to Level A harassment threshold (m)*				Radial distance to Level B harassment threshold (m)
	Low frequency cetaceans (peak SPL/ SEL_{cum})	Mid frequency cetaceans (peak SPL/ SEL_{cum})	High frequency cetaceans (peak SPL/ SEL_{cum})	Phocid pinnipeds (underwater) (peak SPL/ SEL_{cum})	All marine mammals
ET 424 Chirp	-/0	-/0	-/0	-/0	4
ET 512i Chirp	-/0	-/0	-/0	-/0	6
GeoPulse 5430	-/<1	-/0	-/<1	-/0	21
Parametric Sub-Bottom Profilers					
Innomar Parametric SBPs	-/<1	-/<1	-/1.2	-/<1	1
Medium Sub-Bottom Profilers					
AA Triple plate S-Boom (700/1000J)	-/<1	-/0	2.8/0	-/0	34
AA Dura-Spark 400	-/<1	-/0	2.8/0	-/0	141
GeoSource 400 J Sparker	-/<1	-/0	2.0/0	-/0	56
GeoSource 600 J Sparker	-/<1	-/0	3.2/<1	-/<1	112
GeoSource 800 J Sparker	-/<1	-/0	3.5/<1	-/<1	141
Acoustic Corers					
Pangeo Acoustic Corer (LF Chirp)	-/<1	-/0	-/<1	-/0	4
Pangeo Acoustic Corer (HF Chirp)	-/<1	-/0	-/<1	-/0	4
Acoustic Positioning					
USBL and GAPS (all models)	-/0	-/0	-/<1	-/0	50

*Distances to Level A harassment isopleths were calculated to determine the potential for Level A harassment to occur. Skipjack has not requested, and NMFS does not propose to authorize, the take by Level A harassment of any marine mammals.

- = not applicable; AA = Applied Acoustics; CF = Crocker and Fratantonio (2016); ET = EdgeTech; GAPS = Global Acoustic Positioning System; HF = high-frequency; J = joules; LF= low-frequency; m = meter; MF = mid-frequency; PW = Phocids in water; SBP = Sub-bottom profilers; SEL_{cum} = cumulative sound exposure level; SL = source level; SPL_{pk} = zero to peak sound pressure level in decibel referenced to 1 micropascal (dB re 1 μPa); TB = teledyne benthos; USBL = ultra-short baseline.

Predicted distances to Level A harassment isopleths, which vary based on marine mammal functional hearing groups (Table 3), were also calculated. The updated acoustic thresholds for impulsive sounds (such as HRG survey equipment) contained in the Technical Guidance (NMFS, 2018) 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.,* the 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.

When the 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 may result in some degree of overestimate of Level A harassment 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 mobile sources (such as HRG surveys), the User Spreadsheet predicts the closest distance at which a stationary animal would incur PTS if the sound source traveled by the animal in a straight line at a constant speed.

Skipjack used the NMFS optional User Spreadsheet to calculate distances to Level A harassment isopleths based on SEL and used the spherical spreading loss model to calculate distances to Level A harassment isopleths based on peak SPL. Modeling of distances to isopleths corresponding to Level A harassment was performed for all types of HRG equipment proposed for use with the potential to result in harassment of marine mammals. Isopleth distances to Level A harassment thresholds for all types of HRG equipment and all marine mammal functional hearing groups are shown in Table 5. To be conservative, the largest isopleth distances for each functional hearing group were used to model potential exposures above the Level A harassment threshold for all species within that functional hearing group. Inputs to the NMFS optional User Spreadsheet for the GeoSource 800 J Sparker, which resulted in the greatest potential isopleth distance to the Level A harassment threshold for any of the functional hearing groups, are shown in Table 6.

TABLE 6—INPUTS TO THE NMFS OPTIONAL USER SPREADSHEET FOR THE GEOSOURCE 800 J SPARKER

Source Level (RMS SPL)	203 dB re 1μPa.
Source Level (peak)	213 dB re 1μPa.
Weighting Factor Adjustment (kHz).	0.05.
Source Velocity (meters/second)	2.06.
Pulse Duration (seconds)	0.0034.
1/Repetition rate (seconds)	2.43.
Duty Cycle	0.00.

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 proposed mitigation measures (see the *Proposed Mitigation* section for more detail), NMFS has determined that the likelihood of take of marine mammals in the form of Level A harassment occurring as a result of the proposed survey is so low as to be discountable, and we therefore do not propose to authorize the take by Level A harassment of any marine mammals.

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 habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory (Roberts *et al.,* 2016, 2017, 2018) represent the best available information regarding marine mammal densities in the proposed survey area. The density data presented by Roberts *et al.* (2016, 2017, 2018) incorporates aerial and shipboard line-transect survey data from NMFS and other organizations and incorporates data from 8 physiographic and 16 dynamic oceanographic and biological covariates, and controls for the influence of sea state, group size, availability bias, and perception bias on the probability of making a sighting. These density models were originally developed for all cetacean taxa in the U.S. Atlantic (Roberts *et al.,* 2016). In subsequent years, certain models have been updated on the basis of additional data as well as certain methodological improvements. Although these updated models (and a newly developed seal density model) are not currently publicly available, our evaluation of the changes leads to a conclusion that these represent the best scientific evidence available. 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/.* Marine mammal density estimates in the project area (animals/km^2) were obtained using these model results (Roberts *et al.,* 2016, 2017, 2018). The updated models incorporate additional sighting data, including sightings from the NOAA Atlantic Marine Assessment Program for Protected Species (AMAPPS) surveys from 2010–2014 (NEFSC & SEFSC, 2011, 2012, 2014a, 2014b, 2015, 2016).

For purposes of the exposure analysis, density data from Roberts *et al.* (2016, 2017, 2018) were mapped using a geographic information system (GIS). The density coverages that included any portion of the proposed project area were selected for all survey months (see Figure 4 in the IHA application for an example of density blocks used to determine monthly marine mammal densities within the project area). Monthly density data for each species were then averaged over the year to come up with a mean annual density value for each species. Estimated monthly and average annual density (animals per km^2) of all marine mammal species that may be taken by the proposed survey are shown in Table 8 of the IHA application. The mean annual density values used to estimate take numbers are also shown in Table 7 below.

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 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. Skipjack estimates that proposed surveys will achieve a maximum daily track line distance of 110 km per day during proposed HRG surveys. This distance accounts for the vessel traveling at roughly 4 knots and accounts for non-active survey periods. Based on the maximum estimated distance to the Level B harassment threshold of 141 m (Table 5) and the maximum estimated daily track line distance of 110 km, an area of 31.1 km^2 would be ensonified to the Level B harassment threshold per day during Skipjack's proposed HRG surveys. As described above, this is a conservative estimate as it assumes the HRG sources that result in the greatest isopleth distances to the Level B harassment threshold would be operated at all times during the 200 day survey.

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 (animals/km^2), incorporating the estimated marine mammal densities as described above. Estimated numbers of each species taken per day are then multiplied by the total number of survey days (*i.e.,* 200). The product is then rounded, to generate an estimate of the total number of instances of harassment expected for each species over the duration of the survey. A summary of this method is illustrated in the following formula:

$$\text{Estimated Take} = D \times ZOI \times \#\ \text{of days}$$

Where:

D = average species density (per km^2) and
ZOI = maximum daily ensonified area to relevant thresholds.

Using this method to calculate take, Skipjack estimated a total of 2 takes by Level A harassment of 1 species (harbor porpoise) would occur, in the absence of mitigation (see Table 9 in the IHA application for the estimated number of Level A takes for all potential HRG equipment types). However, as described above, due to the very small estimated distances to Level A harassment thresholds (Table 5), and in consideration of the proposed mitigation measures, the likelihood of the proposed survey resulting in take in the form of Level A harassment is considered so low as to be discountable; therefore, we do not propose to authorize take of any marine mammals by Level A harassment. Proposed take numbers are shown in Table 7.

TABLE 7—TOTAL NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION AND PROPOSED TAKES AS A PERCENTAGE OF POPULATION

Species	Density (animals/ 100 km2)	Proposed takes by Level A harassment	Estimated takes by Level B harassment	Proposed takes by Level B harassment	Total takes proposed for authorization	Total proposed takes as a percentage of population [1]
Fin whale	0.00124	0	8	8	8	0.2
Sei whale [2]	0.00001	0	0	1	1	0.1
Minke whale	0.00034	0	2	2	2	0.1
Humpback whale	0.00053	0	3	3	3	0.2
North Atlantic right whale	0.00043	0	3	3	3	0.7
Sperm Whale [2]	0.00004	0	0	3	3	0.1
Atlantic white-sided dolphin [2]	0.00229	0	14	40	40	0.1
Atlantic spotted dolphin [2]	0.00124	0	8	100	100	0.2
Bottlenose dolphin (W. N. Atlantic Coastal Migratory)	0.2355	0	1,465	1,465	1,465	22.1
Killer whale [2]	0.00001	0	0	3	3	27.3
Short-finned pilot whale [2]	0.00031	0	2	20	20	0.1
Long-finned pilot whale [2]	0.00031	0	2	20	20	0.1
Risso's dolphin [2]	0	0	0	30	30	0.4
Common dolphin	0.01328	0	83	83	83	0.1
Harbor porpoise	0.01277	0	79	79	79	0.2
Gray seal	0.00072	0	4	4	4	0.0
Harbor seal	0.00072	0	4	4	4	0.0

[1] Calculations of percentage of stock taken are based on the best available abundance estimate as shown in Table 2. In most cases the best available abundance estimate is provided by Roberts *et al.* (2016, 2017, 2018), when available, to maintain consistency with density estimates derived from Roberts *et al.* (2016, 2017, 2018). For North Atlantic right whales the best available abundance estimate is derived from the 2018 North Atlantic Right Whale Consortium 2018 Annual Report Card (Pettis *et al.,* 2018).

[2] The proposed number of authorized takes (Level B harassment only) for these species has been increased from the estimated take number to mean group size. Source for group size estimates are as follows: Sei whale: Kenney and Vigness-Raposa (2010); sperm whale: Barkaszi and Kelly (2019); killer whale: De Bruyn *et al.* (2013); Risso's dolphin: Kenney and Vigness-Raposa (2010); long-finned and short-finned pilot whale: Olson (2018); Atlantic spotted dolphin: Herzing and Perrin (2018); Atlantic white-sided dolphin: Cipriano (2018).

Skipjack requested take authorization for three marine mammal species for which no takes were calculated based on the modeling approach described above: Killer whale, sei whale and Risso's dolphin. Though the modeling resulted in estimates of less than 1 take for these species, Skipjack determined that take of these species is possible due to low densities in some density blocks and general variability in the movements of these species. NMFS believes this is reasonable and we therefore propose to authorize take of these species.

As described above, Roberts *et al.* (2016, 2017, 2018) produced density models to genus level for *Globicephala* spp. and did not differentiate between long-finned and shortfinned pilot whales. Similarly, Roberts *et al.* (2018) produced density models for all seals and did not differentiate by seal species. The take calculation methodology as described above resulted in an estimate of two pilot whale takes and four seal takes. Based on this estimate, Skipjack requested two takes each of short-finned and long-finned pilot whales, and four takes each of harbor and gray seals, based on an assumption that the modeled takes could occur to either of the respective species. We think this is a reasonable approach and therefore propose to authorize the take of four harbor seals, four gray seals, two short-finned pilot whales and two long-finned pilot whales.

Using the take methodology approach described above, the take estimates for the sei whale, sperm whale, killer whale, Risso's dolphin, Atlantic white-sided dolphin, spotted dolphin, long-finned and short-finned pilot whale were less than the average group sizes estimated for these species (Table 7). However, information on the social structures of these species indicates these species are likely to be encountered in groups. Therefore it is reasonable to conservatively assume that one group of each of these species will be taken during the proposed survey. We therefore propose to authorize the take of the average group size for these species to account for the possibility that the proposed survey encounters a group of any of these species or stocks (Table 7).

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation

(probability implemented as planned), and;

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, 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.

Proposed Mitigation Measures

NMFS proposes the following mitigation measures be implemented during Skipjack's proposed marine site characterization surveys.

Marine Mammal Exclusion Zones, Buffer Zone and Monitoring Zone

Marine mammal exclusion zones (EZ) would be established around the HRG survey equipment and monitored by protected species observers (PSO) during HRG surveys as follows:

- A 500-m EZ would be required for North Atlantic right whales;
- A 200 m EZ would be required for all other ESA-listed marine mammals (*i.e.,* fin, sei and sperm whales); and
- A 100-m EZ would be required for all other marine mammals.

If a marine mammal is detected approaching or entering the EZs during the proposed survey, the vessel operator would adhere to the shutdown procedures described below. In addition to the EZs described above, PSOs would visually monitor a 200 m Buffer Zone. During use of acoustic sources with the potential to result in marine mammal harassment (*i.e.,* anytime the acoustic source is active, including ramp-up), occurrences of marine mammals within the Buffer Zone (but outside the EZs) would be communicated to the vessel operator to prepare for potential shutdown of the acoustic source. The Buffer Zone is not applicable when the EZ is greater than 100 meters. PSOs would also be required to observe a 500 m Monitoring Zone and record the presence of all marine mammals within this zone. In addition, any marine mammals observed within 141 m of the HRG equipment would be documented by PSOs as taken by Level B harassment. The zones described above would be based upon the radial distance from the active equipment (rather than being based on distance from the vessel itself).

Visual Monitoring

A minimum of one NMFS-approved PSO must be on duty and conducting visual observations at all times during daylight hours (*i.e.,* from 30 minutes prior to sunrise through 30 minutes following sunset) and 30 minutes prior to and during nighttime ramp-ups of HRG equipment. Visual monitoring would begin no less than 30 minutes prior to ramp-up of HRG equipment and would continue until 30 minutes after use of the acoustic source ceases or until 30 minutes past sunset. PSOs would establish and monitor the applicable EZs, Buffer Zone and Monitoring Zone as described above. Visual PSOs would coordinate to ensure 360° visual coverage around the vessel from the most appropriate observation posts, and would conduct visual observations using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner. PSOs would estimate distances to marine mammals located in proximity to the vessel and/or relevant using range finders. It would be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate and enforce the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate. Position data would be recorded using hand-held or vessel global positioning system (GPS) units for each confirmed marine mammal sighting.

Pre-Clearance of the Exclusion Zones

Prior to initiating HRG survey activities, Skipjack would implement a 30-minute pre-clearance period. During pre-clearance monitoring (*i.e.,* before ramp-up of HRG equipment begins), the Buffer Zone would also act as an extension of the 100 m EZ in that observations of marine mammals within the 200 m Buffer Zone would also preclude HRG operations from beginning. During this period, PSOs would ensure that no marine mammals are observed within 200 m of the survey equipment (500 m in the case of North Atlantic right whales). HRG equipment would not start up until this 200 m zone (or, 500 m zone in the case of North Atlantic right whales) is clear of marine mammals for at least 30 minutes. The vessel operator would notify a designated PSO of the planned start of HRG survey equipment as agreed upon with the lead PSO; the notification time should not be less than 30 minutes prior to the planned initiation of HRG equipment order to allow the PSOs time to monitor the EZs and Buffer Zone for the 30 minutes of pre-clearance. A PSO conducting pre-clearance observations would be notified again immediately prior to initiating active HRG sources.

If a marine mammal were observed within the relevant EZs or Buffer Zone during the pre-clearance period, initiation of HRG survey equipment would not begin until the animal(s) has been observed exiting the respective EZ or Buffer Zone, or, until an additional time period has elapsed with no further sighting (*i.e.,* minimum 15 minutes for small odontocetes and seals, and 30 minutes for all other species). The 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.

Ramp-Up of Survey Equipment

When technically feasible, a ramp-up procedure would be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure would 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 operation at full power. Ramp-up of the survey equipment would not begin until the relevant EZs and Buffer Zone has been cleared by the PSOs, as described above. HEG equipment would be initiated at their lowest power output and would be incrementally increased to full power. If any marine mammals are detected within the EZs or Buffer Zone prior to or during ramp-up, the HRG equipment would be shut down (as described below).

Shutdown Procedures

If an HRG source is active and a marine mammal is observed within or entering a relevant EZ (as described above) an immediate shutdown of the HRG survey equipment would be required. When shutdown is called for by a PSO, the acoustic source would be immediately deactivated and any dispute resolved only following deactivation. Any PSO on duty would have the authority to delay the start of survey operations or to call for shutdown of the acoustic source if a marine mammal is detected within the applicable EZ. The vessel operator would establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the HRG source(s) to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch. Subsequent restart of the HRG equipment would only occur after the marine mammal has either been observed exiting the relevant EZ, or, until an additional time period has

elapsed with no further sighting of the animal within the relevant EZ (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for large whales).

Upon implementation of shutdown, the HRG source may be reactivated after the marine mammal that triggered the shutdown has been observed exiting the applicable EZ (*i.e.,* the animal is not required to fully exit the Buffer Zone where applicable), or, following a clearance period of 15 minutes for small odontocetes and seals and 30 minutes for all other species with no further observation of the marine mammal(s) within the relevant EZ. If the HRG equipment shuts down for brief periods (*i.e.,* less than 30 minutes) for reasons other than mitigation (*e.g.,* mechanical or electronic failure) the equipment may be re-activated as soon as is practicable at full operational level, without 30 minutes of pre-clearance, only if PSOs have maintained constant visual observation during the shutdown and no visual detections of marine mammals occurred within the applicable EZs and Buffer Zone during that time. For a shutdown of 30 minutes or longer, or if visual observation was not continued diligently during the pause, pre-clearance observation is required, as described above.

The shutdown requirement would be waived for certain genera of small delphinids (*i.e., Delphinus, Lagenorhynchus, Stenella, and Tursiops)* under certain circumstances. If a delphinid(s) from these genera is visually detected approaching the vessel (*i.e.,* to bow ride) or towed survey equipment, shutdown would not be required. If there is uncertainty regarding identification of a marine mammal species (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs would use best professional judgment in making the decision to call for a shutdown.

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 the area encompassing the Level B harassment isopleth (141 m), shutdown would occur.

Vessel Strike Avoidance

Vessel strike avoidance measures would include, but would not be limited to, the following, 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 vessel operators will comply with 10 knot (18.5 km/hr) or less speed restrictions in any SMA and DMA per NOAA guidance;
- All vessel operators will reduce vessel speed to 10 knots (18.5 km/hr) or less when any large whale, any mother/calf pairs, 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 100 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 100 m. If stationary, the vessel must not engage engines until the North Atlantic right whale has moved beyond 100 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.

Skipjack will ensure that vessel operators and crew maintain a vigilant watch for marine mammals 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 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

As described above, the section of the proposed survey area partially overlaps with a portion of a North Atlantic right whale SMA off the mouth of Delaware Bay. This SMA is active from November 1 through April 30 of each year. Any 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 also monitor the NMFS North Atlantic right whale reporting systems for the establishment of Dynamic Management Areas (DMA). If NMFS should establish a DMA in the survey area while surveys are underway, Skipjack would contact NMFS within 24 hours of the establishment of the DMA to determine whether alteration of survey activities was warranted to avoid right whales to the extent possible.

The proposed mitigation measures are designed to avoid the already low potential for injury in addition to some instances of Level B harassment, and to minimize the potential for vessel strikes. Further, we believe the proposed mitigation measures are practicable for the applicant to implement. Skipjack has proposed additional mitigation measures in addition to the measures described above; for information on the measures proposed by Skipjack, see Section 11 of the IHA application.

There are no known marine mammal rookeries or mating or calving grounds in the survey area that would otherwise potentially warrant increased mitigation measures for marine mammals or their

habitat (or both). The proposed 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 proposed survey's occurrence in North Atlantic right whale migratory habitat is not warranted.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Proposed Monitoring Measures

As described above, visual monitoring would be performed by qualified and NMFS-approved PSOs. Skipjack would use independent, dedicated, trained PSOs, meaning that the PSOs must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements (including brief alerts regarding maritime hazards), and must have successfully completed an approved PSO training course appropriate for their designated task. Skipjack would provide resumes of all proposed PSOs (including alternates) to NMFS for review and approval at least 45 days prior to the start of survey operations.

During survey operations (*e.g.,* any day on which use of an HRG source is planned to occur), a minimum of one PSO must be on duty and conducting visual observations at all times on all active survey vessels during daylight hours (*i.e.,* from 30 minutes prior to sunrise through 30 minutes following sunset) and nighttime ramp-ups of HRG equipment. Visual monitoring would begin no less than 30 minutes prior to initiation of HRG survey equipment and would continue until one hour after use of the acoustic source ceases or until 30 minutes past sunset. PSOs would coordinate to ensure 360° visual coverage around the vessel from the most appropriate observation posts, and would conduct visual observations using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner. PSOs may be on watch for a maximum of four consecutive hours followed by a break of at least two hours between watches and may conduct a maximum of 12 hours of observation per 24-hour period. In cases where multiple vessels are surveying concurrently, any observations of marine mammals would be communicated to PSOs on all survey vessels.

PSOs would 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 monitoring of marine mammals. Position data would be recorded using hand-held or vessel GPS units for each sighting. Observations would take place from the highest available vantage point on the survey vessel. General 360-degree scanning would occur during the monitoring periods, and target scanning by the PSO would occur when alerted of a marine mammal presence.

During good conditions (*e.g.,* daylight hours; Beaufort sea state (BSS) 3 or less), to the maximum extent practicable, PSOs would conduct observations when the acoustic source is not operating for comparison of sighting rates and behavior with and without use of the acoustic source and between acquisition periods. Any observations of marine mammals by crew members aboard any vessel associated with the survey would be relayed to the PSO team.

Data on all PSO observations would be recorded based on standard PSO collection requirements. This would include dates, times, and locations of survey operations; dates and times of observations, location and weather; details of marine mammal sightings (*e.g.,* species, numbers, behavior); and details of any observed marine mammal take that occurs (*e.g.,* noted behavioral disturbances).

Proposed 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, Skipjack will provide the reports described below as necessary during survey activities. In the unanticipated event that Skipjack'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, Skipjack 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 New England/Mid-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 Skipjack to minimize reoccurrence of such an event in the future. Skipjack would not resume activities until notified by NMFS.

In the event that Skipjack 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), Skipjack would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the NMFS New England/Mid-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 Skipjack to determine if modifications in the activities are appropriate.

In the event that Skipjack 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), Skipjack would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, and the NMFS New England/Mid-Atlantic Regional Stranding Coordinator, within 24 hours of the discovery. Skipjack would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS. Skipjack may continue its operations in 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 (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).

To avoid repetition, our analysis applies to all the species listed in Table 2, given that NMFS expects the anticipated effects of the proposed survey to be similar in nature.

NMFS does not anticipate that serious injury or mortality would occur as a result of Skipjack's proposed survey, even in the absence of proposed mitigation. Thus the proposed authorization does not authorize any serious injury or mortality. As discussed in the *Potential Effects* section, non-auditory physical effects and vessel strike are not expected to occur. Additionally and as discussed previously, given the nature of activity and sounds sources used and especially in consideration of the required mitigation, Level A harassment is neither anticipated nor authorized. 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, reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007).

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; HDR, Inc., 2012; Lerma, 2014). Most likely, individuals will simply move away from the sound source and temporarily avoid the area where the survey is occurring. We expect that any avoidance of the survey area by marine mammals would be temporary in nature and that any marine mammals that avoid the survey area during the survey activities would not be permanently displaced. Even repeated Level B harassment of some small subset of an overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Instances of more severe behavioral harassment are expected to be minimized by proposed mitigation and monitoring measures.

In addition to being temporary and short in overall duration, the acoustic footprint of the proposed 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, mating or calving grounds known to be biologically important to marine mammals within the proposed survey area and there are no feeding areas known to be biologically important to marine mammals within the proposed survey area. There is no designated critical habitat for any ESA-listed marine mammals in the proposed survey area. The proposed survey area overlaps a portion of 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 coasts of Delaware and Maryland, this biologically important migratory area extends from the coast to beyond the shelf break. Due to the fact that that the proposed survey is temporary and the spatial extent of sound produced by the survey would 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 proposed survey.

Potential impacts to marine mammal habitat were discussed previously in this document (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. Repeated exposures of individuals to relatively low levels of sound outside of preferred habitat areas are unlikely to significantly disrupt critical behaviors. We expect that animals disturbed by sound associated with the proposed survey would simply avoid the area during the survey in favor of other, similar habitats.

As described above, North Atlantic right, humpback, and minke whales, and gray and harbor seals are experiencing ongoing UMEs. For North Atlantic right whales, as described above, no injury as a result of the proposed project is expected or proposed for authorization, and Level B harassment takes of right whales are expected to be in the form of avoidance of the immediate area of the proposed survey. In addition, the number of takes proposed for authorization above the Level B harassment threshold are minimal (*i.e.,* 3). As no injury or mortality is expected or proposed for authorization, and Level B harassment of North Atlantic right whales will be reduced to the level of least practicable adverse impact through use of proposed mitigation measures, the proposed authorized takes of right whales would not exacerbate or compound the ongoing UME in any way.

Similarly, no injury or mortality is expected or proposed for authorization for any of the other species with UMEs, Level B harassment will be reduced to the level of least practicable adverse impact through use of proposed mitigation measures, and the proposed authorized takes would not exacerbate or compound the ongoing UMEs. For minke whales, although the ongoing UME is under investigation (as occurs for all UMEs), this event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 20,000 whales. Even though the PBR value is based on an abundance for U.S. waters that is negatively biased and a small fraction of the true population abundance, annual M/SI does not exceed the calculated PBR value for minke whales. With regard to humpback whales, the UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.,* 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (*i.e.,* approximately 10,000; Stevick *et al.,* 2003; Smith *et al.,* 1999; Bettridge *et al.,* 2015), and appears to be experiencing consistent growth. With regard to gray and harbor seals, although the ongoing UME is under investigation, the UME does not yet provide cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 75,000 and annual M/SI (345) is well below PBR (2,006) (Hayes *et al.,* 2018). For gray seals, the population abundance in the United States is over 27,000, with an estimated abundance including seals in Canada of approximately 505,000, and abundance is likely increasing in the U.S. Atlantic EEZ as well as in Canada (Hayes *et al.,* 2018).

The proposed 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 or more severe behavioral responses. 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 Skipjack's proposed 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 proposed take estimates to impact annual rates of recruitment or survival.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality, serious injury, or Level A harassment is anticipated or authorized;
- The anticipated impacts of the proposed activity on marine mammals would primarily be in the form of temporary behavioral changes due to avoidance of the area around the survey vessel;
- The availability of alternate areas of similar habitat value (for foraging, etc.) for marine mammals that may temporarily vacate the survey area during the proposed survey to avoid exposure to sounds from the activity;
- The proposed project area does not contain known areas of significance for mating or calving;
- Effects on species that serve as prey species for marine mammals from the proposed survey would be minor and temporary and would not be expected to reduce the availability of prey or to affect marine mammal feeding;
- The proposed 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 proposed monitoring and mitigation measures, NMFS preliminarily finds

that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Sections 101(a)(5)(A) and (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 propose for authorization to be taken, for all species and stocks, would be considered small relative to the relevant stocks or populations (less than 28 percent for two of seventeen species and stocks, and less than 1 percent for all remaining species and stocks). See Table 7. Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

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 Permits and Conservation Division is proposing to authorize the incidental take of four species of marine mammals which are listed under the ESA: The North Atlantic right, fin, sei, and sperm whale. The Permits and Conservation Division has requested initiation of Section 7 consultation with NMFS GARFO for the issuance of this IHA. NMFS will conclude the ESA section 7 consultation prior to reaching a determination regarding the proposed issuance of the authorization.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Skipjack for conducting marine site characterization surveys offshore of Delaware and along potential submarine cable routes to a landfall location in Delaware or Maryland, from the date of issuance for a period of one year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed [action]. We also request at this time comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal.

On a case-by-case basis, NMFS may issue a one-year IHA renewal with an additional 15 days for public comments when (1) another year of identical or nearly identical activities as described in the Specified Activities section of this notice is planned or (2) the activities as described in the Specified Activities section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the Dates and Duration section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA;
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take because only a subset of the initially analyzed activities remain to be completed under the Renewal);

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized;

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: September 24, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–20997 Filed 9–26–19; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 17 October 2019, at 9 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street NW, Washington, DC 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our website: *www.cfa.gov*. Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing *cfastaff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated: September 12, 2019, in Washington, DC.

Thomas Luebke,

Secretary.

[FR Doc. 2019–20316 Filed 9–26–19; 8:45 am]

BILLING CODE 6330–01–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletions from the procurement list.

SUMMARY: The Committee is proposing to delete products and services from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* October 27, 2019.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following products and services are proposed for deletion from the Procurement List:

Products

NSNs—Product Names:
7510–01–435–9775—Micro-Cell Stamp Pad, Size #1 2¾″ × 4½″, Red
7510–01–435–9776—Micro-Cell Stamp Pad, Size #1, 2¾″ × 4½″, Black
7510–01–435–9777—Micro-Cell Stamp Pad, Size #2, 3¼″ × 6¼″, Red
7510–01–435–9778—Micro-Cell Stamp Pad, Size #2, 3¼″ × 6¼″, Black
Mandatory Source of Supply: Cattaraugus County Chapter, NYSARC, Olean, NY
Contracting Activity: GSA/FAS Admin Svcs Acquisition Br(2, New York, NY)

Services

Service Type: Custodial service, Grounds Maintenance Service
Mandatory for: Salmon Airbase, 8 Industrial Lane, USFS, Salmon, ID
Mandatory Source of Supply: Development Workshop, Inc., Idaho Falls, ID
Contracting Activity: Forest Service, Caribou–Targhee National Forest
Service Type: Janitorial/Custodial
Mandatory for: Veterans Affairs Outpatient Clinic, Sacramento, CA
Mandatory Source of Supply: Easter Seal Society of Superior California, Sacramento, CA
Contracting Activity: Veterans Affairs, Department of, NAC
Service Type: Mailroom Operation
Mandatory for: Immigration and Naturalization Service: Administrative Center & Western Operations Region, Laguna Niguel, CA
Contracting Activity: Office of Policy, Management, and Budget, NBC Acquisition Services Division
Service Type: Administrative/General Support Services
Mandatory for: Minerals Management Service, DOI, Herndon, VA
Mandatory Source of Supply: ServiceSource, Inc., Oakton, VA
Contracting Activity: Office of Policy, Management, and Budget, NBC Acquisition Services Division
Service Type: Operation of Postal Service Center
Mandatory for: Bolling Air Force Base, Washington, DC
Mandatory Source of Supply: ServiceSource, Inc., Oakton, VA
Contracting Activity: Dept of the Air Force, FA7012 11 CONS LGC
Service Type: Grounds Maintenance
Mandatory for: USACE Bayou Boeuf & Berwick Locks-East/West Calumet & Charenton Floodgates, Morgan City Vicinity, LA
Mandatory Source of Supply: Goodworks, Inc., New Orleans, LA
Contracting Activity: Dept of the Army, W07V ENDIST N Orleans
Service Type: Guard Services
Mandatory for: U.S. Coast Guard-Mayport: 4200 Ocean Street, Mayport, FL
Mandatory Source of Supply: GINFL Services, Inc., Jacksonville, FL
Contracting Activity: U.S. Coast Guard, U.S. Coast Guard
Service Type: Custodial Services
Mandatory for: Illinois Military Academy: 1301 North MacArthur Road, Springfield, IL
Mandatory Source of Supply: United Cerebral Palsy of the Land of Lincoln, Springfield, IL
Contracting Activity: Dept of Defense, DOD/OFF of Secretary of Def (EXC MIL Depts)
Service Type: Grounds Maintenance
Mandatory for: Corpus Christi Resident Office, USACE (SAO), 1920 N. Chaparral St., Corpus Christi, TX
Mandatory Source of Supply: Training, Rehabilitation, & Development Institute, Inc., San Antonio, TX
Contracting Activity: Dept of the Army, W076 ENDIST Galveston
Service Type: Custodial Services
Mandatory for: USDA, Animal and Plant Health Inspection Service: 67 Thomas Johnson Drive, Frederick, MD
Mandatory Source of Supply: NW Works, Inc., Winchester, VA
Contracting Activity: Animal and Plant Health Inspection Service, USDA APHIS MRPBS
Service Type: Custodial Services
Mandatory for: USDA, Animal and Plant Health Inspection Service: 69 Thomas Johnson Drive, Frederick, MD
Mandatory Source of Supply: NW Works, Inc., Winchester, VA
Contracting Activity: Animal and Plant Health Inspection Service, USDA APHIS MRPBS
Service Type: Janitorial/Custodial
Mandatory for: Douglas Station Post Office: 904 Third Street, Douglas, AK
Mandatory Source of Supply: REACH, Inc., Juneau, AK
Contracting Activity: U.S. Postal Service, Washington, DC
Service Type: Janitorial/Custodial
Mandatory for: U.S. Coast Guard Cutter Aspen: Yerba Buena Island, San Francisco, CA
Mandatory Source of Supply: Toolworks, Inc., San Francisco, CA
Contracting Activity: U.S. Coast Guard, Base Alameda
Service Type: Administrative Services
Mandatory for: U.S. Customs Service Academy, Glynco, GA
Mandatory Source of Supply: Challenge Enterprises of North Florida, Inc., Green Cove Springs, FL
Contracting Activity: Bureau of Customs and Border Protection, National Acquisition Center
Service Type: Custodial Services
Mandatory for: Caribou-Targhee National Forest, St. Anthony Supervisor's Office, USFS, St. Anthony, ID
Mandatory Source of Supply: Development Workshop, Inc., Idaho Falls, ID
Contracting Activity: Forest Service, Caribou–Targhee National Forest
Service Type: Grounds Maintenance
Mandatory for: USDA, Southern Plains Agriculture Research Center: 2881 F&B Road, College Station, TX
Mandatory Source of Supply: World Technical Services, Inc., San Antonio, TX
Contracting Activity: Agricultural Research Service, Dept of AGRIC/Agricultural Research Service
Service Type: Vehicle Retrofitting Srvc limited to FPI surplus
Mandatory for: Retrofit Facility (Prime Contract): Bremerton, WA
Mandatory Source of Supply: Skookum Educational Programs, Bremerton, WA
Contracting Activity: Bureau of Customs and Border Protection, SBI Acquisition Office
Service Type: Janitorial/Grounds Maintenance
Mandatory for: Oxnard Border Patrol Station, Camarillo, CA
Mandatory Source of Supply: The ARC of Ventura County, Inc., Ventura, CA
Contracting Activity: U.S. Immigration and Customs Enforcement, Detention Management—Laguna Office
Service Type: Custodial Services
Mandatory for: U.S. Coast Guard Marine Safety Office: 9640 Clinton Drive, Galena, TX

Mandatory Source of Supply: On Our Own Services, Inc., Houston, TX
Contracting Activity: U.S. Coast Guard, U.S. Coast Guard
Service Type: Reception Service Support
Mandatory for: Fort Bragg, Fort Bragg, NC
Mandatory Source of Supply: Employment Source, Inc., Fayetteville, NC
Contracting Activity: Dept of the Army, W6QM MICC FDO FT BRAGG
Service Type: Reception Service Support
Mandatory for: Fort Campbell, Fort Campbell, KY
Mandatory Source of Supply: Employment Source, Inc., Fayetteville, NC
Contracting Activity: Dept of the Army, W6QM MICC FDO FT BRAGG
Service Type: Reception Service Support
Mandatory for: Fort Hood, Fort Hood, TX
Mandatory Source of Supply: Professional Contract Services, Inc., Austin, TX
Contracting Activity: Dept of the Army, W6QM MICC FDO FT BRAGG
Service Type: Reception Service Support
Mandatory for: Fort Bliss, Fort Bliss, TX
Mandatory Source of Supply: Tresco, Inc., Las Cruces, NM
Contracting Activity: Dept of the Army, W6QM MICC FDO FT BRAGG
Service Type: Reception Service Support
Mandatory for: Fort Sill, Fort Sill, OK
Mandatory Source of Supply: Work Services Corporation, Wichita Falls, TX
Contracting Activity: Dept of the Army, W6QM MICC FDO FT BRAGG
Service Type: Reception Service Support
Mandatory for: Fort Lewis, Fort Lewis, WA
Mandatory Source of Supply: Skookum Educational Programs, Bremerton, WA
Contracting Activity: Dept of the Army, W6QM MICC FDO FT BRAGG
Service Type: Disposal Support Services
Mandatory for: Hill Air Force Base: Defense Reutilization and Marketing Office, Hill Air Force Base, UT
Mandatory Source of Supply: EnableUtah, Ogden, UT
Contracting Activity: Dept of Defense, DOD/OFF of Secretary of Def (EXC MIL Depts)
Service Type: Laundry Service
Mandatory for: Whidbey Island Naval Air Station: Naval Hospital, Oak Harbor, WA
Mandatory Source of Supply: Northwest Center, Seattle, WA
Contracting Activity: Dept of the Navy, NAVSUP FLT LOG CTR Puget Sound
Service Type: Grounds Maintenance
Mandatory for: Marine Corps Support Activity: Richards-Gebaur Memorial Airport, Kansas City, MO
Mandatory Source of Supply: JobOne, Independence, MO
Contracting Activity: Dept of the Navy, U.S. Fleet Forces Command
Service Type: Custodial service
Mandatory for: Eastern ARNG Aviation Training Site, Capital City Airport Hanger 2, New Cumberland, PA
Mandatory Source of Supply: Opportunity Center, Incorporated, Wilmington, DE
Contracting Activity: Dept of the Army, W7NX USPFO Activity PA ARNG
Service Type: Janitorial/Custodial
Mandatory for: Segura U.S. Army Reserve Center: 301 Ascarate Park Road, El Paso, TX
Mandatory Source of Supply: Let's Go To Work, El Paso, TX
Contracting Activity: Dept of the Army, W6QM MICC–PRESIDIO (RC–W)

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–20995 Filed 9–26–19; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before October 28, 2019.

ADDRESSES: Comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, may be submitted directly to the Office of Information and Regulatory Affairs (OIRA) in OMB within 30 days of this notice's publication by either of the following methods. Please identify the comments by ''OMB Control No. 3038–0107.''

- *By email addressed to: OIRAsubmissions@omb.eop.gov* or
- *By mail addressed to:* The Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Commodity Futures Trading Commission, 725 17th Street NW, Washington, DC 20503.

A copy of all comments submitted to OIRA should be sent to the Commodity Futures Trading Commission (the ''Commission'') by either of the following methods. The copies should refer to ''OMB Control No. 3038–0107.''

- *By mail addressed to:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581;
- *By Hand Delivery/Courier to the same address;* or
- Through the Commission's website at *http://comments.cftc.gov.* Please follow the instructions for submitting comments through the website.

A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting *http://RegInfo.gov.*

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Dan Rutherford, Associate Director, Office of Public Affairs, Office of Customer Education and Outreach, Commodity Futures Trading Commission, (202) 418–6552; email: *drutherford@cftc.gov,* and refer to OMB Control No. 3038–0107.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback for Agency Service Delivery (OMB Control No. 3038–0107). This is a request for an extension of a currently approved information collection.

Abstract: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, the Commodity Futures Trading Commission's Office of Customer Education and Outreach (OCEO) seeks to obtain OMB approval of a generic clearance to collect qualitative and quantitative feedback. By feedback we mean information that provides useful insights on perceptions

[1] 17 CFR 145.9.

and opinions, but are not statistically significant surveys that yield results that can be generalized to the population of study.

This collection of information is necessary to enable the OCEO to garner customer and stakeholder feedback in an efficient and timely manner in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with OCEO programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the OCEO and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

On July 24, 2019, the Commission published in the **Federal Register** notice of the proposed extension of this information collection and provided 60 days for public comment on the proposed extension, 84 FR 35606 (''60-Day Notice'') The Commission did not receive any comments on the 60-Day Notice.

Burden Statement: This is a renewal request for a previous generic approval. No changes in requirements are anticipated. The respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 1,440.

Estimated Average Burden Hours per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 28,800.

Frequency of Collection: 10 per year.

There are no capital costs or operating and maintenance costs associated with this collection.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: September 23, 2019.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2019–20957 Filed 9–26–19; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before October 28, 2019.

ADDRESSES: Comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, may be submitted directly to the Office of Information and Regulatory Affairs (OIRA) in OMB, within 30 days of the notice's publication, by by either of the following methods. Please identify the comments by ''OMB Control No. 3038–0017.''

- *By email addressed to: OIRAsubmissions@omb.eop.gov* or
- *By mail addressed to:* The Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Commodity Futures Trading Commission, 725 17th Street NW, Washington DC 20503.

A copy of all comments submitted to OIRA should be sent to the Commodity Futures Trading Commission (the ''Commission'') by either of the following methods. The copies should refer to ''OMB Control No. 3038–0017.''

- By mail addressed to: Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581;
- By Hand Delivery/Courier to the same address; or
- Through the Commission's website at *http://comments.cftc.gov*. Please follow the instructions for submitting comments through the website.

A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting *http://RegInfo.gov*.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov*. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the Information Collection Request will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Adam Charnisky, Market Analyst, Division of Market Oversight, Commodity Futures Trading Commission, (312) 596–0630; email: *acharnisky@cftc.gov,* and refer to ''OMB Control No. 3038–0017.''

SUPPLEMENTARY INFORMATION:

Title: Notice of Intent to Renew Collection, Market Surveys (OMB Control No. 3038–0017). This is a request for extension of a currently approved information collection.

Abstract: Under Commission Rule 21.02, upon call by the Commission, information must be furnished related to futures or options positions held or introduced by futures commission merchants, members of contract markets, introducing brokers, and foreign brokers and, for options positions, by each reporting market. This rule is designed to assist the Commission in prevention of market manipulation and is promulgated pursuant to the Commission's rulemaking authority contained in section 8a of the Commodity Exchange Act, 7 U.S.C. 12a (2010).

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. On July 23, 2019, the Commission published in the **Federal Register** notice of the proposed extension of this information collection and provided 60 days for public comment on the proposed extension, 84 FR 35376 (''60-Day Notice''). The Commission did not receive any

[1] 17 CFR 145.9.

relevant comments on the 60-Day Notice.

Burden Statement: The respondent burden for this collection is estimated to be as follows:

ESTIMATED ANNUAL REPORTING BURDEN

17 CFR section	Annual number of respondents	Frequency of response	Total annual responses	Hours per response	Total burden hours
21.02	100	Annually	100	1.75	175

There are no capital costs or operating and maintenance costs associated with this collection.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: September 23, 2019.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2019–20956 Filed 9–26–19; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2019–ICCD–0084]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for Approval To Participate in Federal Student Aid Programs

AGENCY: Federal Student Aid (FSA), Department of Education (ED)

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before October 28, 2019.

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–2019–ICCD–0084. 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. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *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, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Application for Approval to Participate in Federal Student Aid Programs.

OMB Control Number: 1845–0012.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 7,286.

Total Estimated Number of Annual Burden Hours: 24,352.

Abstract: Section 487(c) of the Higher Education Act of 1965, as amended (HEA) requires that the Secretary of Education prescribe regulations to ensure that any funds postsecondary institutions receive under the HEA are used solely for the purposes specified in, and in accordance with, the provision of the applicable programs. The Institutional Eligibility regulations govern the initial and continuing eligibility of postsecondary educational institutions participating in the student financial assistance program authorized by Title IV of the HEA. An institution must use this Application to apply for approval to be determined to be eligible and if the institution wishes, to participate; to expand its eligibility; or to continue to participate in the Title IV programs. An institution must also use the application to report certain required data as part of its recordkeeping requirements contained in the regulations under 34 CFR part 600 (Institutional Eligibility under the HEA). The Department uses the information reported on the Application in its determination of whether an institution meets the statutory and regulatory requirements.

Dated: September 24, 2019.

Kate Mullan,

PRA Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–21020 Filed 9–26–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Record of Decision for Final Environmental Impact Statement for Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory, California

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Record of decision.

SUMMARY: The U.S. Department of Energy (DOE) announces its decision to demolish the 18 buildings it owns in Area IV of the Santa Susana Field Laboratory (SSFL) and dispose of or recycle the materials off site. This action will be taken in accordance with applicable federal, state, and local requirements. (The demolition of five of the eighteen buildings and the disposal of the resulting debris will be accomplished pursuant to closure plans approved by the California Department of Toxic Substances Control.) This action will also be taken consistent with agreements and decisions resulting from interagency consultations conducted in accordance with applicable federal, state, and local requirements, including the Programmatic Agreement executed with the California State Historic Preservation Officer pursuant to the National Historic Preservation Act and the Biological Opinion issued by the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act.

ADDRESSES: This Record of Decision (ROD), the SSFL Area IV Final Environmental Impact Statement (EIS), and related NEPA documents are available at the DOE SSFL Area IV website (*http://etec.energy.gov*) and the DOE NEPA website (*http://energy.gov/nepa*).

FOR FURTHER INFORMATION CONTACT: For further information on the SSFL FEIS, the ROD, and DOE cleanup actions within Area IV of SSFL and the Northern Buffer Zone, please contact Ms. Stephanie Jennings, ETEC National Environmental Policy Act (NEPA) Compliance Officer, U.S. Department of Energy at *stephanie.jennings@emcbc.doe.gov*. For general information on DOE's NEPA process, please contact Mr. Bill Ostrum, Acting NEPA Compliance Officer, U.S. Department of Energy, Office of Environmental Management, 1000 Independence Avenue SW, Washington, DC 20585–0103: Telephone: (202) 586–2513; or Email: *william.ostrum@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

Background

DOE prepared the SSFL Area IV Final EIS (DOE/EIS–0402) in accordance with NEPA (42 U.S.C 4321 *et seq.*), CEQ NEPA regulations (40 CFR parts 1500–1508), and DOE's NEPA Implementing Procedures (10 CFR part 1021). DOE announced its intent to prepare an EIS on May 16, 2008 (73 FR 28437) and conducted public scoping. DOE prepared a Draft EIS and distributed it to interested parties. Following the U.S. Environmental Protection Agency (EPA) Notice of Availability of the SSFL Area IV Draft EIS (82 FR 4336; January 13, 2017), DOE conducted public hearings and invited comment on the Draft EIS. After considering comments received on the Draft EIS, DOE addressed the comments and prepared a Final EIS that was issued with EPA's Notice of Availability (83 FR 67282; December 28, 2018).

SSFL, located on approximately 2,850 acres in the hills between Chatsworth and Simi Valley, California, was developed as a remote site to test rocket engines and conduct nuclear research. Rocket engine testing by North American Aviation (later Rockwell International (Rocketdyne)) began in 1947. In the mid-1950s, the Atomic Energy Commission (AEC), a predecessor agency to DOE, funded nuclear research on a 90-acre parcel within Area IV of SSFL. The Energy Technology Engineering Center (ETEC) was established on this parcel as a ''center of excellence'' for liquid metals research. A total of 10 small reactors were built and operated as part of nuclear research that ended in 1982. DOE-directed liquid metals research continued until 1998.

During the years of research activities within Area IV, there were more than 270 numbered structures supporting the research (structures included occupied buildings, storage sheds, tanks, transformers, loading docks, etc.). As the mission associated with each structure was completed, the structure was decontaminated, demolished, and the debris transported offsite for disposal. There was no DOE-sponsored development within the Northern Buffer Zone (NBZ).

By 2006, only 18 DOE-owned numbered structures (buildings and sheds) remained in Area IV. Operations within five of the structures were conducted under two Resource Conservation and Recovery Act (RCRA) permits issued by the State of California Department of Toxic Substances Control (DTSC). The remaining 13 buildings were operated pursuant to DOE requirements and other applicable laws and regulations.

The RCRA permitted structures at the Radioactive Materials Handling Facility (RMHF) include:

- Building 4021—Decontamination and Packaging Facility (for radioactive material)
- Building 4022—Radioactive Storage Building (for reactor fuel)
- Building 4621—Interim storage facility for contaminated equipment and source materials

The RCRA permitted structures at the Hazardous Waste Management Facility (HWMF) include:

- Building 4029—storage of non-radioactive chemical wastes
- Building 4133—treatment of reactive (potassium and sodium) metals

The non-RCRA-permitted structures include:

- Building 4019—Systems for Nuclear Auxiliary Power (SNAP) criticality tests
- Building 4024—SNAP reactor testing
- Building 4038—ETEC office building
- Building 4057—sodium test rig housing/currently a warehouse
- Building 4034—RMHF office building
- Building 4044—RMHF clean shop
- Structure 4075—RMHF radioactive waste storage area
- Structure 4563—RMHF radioactive waste storage area
- Structure 4658—RMHF guard shack
- Building 4665—RMHF oxidation facility
- Structure 4688—RMHF storage shed
- Building 4462—Sodium Pump Test Facility (SPTF)
- Building 4463—SPTF support building

Purpose and Need for Agency Action

DOE's purpose and need for action remains as stated in the SSFL Area IV Final EIS. DOE needs to complete remediation of Area IV and the NBZ to comply with applicable requirements for cleanup of radiological and non-radiological hazardous substances. Pursuant to this ROD, DOE has decided to remove the remaining 18 DOE-owned structures in Area IV of SSFL in a manner that is protective of the environment and the health and safety of the public and its workers. (The demolition of five of these buildings requires closure plans approved by DTSC.)

Proposed Action

DOE's proposed action that is the subject of this ROD is to demolish the 18 DOE-owned buildings in Area IV and transport the resulting waste off site for disposal. Demolition of 13 facilities and disposition of the resulting debris will be in accordance with DOE requirements and applicable laws and regulations. Three facilities at the RMHF and the two facilities comprising the HWMF will be closed in accordance with California DTSC-approved RCRA facility closure plans. By doing so, DOE will no longer have a long-term safety and environmental liability at SSFL related to buildings, and removal is consistent with the future land use as open space/recreational. This action

allows DOE to sample soil beneath the buildings, completing soil characterization for chemicals and radionuclides. In the SSFL Area IV Final EIS, DOE identified the potential environmental impacts associated with soil remediation, groundwater remediation, and building demolition. However, this ROD only addresses DOE's decision for building demolition. Subsequent ROD(s) will be developed when DOE makes a decision for soil and groundwater remediation.

Alternatives

In the SSFL Area IV Draft and Final EIS, DOE evaluated the No Action, Alternative Use of Area IV Buildings, and Building Removal alternatives. The Alternative Use of Area IV Buildings was dismissed in the SSFL Area IV Draft EIS as a viable alternative because DOE does not own the land, and Boeing, the land owner, has established conservation easements and agreements designating the future use of its land as open space/recreational. There is no viable purpose for reuse of the buildings and their removal is consistent with Boeing's land-use plans. Under the No Action Alternative, none of the 18 structures would be removed, but as required by the Atomic Energy Act of 1954, as amended, DOE would still be responsible for long-term surveillance, maintenance, and security. The Building Removal Alternative would involve complete removal of the buildings and foundations (except for the concrete slabs of Buildings 4462 and 4463 which are owned by Boeing) with offsite disposal of debris at permitted or authorized facilities in accordance with its waste classification.

Potential Environmental Impacts

In the SSFL Area IV Final EIS DOE analyzed environmental issues and the potential impacts, including land resources, geology and soils, surface water, groundwater, biology, air quality and climate change, noise, transportation and traffic, human health, waste management, cultural resources, socioeconomics, environmental justice, and sensitive-aged populations. DOE also evaluated the potential impacts of the irreversible and irretrievable commitment of resources, the short-term uses of the environment, and the maintenance and enhancement of long-term productivity. These analyses and results are described in the SSFL Area IV Final EIS, including the Summary and in Section 2.8 of the SSFL Area IV Final EIS.

In identifying the preferred alternative for building demolition and disposal, and in making the decision announced in this ROD, DOE considered the potential impacts that would result from the building removal. Table S–8 of the SSFL Area IV Final EIS Summary also provides a summary and comparison of potential environmental consequences associated with each alternative. The impacts to the physical, social, and natural environments will be minimal and manageable.

Environmentally Preferable Alternative

The environmentally preferable alternative is the complete removal of all 18 buildings and structures. The deteriorating buildings have the potential to release contamination (*e.g.,* heavy metals) and could be a safety risk to wildlife attempting to enter or occupy them. Complete removal also is consistent with Boeing's commitment to return its portion of SSFL to open space/recreational use.

Permits, Consultations, and Notifications

DOE will demolish and dispose of the RMHF and HWMF buildings in accordance with the closure plans approved by California DTSC. DOE has coordinated the processes associated with NEPA and Section 106 of the National Historic Preservation Act, codified at 54 U.S.C. 306108, and complied with Section 106 requirement through completion of the Programmatic Agreement with the California State Historic Preservation Officer (September 13, 2019). DOE also consulted with the U.S. Fish and Wildlife Service (USFWS) for compliance with Section 7 of the Endangered Species Act, codified at 16 U.S.C. 1536. Area IV of SSFL includes federally-designated critical habitat for the endangered Braunton's milk-vetch. USFWS issued its Biological Opinion related to DOE's proposed actions on August 28, 2018 (*http://www.ssflareaiveis.com/documents/feis/Biological%20Opinion.pdf*).

Public and Agency Involvement

Following the 2007 Federal court decision resulting from a legal challenge to the 2003 Environmental Assessment (EA) Finding of No Significant Impact (FONSI), DOE published in the **Federal Register** its Advanced Notice of Intent (ANOI) to prepare an EIS on October 17, 2007 (72 FR 58834). The ANOI was issued to request early comments and to obtain input on the scope of the EIS. The NOI to prepare an EIS and to announce scoping meetings was published in the **Federal Register** on May 16, 2008 (73 FR 28437). The public scoping period started on May 16, 2008 and continued through August 14, 2008. Scoping meetings were held in Simi Valley, California (July 22, 2008), Northridge, California (July 23, 2008), and Sacramento, California (July 24, 2008).

Preparation of the Draft EIS was delayed due to the need to collect soil and groundwater characterization data for Area IV and the NBZ. The lack of characterization data was one of EPA's and the State of California's comments on the 2003 EA. EPA collected characterization data for radionuclides from October 2010 to December 2012. DOE (under DTSC oversight) collected characterization data for chemicals from October 2010 to June 2014. While the characterization data were being collected, DOE ETEC continued public involvement through release of newsletters and conducting Community Alternatives Development Workshops in 2012. Due to the length of time between the 2008 NOI and completion of characterization, DOE published in the **Federal Register** on February 7, 2014, an Amended NOI for the SSFL Area IV EIS (79 FR 7439). Additional scoping meetings were held in Simi Valley, California on February 27, 2014, and in Agoura Hills/Calabasas, California on March 1, 2014. The scoping period ended on March 10, 2014. The Notice of Availability of the SSFL Area IV Draft EIS was published in the **Federal Register** on January 13, 2017 (82 FR 4336). An Amended Notice Extending the Comment Period to April 13, 2017 was published in the **Federal Register** on March 17, 2017 (82 FR 14218).

Comments Received on the Final Environmental Impact Statement for Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory

The Notice of Availability of the SSFL Area IV Final EIS was published in the **Federal Register** on December 28, 2018 (83 FR 67282). DOE distributed the SSFL Area IV Final EIS to Members of Congress, State and local governments; other Federal agencies; culturally-affiliated American Indian tribal governments; non-governmental organizations; and other stakeholders including members of the public who requested the document. Also, the SSFL Area IV Final EIS was made available via the internet (*http://www.SSFLAreaIVEIS.com*). In the SSFL Area IV Final EIS, DOE announced the preferred alternative for building demolition as the Building Removal Alternative.

DOE received 885 letters or emails regarding the SSFL Area IV Final EIS. DOE considered all comments contained in the letters and emails received subsequent to publication of the FEIS. Some of the comments

reiterated issues raised during the comment period on the SSFL Area IV Draft EIS, which DOE previously evaluated and provided responses to those comments in the SSFL Area IV Final EIS, Volume 3, Comment/Response Document. Comments previously considered and responded to on the SSFL Area IV Draft EIS are not being addressed anew in this response to comments on the Final EIS. Relevant to this ROD on Building Demolition, DOE has no additional responses specifically to the following items that were raised in comments on the SSFL Area IV Final EIS which were addressed in the response to comments received on the SSFL Area IV Draft EIS:

- Comments that DOE needs to take responsibility and perform a full cleanup; that less would not be protective of human health and safety.
- Comments that DOE's proposed cleanup alternatives would leave contamination that could migrate from the site.
- Comments that the health of the local population would be threatened by the continued onsite presence of contaminants.
- Comments that DOE must comply with all laws and commitments, including the 2010 Administrative Order on Consent (AOC).
- Comments that DOE needs to comply with RCRA standards, enforced by DTSC, and that DOE does not intend to comply; the alternatives presented are attempts by DOE to usurp DTSC authority.
- Comments regarding DOE's failure to address only alternatives that comply with the AOC.
- Comments incorporated by reference by the City of Los Angeles.

This section of the ROD addresses comments that are generally applicable to the SSFL Area IV Final EIS, including any that are relevant to the building demolition and disposal decision. Comments generally applicable to the SSFL Area IV Final EIS address compliance with laws and regulations (*e.g.,* NEPA) and include those related to how the Woolsey fire affected the site and the NEPA analysis.

DOE received comment letters from the EPA, Region IX; DTSC; The Boeing Company; City of Los Angeles; Natural Resources Defense Council/Committee to Bridge the Gap; Physicians for Social Responsibility—Los Angeles; Rocketdyne Cleanup Coalition; Southern California Federation of Scientists; and the SSFL Community Advisory Group. DOE also received 876 comment emails from individuals. The primary topics of the comments are NEPA compliance, soil remediation, groundwater remediation, the Biological Opinion, and the Woolsey Fire. No new comments specific to the building demolition alternative, its impacts, or status of the building removal preferred alternative were received on the SSFL Area IV Final EIS. The topics below summarize the comments received related to building demolition, the SSFL Area IV Final EIS, and the proposed action in general. DOE has responded to each topic. Comments and comment topics related to soil or groundwater remediation are not addressed below because they are not relevant to the decision being made in this ROD. Comments related to soil and groundwater remediation will be addressed in the future ROD(s). DOE reviewed and responded to all comments received through March 28, 2019. There were no comments received after that date.

Topic A—National Environmental Policy Act (NEPA) Compliance: Commenters stated that DOE violated NEPA by issuing a SSFL Area IV Final EIS that was substantially changed from the SSFL Area IV Draft EIS published for public comment. Commenters asserted that 50 to 60 percent of the SSFL Area IV Final EIS was new material that the public had not been provided an opportunity to review and comment on and DOE had therefore, not provided its responses to any such comments. Commenters asserted that DOE failed to comply with its duties under the law or its failure to include certain information in the Draft EIS for public review is a violation of NEPA. A commenter repeated an assertion made in the comments on the Draft EIS that the EIS violates NEPA because it evaluates actions that DOE does not have the discretion to take.

Various requests were made regarding review of the SSFL Area IV Final EIS. Some commenters requested that the review period for the SSFL Area IV Final EIS be extended. Some commenters requested recirculating the SSFL Area IV Final EIS for public comment and others requested withdrawing the current document and issuing a new SSFL Area IV Final EIS that the commenters asserted would be compliant with NEPA.

Response: Commenters are incorrect in their assertion that DOE has violated NEPA. NEPA regulations require agencies to analyze the potential environmental impacts associated with a proposed action, to issue a Draft EIS for public comment (40 CFR 1503.1), and to respond to comments (40 CFR 1503.4). NEPA regulations also state that the agency may not make a decision on a proposed action until 30 days after the **Federal Register** announcement of a final EIS (40 CFR 1506.10). In accordance with NEPA regulations, in preparing the Final EIS, DOE made revisions to reflect more recent information and to respond to comments received on the SSFL Area IV Draft EIS. Much of the additional material in the Final EIS was in response to comments on the Draft EIS. In Section 1.11 of the Final EIS, DOE summarized the major factors that resulted in changes. Comments that resulted in changes are also summarized and described in greater detail in Volume 3, the Comment Response Document. The **Federal Register** notification of the SSFL Area IV Final EIS was published on December 28, 2018, and indicated that a 30-day review period would end on January 28, 2019. During the period from December 28, 2018, until the issuance of this ROD, DOE received 885 submittals regarding the SSFL Area IV Final EIS. DOE received comments through March 28, 2019 and considered those comments in the development of this ROD. There were no comments received after March 28, 2019.

By submitting comments on the SSFL Area IV Final EIS, organizations and individuals demonstrated that they did have an opportunity to review and comment on the Area IV Final EIS. Having reviewed and considered comments received, DOE has determined that there is no need to reissue the SSFL Area IV Final EIS (or issue a new or supplemental EIS). DOE has met its obligations under NEPA for public input and review. Public involvement and review opportunities included two scoping periods, alternatives development workshops, and a comment period on the Draft EIS. Additionally, DOE considered comments received on the SSFL Area IV Final EIS.

Topic B—Responses to Comments on the Draft EIS: Commenters stated that DOE failed to substantively and adequately respond to comments received on the SSFL Area IV Draft EIS. Commenters noted that there are many pages purporting to respond to comments, but claimed that the responses do not meet DOE's requirements under NEPA. Some commenters also claimed that DOE changed the EIS without a meaningful explanation of the changes in responding to the comments on the SSFL Area IV Draft EIS. One commenter specifically noted that ''DOE has not fairly addressed opposing scientific and legal viewpoints.''

Response: DOE carefully reviewed, considered and responded to all

comments on the SSFL Area IV Draft EIS. The commenters failed to provide examples to support their allegations that DOE did not substantively and adequately respond to comments on the SSFL Area IV Draft EIS. One commenter cited a federal court decision, but failed to provide a specific instance of its relevance to the SSFL Area IV Final EIS content. DOE performed a careful review and analysis of the comment documents (letters, emails, hearing transcripts) received on the SSFL Area IV Draft EIS to identify individual comments. DOE performed a comment-by-comment review and prepared an individual response to each comment. The resulting Comment Response Document (Volume 3 of the SSFL Area IV Final EIS) represents 1,363 comment documents. The comments and responses to those comments can be found in the 1,675 pages in the Comment *Response* Document.

Topic C—Resource Conservation and Recovery Act (RCRA) Compliance: Commenters stated that the SSFL Area IV Final EIS violated RCRA. Commenters repeated a comment made on the SSFL Area IV Draft EIS, which DTSC, as the regulator, rather than DOE, decides how much contamination must be cleaned up.

Response: The preparation and issuance of the SSFL Area IV Final EIS, which is not a decision document, is not a violation of RCRA. DOE recognizes that DTSC has regulatory authority for RCRA decisions and introduced DTSC's authorities on page 1–4 of the SSFL Area IV Final EIS. As discussed in the SSFL Area IV Final EIS (Section 1.9), DOE has prepared and submitted to DTSC RCRA closure plans addressing DOE's five RCRA-regulated buildings in Area IV.

Topic D—Misrepresentation of Related Documents: Commenters were concerned that DOE mischaracterizes the AOC and the 2007 Federal court order in *Natural Resources Defense Council, Inc., Committee to Bridge the Gap, and City of Los Angeles* v. *Department of Energy, et al.* (*NRDC* v. *DOE*), (Case No. 3:04–CV–04448–SC, May 7, 2007). The commenter stated that DOE implies that its obligations under the AOC are ''suspended'' because of a section of the AOC stating that if there are inconsistencies between the AOC and the court's decision, DOE would work with the parties to request any relief needed. The commenter asserts that this ruling applied only to the need to remove DOE buildings in order to take soil measurements beneath them for the SSFL Area IV Final EIS.

Response: In the SSFL Area IV Final EIS, DOE characterized the relationship of the EIS, AOC, and 2007 Federal court order in Sections 1.3, 1.9, 1.11, 2.2, 2.7, and Comment Response Document, Section 2.2. Claims that DOE breached the AOC or failed to comply with the AOC were addressed in the response to comments on the SSFL Area IV Draft EIS (*e.g.,* response to comment 72–2). Section 6.2 of the AOC states: ''In the event that DOE and DTSC are not successful in obtaining relief from that order, DOE's obligations under this Order shall be stayed. The Parties shall thereupon undertake to agree upon a procedure for environmental review that would meet the requirements of the injunction in *NRDC* v. *DOE* and make any necessary modifications to this Order.'' Since the parties did not get relief from the Order, the SSFL Area IV Draft and Final EIS provide the required environmental review and, pursuant to the AOC, DOE will work with DTSC to make any appropriate modifications to the AOC.

Topic E—Biological Opinion Development Process: Commenters submitted a number of comments raising concerns about the development and use of the Biological Opinion developed by the USFWS. Some commenters took issue with the manner in which DOE consulted with USFWS, asserting that DOE requested consultation for an action that would violate the AOC. Commenters note that the Biological Opinion does not make a jeopardy determination. Commenters therefore asserted that no exception to the AOC criterion is allowed, because the Biological Opinion issued makes no finding that the cleanup action would violate specific sections of the Endangered Species Act as identified in the AOC. A commenter also implied that there were misrepresentations in the Biological Assessment prepared by DOE that USFWS relied on to prepare the Biological Opinion.

Response: DOE consulted appropriately with the USFWS in the development of the Biological Opinion for remediation of Area IV and the NBZ. A Biological Opinion is prepared by the USFWS in compliance with its obligations under the Endangered Species Act. DOE initiated informal consultation with USFWS in June 2013 relative to the AOC soil cleanup in Area IV. There were seven meetings with USFWS during the informal consultation period, six attended by DTSC staff. Formal consultation started in January 2018, after DOE answered the USFWS' questions regarding the project and the AOC exemption process. There were two formal consultation meetings with USFWS in 2018. Pursuant to the USFWS Biological Opinion, the formal consultation was based on the following USFWS statement, which was provided on page 1 of its Biological Opinion: ''For purposes of section 7 consultation, the AOC provides that impacts to species or habitat protected under the Endangered Species Act may be considered as possible exemptions from the cleanup standard specified herein only to the extent that the federal Fish and Wildlife Service, in response to a request by DOE for consultation, issues a Biological Opinion with a determination that implementation of the cleanup action would violate Section 7(a)2 or Section 9 of the ESA, and no reasonable and prudent measures or reasonable or prudent alternatives exist that would allow for the use of the specific cleanup standard in that portion of the site.'' The USFWS prefers to work with project proponents (*i.e.,* engage in consultation) such that the need for a jeopardy opinion can be avoided. The USFWS consults with project proponents to attempt to develop alternatives to the action, if possible, so that a jeopardy opinion would not be necessary. In a letter dated February 2, 2017, the USFWS responded to a request by DOE for technical assistance, and outlined the direct and substantial effects to the federally endangered Braunton's milk-vetch and its critical habitat that would result from a cleanup to background and recommended that DOE exercise an exemption to the AOC for the protection of the species. The exemption process that was described in the Draft EIS (page 2–18) and repeated in the SSFL Area IV Final EIS was the foundation of the consultation between DOE and USFWS, which resulted in the protection of endangered species at SSFL. Commenters provided no examples of claims of misrepresentation in the Biological Assessment, other than those addressed above regarding the AOC.

Topic F—Biological Assessment and Biological Opinion Were Not Available for the Draft EIS: Commenters stated concerns that the Biological Assessment and the Biological Opinion were not included in the SSFL Area IV Draft EIS nor made available during the Draft EIS process, nor made available during the Draft EIS process, and therefore were unavailable for review. As a consequence, commenters were concerned that the Biological Opinion has not been subjected to public scrutiny or comment. Another commenter stated that not having the Biological Opinion in the SSFL Area IV Draft EIS did not allow an opportunity for public comment, and was thus a violation of NEPA.

Response: The lack of public review of the Biological Assessment or

Biological Opinion is not an issue under NEPA. DOE did not violate NEPA because of the lack of public review of the Biological Assessment or Biological Opinion. The Biological Assessment and Biological Opinion are required by the Endangered Species Act and USFWS regulations. The Biological Assessment is prepared by the project proponent for use by the USFWS in preparing the Biological Opinion. Nevertheless, the content of the Biological Assessment formed the basis of Section 3.5, Biological Resources (Affected Environment—baseline conditions) and Section 4.5, Biological Resources (Environmental Consequences—impact assessment) that were included in the SSFL Area IV Draft EIS. The exemption process for protection of endangered species that USFWS used in formulating its Biological Opinion was described in the SSFL Area IV Draft EIS (page 2–18) and therefore, was available for comment. It remained the same process as is analyzed in the SSFL Area IV Final EIS. Because the Biological Opinion is a USFWS document, its content and references are within the purview of the USFWS. The County of Los Angeles had requested that the SSFL Area IV Draft EIS be recirculated after completion of the Biological Opinion for additional public review. DOE did not recirculate the SSFL Area IV Draft EIS. Data from the USFWS Biological Opinion was integrated into this SSFL Area IV Final EIS, (for example, used to refine the extent of the areas in which the exemption process would be applied).

Topic G—Woolsey Fire Impact on the Braunton's Milk-vetch: Commenters made a number of observations regarding the Braunton's milk-vetch with respect to the Woolsey Fire. They noted that the fire burned a portion of Area IV that is identified as primary habitat for Braunton's milk-vetch. A commenter also noted that Braunton's milk-vetch is the ''one endangered plant in Area IV and the NBZ. . . .'' Commenters expressed the belief that because the fire had burned the Braunton's milk-vetch habitat, that there was no longer a need for an exception to cleaning up contamination in that area.

Response: These comments reflect a misunderstanding of the southern California fire ecology and this species. The milk-vetch requires soil disturbance, either by fire or mechanical means, to germinate. It exists as a plant for about 5 to 7 years producing seeds that remain in the soil until the next disturbance. The last disturbance was EPA's 2010 survey of Area IV. Species germination following that disturbance is documented, but most of those plants had completed their life cycle by the time of the recent fire. Further, not all of the remaining plants were burned by the Woolsey fire. The plant also germinated following the 2005 Topanga fire as discussed on pages 3–79 of the SSFL Area IV Final EIS. DOE is engaged in monitoring of germination and the recovery of the burned area following the 2018 fire. In compliance with the Endangered Species Act and the AOC, it remains necessary and appropriate for DOE to protect the Braunton's milk-vetch habitat.

Topic H—Woolsey Fire: Commenters expressed concern that the Woolsey fire was not included in and accounted for in the SSFL Area IV Final EIS. Commenters noted that the fire occurred before the issuance of the SSFL Area IV Final EIS and stated that the effects of the fire could therefore, have been evaluated. Using maps from the SSFL Area IV Final EIS and the *DTSC Interim Summary Report of Woolsey Fire (https://bit.ly/2m2QZLc)* commenters included maps in their comments reflecting their understanding of the extent of the burned area within Area IV. Citing information from DOE provided in informational emails or news articles, commenters noted that DOE initially indicated that Area IV had not been affected by the fire and later stated that 80 percent of SSFL had been burned. Commenters also noted that significant portions of SSFL were burned and hypothesized that contamination was mobilized and winds likely moved contamination to new areas. Commenters also claimed as a result of this fire that the EIS is flawed in asserting that there is no public health risk from leaving contamination in place, because there is a potential for future fires to cause offsite releases. Commenters stated that regardless of the damage to the Braunton's milk-vetch habitat, the Final EIS should have discussed the effects of the fire on baseline conditions. Further, commenters indicated that DOE has not considered the impacts of the fire on its preferred alternatives and therefore no ROD can lawfully be based on the Final EIS.

Response: Because the fire burned a portion of SSFL, DOE understands that there is concern in communities near the site about the effects of the fire on the contamination on site and the analysis in the SSFL Area IV Final EIS. The fire did not burn any Area IV buildings or any locations, either in Area IV or the NBZ with elevated soil contamination, and none of the Area IV groundwater cleanup locations were affected. Subsequent to the fire, DOE prepared a separate technical report *http://www.ssflareaiveis.com* that evaluates the impacts of the fire on Area IV and the NBZ and whether the fire had any effect on the analyses and conclusions in the SSFL Area IV Final EIS. In that report, DOE corrects the location of the line showing the extent of the burned portion of Area IV. The report's conclusion is that the fire had no substantive effect on the analyses in the SSFL Area IV Final EIS or on the selection of the Preferred Alternative for buildings. Because the fire did not result in substantial changes and significant new information related to the buildings (DOE NEPA regulation 40 CFR part 1502, Section 1502.9), it was determined that there was no need to prepare a Supplemental EIS or Supplement Analysis. See Topic G for the effect of the fire on the Braunton's milk-vetch.

Regarding comments that the fire resulted in the release of contamination, DOE, Boeing, and the National Aeronautics and Space Administration performed air sampling during and following the fire and DTSC, EPA, and others conducted sampling immediately post-fire. As reported in the *DTSC Interim Summary Report of Woolsey Fire,* measurements and analyses indicate that no radioactive or hazardous materials associated with contamination of SSFL were released by the fire. These results are reasonably consistent with those reported following the 2005 Topanga fire as presented in Section 3.9 of the SSFL Area IV Final EIS.

Topic I—Risk Assessment Process: Commenters stated that the risk assessment presented in the SSFL Area IV Final EIS was new. A commenter also claimed that the process did not follow EPA guidance.

Response: The SSFL Area IV Final EIS includes risk assessments of onsite and offsite impacts. The risk assessment presented in Appendix G of the SSFL Area IV Final EIS evaluates potential impacts on the offsite public from implementation of the building demolition and soil remediation alternatives. This analysis was new in the SSFL Area IV Final EIS. It was added in response to comments on the Draft EIS requesting a quantitative analysis of offsite impacts.

Risk assessments of onsite impacts were not new in the SSFL Area IV Final EIS (Section 4.9.1 Draft EIS). Comments related to risk assessments as they concern onsite risks associated with soil remediation, including the comment regarding EPA guidance, are not addressed in this ROD; DOE will

address those comments in a future ROD for soil remediation.

Additional Topics: A number of additional topics related to the soil and groundwater remediation alternatives were identified in comments on the SSFL Area IV Final EIS. Commenters were concerned that the Preferred Alternative for soil remediation (an open space scenario based on a recreational user) was not one of the alternatives identified in the SSFL Area IV Draft EIS (January 2017) and had not been subject to public review and comment. Commenters took issue with how DOE incorporated Boeing's two Grant Deeds of Conservation Easement and Agreements (April and November 2017) and also were concerned that the alternative left large amounts of contaminated soil on site, and was inconsistent with the AOC. Commenters repeated claims that SSFL is extensively contaminated and were concerned that failing to clean soil to background would place the surrounding community at risk. Other commenters expressed support for a risk-based alternative for cleanup of Area IV and the NBZ. A commenter was concerned that the discussion of soil remediation actions does not include sufficient data or discussion to determine the elements of the Soil Remedial Action Implementation Plan (SRAIP) as required by the AOC. The commenter noted that the SSFL Area IV Final EIS fails to include sufficient information to address how DOE would conduct the remediation, the areas where soil remediation would occur, areas identified for biological and cultural exemptions, mitigation measures, and a schedule for implementation. Regarding DOE's Preferred Alternative for groundwater remediation, commenters were concerned that it would not adequately clean up groundwater and relied too much on natural attenuation.

Response: The focus of the additional topics summarized above is on the SSFL Area IV Final EIS discussion and analysis of soil and groundwater remediation. DOE is not making a decision regarding soil or groundwater remediation in this ROD. Consequently, DOE is deferring responses to these comments to a future ROD(s) announcing a decision on cleanup of soil and groundwater.

DOE Comment Review Conclusion

DOE has considered these comments and concludes that they do not present substantial changes to a proposal or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts within the meaning of 40 CFR 1502.9(c) and 10 CFR 1021.314(a) and therefore do not require preparation of a supplement analysis or a supplemental EIS.

Decision

DOE–EM has decided to implement the Building Removal Alternative, its Preferred Alternative for building demolition, as described in the SSFL Area IV Final EIS. Under this alternative, DOE–EM will prepare demolition/disposal plans for each building describing: (1) Processes for characterizing building materials for the presence of hazardous materials and radionuclides; (2) processes for collecting, handling, transporting, and disposing of debris containing hazardous materials and radionuclides; and (3) the identification of the facilities receiving the materials. The demolition/disposal plans will also describe the handling, transporting, and disposing of building debris in accordance with disposal facility waste acceptance criteria. Building demolition will be performed using standard mechanized equipment and transported using standard highway trucks. Demolition materials will be sampled for comparison with the waste acceptance criteria of the receiving facilities prior to or during building demolition. Some material will be containerized for transport. Following building removal DOE will prepare and implement plans for soil sampling beneath the building footprints. This will allow DOE to complete soil characterization and decision plans for soil and groundwater remediation.

DOE has prepared RCRA Closure Plans for the RMHF (3 buildings) and HWMF (2 buildings). DOE submitted the plans to DTSC for approval in October 2016. On August 13, 2018, DTSC announced the plans to be complete and initiated a public comment period. The public comment period ran from August 13, 2018, to October 12, 2018. The RCRA closure plans are also subject to review under the California Environmental Quality Act. In October 2017, DTSC released a draft Programmatic Environmental Impact Report describing cleanup actions for the entirety of SSFL. DOE will demolish and remove the RCRA-permitted buildings/structures at the RMHF and HWMF and clean up the sites to meet the requirements in the DTSC-approved closure plans.

In reaching this decision, DOE balanced the environmental information in the Final EIS, potential environmental impacts of building demolition and debris transportation, current and future mission needs, technical and security considerations, availability of resources, and public comments on the SSFL Area IV Draft and Final EIS. DOE no longer has a need for any of the buildings and by removing them DOE will facilitate accomplishment of its environmental management program initiatives. Some buildings still contain radionuclides imbedded in building material, and removal of the buildings with disposal of the radiological materials at a regulated facility provides long-term protection from the materials. The future land use of the Area IV property is open space/recreational, and removal of the buildings is consistent with that future land use. Removal of the buildings also allows for access to soil for final soil sampling. Building demolition and debris transportation can be conducted in a manner that is protective of the local Area IV environment and populations along the transport route. Implementing the Preferred Alternative will allow DOE to continue its progress of cleaning up legacy nuclear research properties.

Mitigation Measures

Building demolition and debris transportation could result in airborne emissions of various pollutants in diesel exhaust, and potential pollutants including radionuclides, metals, and organic constituents during demolition activities. This decision adopts the mitigation and monitoring measures relevant to building demolition that are identified in Chapter 6 of the Final EIS, the Programmatic Agreement, and the Biological Opinion. Practicable means to avoid or minimize environmental harm from the selected alternative for building demolition have been, or will be, adopted. Prior to building demolition, DOE will prepare a mitigation and monitoring plan that will address how air emissions be will minimized. Diesel emissions will be controlled through using demolition equipment and highway trucks fitted with pollution control equipment maintained to manufacturer specifications. Particulate emissions during building demolition will be controlled using best available control measures including water sprays. Toxic chemicals and radionuclides found in debris will be packaged to prevent releases during transportation. Occupational safety risks to workers will be minimized by adherence to Federal and state occupational safety laws, and DOE requirements, regulations, and orders. Workers will also be protected by use of engineering and administrative controls. Emergency preparedness will also include an

Accident Preparedness Program to address protection of the public during the transportation of building materials. Storm water control best management practices will be implemented to prevent surface water runoff from demolition sites.

Signed at Washington, DC, on September 23, 2019.

William I. White,

Senior Advisor for Environmental Management to the Under Secretary for Science.

[FR Doc. 2019–21013 Filed 9–26–19; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9047–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa/*.

Weekly receipt of Environmental Impact Statements

Filed 09/16/2019 10 a.m. ET Through 09/23/2019 10 a.m. ET

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20190231, Draft, HCIDLA, CA, Rose Hill Courts Redevelopment Project, Comment Period Ends: 11/12/2019, Contact: Shelly Lo 213–808–8879

EIS No. 20190232, Final, NMFS, FL, Coral Habitat Areas Considered for Habitat Areas of Particular Concern Designation in the Gulf of Mexico, Review Period Ends: 10/28/2019, Contact: Lauren M. Waters 727–524–5305

EIS No. 20190233, Final, BLM, CA, Desert Quartzite Solar Project Final Plan Amendment/Environmental Impact Statement/Environmental Impact Report, Review Period Ends: 10/28/2019, Contact: Brandon G. Anderson 951–697–5200

EIS No. 20190234, Final, USFS, WY, Invasive Plant Management Final Environmental Impact Statement for the Bridger-Teton National Forest, Review Period Ends: 11/12/2019, Contact: Chad Hayward 307–276–3375

EIS No. 20190235, Final, USFWS, WA, Long-Term Conservation Strategy for the Marbled Murrelet, Review Period Ends: 10/28/2019, Contact: Tim Romanski 360–753–5823

EIS No. 20190236, Final, USACE, TX, Lake Ralph Hall Regional Water Supply Reservoir Project, Review Period Ends: 10/28/2019, Contact: Chandler J. Peter 817–886–1736

Dated: September 23, 2019.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2019–20990 Filed 9–26–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0474]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments shall be submitted on or before November 26, 2019. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email: *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0474.

Title: Section 74.1263, Time of Operation.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for profit entities; not-for-profit institutions.

Number of Respondents and Responses: 110 respondents; 110 responses.

Estimated Time per Response: 0.5 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 55 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The information collection requirements contained in 47 CFR 74.1263(c) require licensees of FM translator or booster stations to notify the Commission of its intent to discontinue operations for 30 or more consecutive days. In addition, licensees must notify the Commission within 48 hours of the station's return to operation. The information collection requirements contained in 47 CFR Section 74.1263(d) require FM translator or booster station licensees to notify the Commission of its intent to discontinue operations permanently and to forward the station license to the FCC for cancellation.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–21019 Filed 9–26–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0568 and OMB 3060–1104]

Information Collections Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before October 28, 2019. If you anticipate that you will be submitting comments but find it difficult to do so with the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via email *Nicholas_A._Fraser@OMB.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–0568.

Title: Sections 76.970, 76.971, and 76.975, Commercial Leased Access Rates, Terms and Conditions, and Dispute Resolution.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Businesses or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 2,677 respondents; 6,879 responses.

Estimated Time per Response: 0.5 hours to 40 hours.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Third-party disclosure requirement.

Obligation to Respond: Mandatory; Required to obtain or retain benefits. The statutory authority for this information collection is contained in sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 532.

Total Annual Burden: 17,131 hours.

Total Annual Cost: $118,000.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On June 7, 2019, in document FCC 19–52, the Commission released a Report and Order and Second Further Notice of Proposed Rulemaking updating its leased access rules as part of its Modernization of Media Regulation Initiative.

The information collection requirements for this collection, some of which were revised (Sections 76.970(h) and 76.975(e)) by FCC 19–52, are contained in the following rule sections:

47 CFR 76.970(h) requires cable operators to provide prospective leased access programmers with the following information within 30 calendar days of the date on which a bona fide request for leased access information is made, provided that the programmer has remitted any application fee that the cable system operator requires up to a maximum of $100 per system-specific bona fide request (for systems subject to small system relief, cable operators are required to provide the following information within 45 calendar days of a bona fide request):

(a) How much of the cable operator's leased access set-aside capacity is available;

(b) a complete schedule of the operator's full-time leased access rates;

(c) rates associated with technical and studio costs; and

(d) if specifically requested, a sample leased access contract.

Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:

(a) The desired length of a contract term;

(b) the anticipated commencement date for carriage; and

(c) the nature of the programming.

All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator. Operators must maintain supporting documentation to justify scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

Cable system operators must disclose on their own websites, or through alternate means if they do not have their own websites, a contact name or title, telephone number, and email address for the person responsible for responding to requests for information about leased access channels.

47 CFR 76.971 requires cable operators to provide billing and collection services to leased access programmers unless they can demonstrate the existence of third party billing and collection services which, in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered to comparable non-leased access programmers.

47 CFR 76.975(b) allows any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the relevant provisions of the statute or the implementing regulations to file a petition for relief with the Commission. Persons alleging that a cable operator's leased access rate is unreasonable must receive a determination of the cable operator's maximum permitted rate from an independent accountant prior to filing a petition. If parties cannot agree on a mutually acceptable accountant within five business days of the programmer's request for a review, they must each select an independent accountant on the sixth business day. These two accountants will then have five business days to select a third independent accountant to perform the review. To account for their more limited resources, operators of systems entitled to small system relief have 14 business days to select an independent accountant when no agreement can be reached.

47 CFR 76.975(c) requires that petitioners attach a copy of the final accountant's report to their petition where the petition is based on allegations that a cable operator's leased access rates are unreasonable.

47 CFR 76.975(e) provides that the cable operator or other respondent will have 30 days from service of the petition to file an answer. If a leased access rate is disputed, the answer must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after an answer is submitted, the staff finds a prima facie violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding. Replies to answers must be filed within fifteen (15) days after submission of the answer.

The Commission has determined that there is some duplication in collections 3060–0568 and 3060–0569. Therefore, we are also consolidating collection 3060–0569 into 3060–0568. The Commission intends to discontinue collection 3060–0569 once the consolidation has been approved by OMB.

OMB Control Number: 3060–1104.

Title: Section 73.682(d), DTV Transmission and Program System and Information Protocol (''PSIP'') Standards.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not for-profit institutions.

Number of Respondents and Responses: 1,812 respondents and 1,812 responses.

Estimated Hours per Response: 0.50 hours.

Frequency of Response: Third party disclosure requirement; weekly reporting requirement.

Total Annual Burden: 47,112 hours.

Total Annual Cost: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 309 and 337 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: Confidentiality is not required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 73.682(d) of the Commission's rules incorporates by reference the Advanced Television Systems Committee, Inc. (''ATSC'') Program System and Information Protocol (''PSIP'') standard ''A/65C.'' PSIP data is transmitted along with a TV broadcast station's digital signal and provides viewers (via their DTV receivers) with information about the station and what is being broadcast, such as program information. The Commission has recognized the utility that the ATSC PSIP standard offers for both broadcasters and consumers (or viewers) of digital television (''DTV'').

ATSC PSIP standard A/65C requires broadcasters to provide detailed programming information when transmitting their broadcast signal. This standard enhances consumers' viewing experience by providing detailed information about digital channels and programs, such as how to find a program's closed captions, multiple streams and V-chip information. This standard requires broadcasters to populate the Event Information Tables (''EITs'') (or program guide) with accurate information about each event (or program) and to update the EIT if more accurate information becomes available. The previous ATSC PSIP standard A/65–B did not require broadcasters to provide such detailed programming information but only general information.

Federal Communications Commission.

Marlene Dortch,

Secretary. Office of the Secretary.

[FR Doc. 2019–21017 Filed 9–26–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Open Commission Meeting, Thursday, September 26, 2019

September 19, 2019.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, September 26, 2019, which is scheduled to commence at 10:30 a.m. in Room TW–C305, at 445 12th Street SW, Washington, DC

Item number	Bureau	Subject
1	Wireline Competition	*Title:* The Uniendo a Puerto Rico Fund and the Connect USVI Fund (WC Docket No. 18–143); Connect America Fund (WC Docket No. 10–90); and ETC Annual Reports and Certifications (WC Docket No. 14–58). *Summary:* The Commission will consider a Report and Order that would allocate $950 million in fixed and mobile high-cost universal service support for Stage 2 of the Uniendo a Puerto Rico Fund and the Connect USVI Fund to expand, improve, and harden communications networks in Puerto Rico and the U.S. Virgin Islands. The Commission will also consider an Order on Reconsideration that would dispose of two petitions related to Uniendo a Puerto Rico Fund and Connect USVI Fund advance support and Stage 1 support.

Item number	Bureau	Subject
2	Wireline Competition	*Title:* Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage (WC Docket No. 18–155). *Summary:* The Commission will consider a Report and Order and Modification of Section 214 Authorizations that would adopt reforms to eliminate wasteful access arbitrage schemes and promote the efficient use of the nation's communications networks.
3	Wireless Tele–Communications and Office of Economics & Analytics.	*Title:*Auction of Priority Access Licenses for the 3550–3650 MHz Band; Comment Sought on Competitive Bidding Procedures for Auction 105; Bidding in Auction 105 Scheduled to Begin June 25, 2020 (AU Docket No. 19–244). *Summary:* The Commission will consider a Public Notice that would seek comment on procedures to be used for Auction 105, the auction of Priority Access Licenses (PALs) in the 3550–3650 MHz band.
4	Media	*Title:* Amendment of Section 73.3580 of the Commission's Rules Regarding Public Notice of the Filing of Applications (MB Docket No. 17–264); Modernization of Media Regulation Initiative (MB Docket No. 17–105); and Revision of the Public Notice Requirements of Section 73.3580 (MB Docket No. 05–6). *Summary:* The Commission will consider a Further Notice of Proposed Rulemaking that would propose to modernize and simplify the written and on-air public notices broadcasters must provide upon the filing of certain applications.
5	International	*Title:* Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service (IB Docket No. 06–160). *Summary:* The Commission will consider a Report and Order that would align the Direct Broadcast Satellite licensing procedures with those of the geostationary orbit fixed-satellite service satellites.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted but may be impossible to fill. Send an email to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Additional information concerning this meeting may be obtained from the Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.*

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2019–21022 Filed 9–26–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of Intent To Terminate Receiverships

Notice is hereby given that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institutions listed below, intends to terminate its receivership for said institutions.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIPS

Fund	Receivership name	City	State	Date of appointment of receiver
10098	First State Bank	Sarasota	FL	08/07/2009
10099	Community National Bank Of Sarasota County	Venice	FL	08/07/2009
10107	Ebank	Atlanta	GA	08/21/2009
10136	Bank USA, N.A.	Phoenix	AZ	10/30/2009
10137	Community Bank Of Lemont	Lemont	IL	10/30/2009
10138	North Houston Bank	Houston	TX	10/30/2009
10141	Citizens National Bank	Teague	TX	10/30/2009
10145	United Security Bank	Sparta	GA	11/06/2009
10152	The Buckhead Community Bank	Atlanta	GA	12/04/2009
10167	First Federal Bank Of California	Los Angeles	CA	12/18/2009
10502	Valley Bank	Moline	IL	06/20/2014
10512	Capitol City Bank & Trust Company	Atlanta	GA	02/13/2015
10514	Edgebrook Bank	Chicago	IL	05/08/2015

The liquidation of the assets for each receivership has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receiverships will serve no useful purpose. Consequently, notice is given that the receiverships shall be terminated, to be effective no sooner than thirty days after the date of this notice. If any person wishes to comment concerning the termination of any of the receiverships, such comment must be made in writing, identify the receivership to which the comment pertains, and be sent within thirty days of the date of this notice to:

Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34.6, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of the above-mentioned receiverships will be considered which are not sent within this time frame.

Authority: 12 U.S.C. 1819.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 24, 2019.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–20999 Filed 9–26–19; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice.

SUMMARY: The FTC plans to ask the Office of Management and Budget (OMB) to extend for an additional three years the current Paperwork Reduction Act (PRA) clearance for information collection requirements contained in the FTC's portion of the information collection requirements contained in the Consumer Financial Protection Bureau's Regulation N (the Mortgage Acts and Practices—Advertising Rule). The FTC generally shares enforcement of Regulation N with the Consumer Financial Protection Bureau (''CFPB''). The current clearance expires on January 31, 2020.

DATES: Comments must be received on or before November 26, 2019.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Regulation N; PRA Comment: FTC File No. P072108'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Carole L. Reynolds, Attorney, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, (202) 326–3230.

SUPPLEMENTARY INFORMATION:

Proposed Information Collection Activities

Under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520, federal agencies must get OMB approval for each collection of information they conduct, sponsor, or require. ''Collection of information'' means agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the FTC's existing PRA clearance for the information collection requirements associated with the CFPB's Regulation N (Mortgage Acts and Practices—Advertising), 12 CFR 1014.[1] The FTC and the CFPB generally share enforcement authority for Regulation N and thus the CFPB has incorporated into its recently approved burden estimates for Regulation N one half of its burden estimates.

Regulation N requires covered persons to retain: (1) Copies of materially different commercial communications and related materials, regarding any term of any mortgage credit product, that the person made or disseminated during the relevant time period; (2) documents describing or evidencing all mortgage credit products available to consumers during the relevant time period; and (3) documents describing or evidencing all additional products or services (such as credit insurance or credit disability insurance) that are or may be offered or provided with the mortgage credit products available to consumers during the relevant time period.[2] A failure to keep such records would be an independent violation of the Rule. Regulation N's recordkeeping requirements constitute a ''collection of information'' for purposes of the PRA.[3] The Rule does not impose a disclosure requirement.

Commission staff believes the recordkeeping requirements pertain to records that are usual and customary and kept in the ordinary course of business for many covered persons, such as mortgage brokers, lenders, and servicers; real estate brokers and agents; home builders, and advertising agencies.[4] As to these persons, the retention of these documents does not constitute a ''collection of information,'' as defined by OMB's regulations that implement the PRA.[5] Certain other covered persons such as lead generators and rate aggregators may not currently maintain these records in the ordinary course of business.[6] Thus, the recordkeeping requirements for those persons would constitute a ''collection of information.''

The information retained under the Rule's recordkeeping requirements is used by the Commission to substantiate compliance with the Rule and may also provide a basis for the Commission to bring an enforcement action. Without

[1] The OMB Control Number is 3085–0156 and the existing clearance expires on January 31, 2020. As background, the FTC's Mortgage Acts and Practices—Advertising Rule, 16 CFR 321, was issued by the FTC in July 2011, 76 FR 43826 (July 22, 2011), and became effective on August 19, 2011. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) transferred to the CFPB the Commission's rulemaking authority under section 626 of the 2009 Omnibus Appropriations Act on July 21, 2011. As a result, the CFPB republished the Mortgage Acts and Practices—Advertising Rule, at 12 CFR 1014, which became effective December 30, 2011. 76 FR 78130. Thereafter, the Commission rescinded its Rule, which was effective on April 13, 2012. 77 FR 22200. Under the Dodd-Frank Act, the FTC retains its authority to bring law enforcement actions to enforce Regulation N.

[2] Section 1014.5 of the Rule sets forth the recordkeeping requirements.

[3] *See* 44 U.S.C. 3502(3)(A).

[4] Some covered persons, particularly mortgage brokers and lenders, are subject to state recordkeeping requirements for mortgage advertisements. *See, e.g.,* Fla. Stat. 494.00165 (2019); Ind. Code Ann. 23–2–5–18 (2018); Kan. Stat. Ann. 9–2208 (2018); Minn. Stat. 58.14 (2018); Wash. Rev. Code 19.146.060 (2018). Many mortgage brokers, lenders (including finance companies), and servicers are subject to state recordkeeping requirements for mortgage transactions and related documents, and these may include descriptions of mortgage credit products. *See, e.g.,* Mich. Comp. Laws Serv. 445.1671 (2019); N.Y. Banking Law 597 (Consol. 2018); Tenn. Code Ann. 45–13–206 (2019). Lenders and mortgagees approved by the Federal Housing Administration must retain copies of all print and electronic advertisements and promotional materials for a period of two years from the date the materials are circulated or used to advertise. *See* 24 CFR 202. Various other entities, such as real estate brokers and agents, home builders, and advertising agencies can be indirectly covered by state recordkeeping requirements for mortgage advertisements and/or retain ads to demonstrate compliance with state law. *See, e.g.,* 76 Del. Laws, c. 421, § 1.

[5] *See* 44 U.S.C. 3502(3)(A); 5 CFR 1320.3(b)(2).

[6] *See, e.g., United States* v. *Intermundo Media, LLC, dba Delta Prime Refinance,* No. 1:14–cv–2529 (D. Colo. filed Sept. 12, 2014) (D. Colo. Oct.7, 2014) (stipulated order for permanent injunction and civil penalty judgment), *available at https://www.ftc.gov/system/files/documents/cases/140912deltaprimestiporder.pdf.* The complaint charged this lead generator with numerous violations of Regulation N, including recordkeeping, and of other federal mortgage advertising mandates.

the required records, it would be difficult either to ensure that entities are complying with the Rule's requirements or to bring enforcement actions based on violations of the Rule.

Burden Statement

Estimated total annual hours burden: 1,500 hours (for the FTC).

Commission staff estimates that the Rule's recordkeeping requirements will affect approximately 1,000 persons [7] who would not otherwise retain such records in the ordinary course of business. As noted, this estimate includes lead generators and rate aggregators that may provide commercial communications regarding mortgage credit product terms.[8] Although the Commission cannot estimate with precision the time required to gather and file the required records, it is reasonable to assume that covered persons will each spend approximately 3 hours per year to do these tasks, for a total of 3,000 hours (1,000 persons × 3 hours). Since the FTC generally shares enforcement authority with the CFPB for Regulation N, the FTC's allotted PRA burden is 1,500 annual hours.[9]

Estimated labor costs: $24,375.

Commission staff derived labor costs by applying appropriate hourly cost figures to the burden hours described above. Staff further assumes that office support file clerks will handle the Rule's record retention requirements at an hourly rate of $16.25.[10] Based upon the above estimates and assumptions, the total annual labor cost to retain and file documents, for the FTC's allotted burden, is $24,375 (1,500 hours × $16.25 per hour).

Absent information to the contrary, staff anticipates that existing storage media and equipment that covered persons use in the ordinary course of business will satisfactorily accommodate incremental recordkeeping under the Rule. Accordingly, staff does not anticipate that the Rule will require any new capital or other non-labor expenditures.

Request for Comments

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond. All comments must be received on or before November 26, 2019.

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before November 26, 2019. Write ''Regulation N; PRA Comment: FTC File No. P072108'' on your comment. Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it through the *https://www.regulations.gov* website by following the instructions on the web-based form. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the *https://www.regulations.gov* website. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on *www.regulations.gov.*

If you file your comment on paper, write ''Regulation N; PRA Comment: FTC File No. P072108'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC website at *www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.[11] Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *www.regulations.gov,* we cannot redact or remove your comment unless

[7] No general source provides precise numbers of the various categories of covered persons. Commission staff, therefore, has used the following sources and inputs to arrive at this estimated total: 1,000 lead generators and rate aggregators, based on staff's administrative experience.

[8] The Commission does not know what percentage of these persons are, in fact, engaged in covered conduct under the Rule, *i.e.,* providing commercial communications about mortgage credit product terms. For purposes of these estimates, the Commission has assumed all of them are covered by the recordkeeping provisions and are not retaining these records in the ordinary course of business.

[9] This estimate reflects the same burden compared to prior FTC estimates, because many entities can be indirectly covered by state recordkeeping requirements for mortgage advertisements and/or retain ads to demonstrate compliance with state law, as discussed above. *See supra* note 4. The FTC notes that the CFPB's recent information collection filing with OMB for Regulation N also reflects the view that, in large part, most entities either retain records in the ordinary course of business or to demonstrate compliance with other laws. See generally Bureau of Consumer Financial Protection, Agency Information Collection Activities: Submission for OMB Review; Comment Review, 83 FR 61376 (Nov. 29, 2018), available at *https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25973.pdf.*

[10] This estimate is based on mean hourly wages for office support file clerks provided by the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, Occupational Employment and Wages—May 2018, table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation''), released March 29, 2019, *available at http://www.bls.gov/news.release/pdf/ocwage.pdf. See* FTC Rule 4.9(c).

[11] *See* FTC Rule 4.9(c).

you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 26, 2019. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *https://www.ftc.gov/site-information/privacy-policy.*

Heather Hippsley,

Deputy General Counsel.

[FR Doc. 2019–20985 Filed 9–26–19; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (FTC).

ACTION: Notice and request for comment.

SUMMARY: The FTC requests that the Office of Management and Budget (OMB) extend for three years the current PRA clearance for information collection requirements contained in the Contact Lens Rule (Rule). That clearance expires on October 31, 2019.

DATES: Comments must be received by October 28, 2019.

ADDRESSES: Comments in response to this notice should be submitted to the OMB Desk Officer for the Federal Trade Commission within 30 days of this notice. You may submit comments using any of the following methods:

Electronic: Write ''Contact Lens Rule: PRA Comment, P072108,'' on your comment and file your comment online at *https://www.regulations.gov,* by following the instructions on the web-based form.

Email: MBX.OMB.OIRA.Submission@OMB.eop.gov.

Fax: (202) 395–5806.

Mail: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Paul Spelman, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Drop CC–10528, Washington, DC 20580, at (202) 326–2487.

SUPPLEMENTARY INFORMATION:

Title: Contact Lens Rule (Rule), 16 CFR part 315.

OMB Control Number: 3084–0127.

Type of Review: Extension of a currently approved collection.

Abstract: The Rule was promulgated by the FTC pursuant to the Fairness to Contact Lens Consumers Act (FCLCA), Public Law 108–164 (Dec. 6, 2003), which was enacted to enable consumers to purchase contact lenses from the seller of their choice. The Rule became effective on August 2, 2004. As mandated by the FCLCA, the Rule requires the release and verification of contact lens prescriptions which are generally valid for one year and contains recordkeeping requirements applying to both prescribers and sellers of contact lenses.

Specifically, the Rule requires that prescribers provide a copy of the prescription to the consumer upon the completion of a contact lens fitting, even if the patient does not request it, and verify or provide prescriptions to authorized third parties. The Rule also mandates that a contact lens seller may sell contact lenses only in accordance with a prescription that the seller either: (a) Has received from the patient or prescriber; or (b) has verified through direct communication with the prescriber. In addition, the Rule imposes recordkeeping requirements on contact lens prescribers and sellers. For example, the Rule requires prescribers to document in their patients' records the medical reasons for setting a contact lens prescription expiration date of less than one year. The Rule requires contact lens sellers to maintain records for three years of all direct communications involved in obtaining verification of a contact lens prescription, as well as prescriptions, or copies thereof, which they receive directly from customers or prescribers.

The information retained under the Rule's recordkeeping requirements is used by the Commission to substantiate compliance with the Rule and may also provide a basis for the Commission to bring an enforcement action. Without the required records, it would be difficult either to ensure that entities are complying with the Rule's requirements or to bring enforcement actions based on violations of the Rule.

On July 5, 2019, the FTC sought comment on the information collection requirements associated with the Rule. 84 FR 32170. The FTC received no comments that were germane to the issues that the agency sought comment on pursuant to the Paperwork Reduction Act (PRA) renewal request. Pursuant to OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule. For more details about the Rule requirements and the basis for the calculations summarized below, see 84 FR 32170.

Likely Respondents: Contact lens prescribers and contact lens sellers.

Estimated Annual Hours Burden: 2,104,050 hours (derived from 1,045,650 hours + 1,058,400 hours).

- *Contact Lens Prescribers:* 750,000 hours (45 million contact lens wearers × 1 minute per prescription/60 minutes) + 295,650 hours (3,547,800 verification requests × 3 minutes/60 minutes) = 1,045,650 hours
- *Contact Lens Sellers:* 985,500 hours (11,826,000 orders × 5 minutes/60 minutes) + 72,900 burden hours (4,374,000 orders × 1 minute/60 minutes) = 1,058,400 hours

Estimated Annual Cost Burden: $84,548,448, which is derived from ($57.68 × 888,802.5 optometrist hours) + ($98.02 × 156,847.5 ophthalmologist hours) + ($16.92 × 1,058,400 office clerk hours).[1]

Request for Comment

Your comment—including your name and your state—will be placed on the public record of this proceeding at the *https://www.regulations.gov* website. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or

[1] The hourly wage rates for sales and related workers are based on mean hourly wages found at *https://www.bls.gov/news.release/ocwage.htm* (''Occupational Employment and Wages–May 2018,'' U.S. Department of Labor, released March 2019, Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2018'').

confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Heather Hippsley,

Deputy General Counsel.

[FR Doc. 2019–20963 Filed 9–26–19; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (''PRA''), the Federal Trade Commission (''FTC'' or ''Commission'') is seeking public comment on its proposal to extend for an additional three years the Office of Management and Budget clearance for information collection requirements of its Affiliate Marketing Rule, which applies to certain motor vehicle dealers, and its shared enforcement with the Consumer Financial Protection Bureau (''CFPB'') of the provisions (subpart C) of the CFPB's Regulation V regarding other entities (''CFPB Rule''). The current clearance expires on January 31, 2020.

DATES: Comments must be filed by November 26, 2019.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P0105411'' on your comment, and file your comment online at *https://www.regulations.gov,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Katherine McCarron, Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room CC–8232, Washington, DC 20580, (202) 326–2333.

SUPPLEMENTARY INFORMATION: The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') was enacted on July 21, 2010.[1] The Dodd-Frank Act transferred to the CFPB most of the FTC's rulemaking authority for the Affiliate Marketing provisions of the Fair Credit Reporting Act (''FCRA'').[2] The FTC retained rulemaking authority for its Affiliate Marketing Rule (16 CFR 680) solely for motor vehicle dealers described in section 1029(a) of the Dodd-Frank Act as predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[3] Additionally, the FTC shares enforcement authority with the CFPB for provisions of Regulation V subpart C (12 CFR 1022.21) that apply to entities other than those specified above.

As mandated by section 214 of the Fair and Accurate Credit Transactions Act (''FACT Act''), Public Law 108–159 (Dec. 6, 2003), the Affiliate Marketing Rule (''Rule'') requires covered entities to provide consumers with notice and an opportunity to opt out of the use of certain information before sending marketing solicitations. The Rule generally provides that, if a company communicates certain information about a consumer (eligibility information) to an affiliate, the affiliate may not use it to make or send solicitations to the consumer unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and does not opt out.

To minimize compliance costs and burdens for entities, particularly any small businesses that may be affected, the Rule contains model disclosures and opt-out notices that may be used to satisfy the statutory requirements. The Rule also gives covered entities flexibility to satisfy the notice and opt-out requirement. Covered entities may send the consumer a free-standing opt-out notice to satisfy the Rule's requirements or add the opt-out notice to privacy notices already provided to consumers, such as those provided in accordance with the provisions of Title V, subtitle A of the Gramm Leach Bliley Act (''GLBA'').[4] As a result, the time necessary to prepare or incorporate an opt-out notice is likely to be minimal because covered entities may either use the model disclosure verbatim or base their own disclosures upon it. Moreover, verbatim adoption of the model notice does not constitute a PRA ''collection of information.'' [5] The Rule also provides that affiliated companies may send a joint disclosure to consumers, thereby eliminating the need for each affiliate to send a separate disclosure. Staff anticipates that affiliated entities will choose to send a joint notice, which will reduce the number of notices required under the Rule.

Burden Statement

Under the PRA, 44 U.S.C. 3501–3521, the FTC is requesting that OMB renew the clearance (OMB Control Number 3084–0131) for the information collection burden associated with the Rule.[6] Staff estimates that there are approximately 54,753 franchise/new car and independent/used car dealers in the U.S.[7] Applying an estimated rate of affiliation of 16.75%, staff estimates that there are approximately 9,171 motor vehicle dealerships in affiliated families that may be subject to the Rule's affiliate sharing obligations. Staff further estimates an average of five businesses per family or affiliated relationship, and anticipates that affiliated entities will choose to send a joint notice as permitted by the Rule. Therefore, staff estimates that approximately 1,834 business families would be subject to the Rule.

Staff assumes that all or nearly all motor vehicles subject to the Rule's provisions are also subject to the Commission's Privacy of Consumer Financial Information Rule under the Gramm-Leach-Bliley Act (16 CFR 313) (''Privacy Rule''). Entities that are subject to the Commission's GLBA

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] 15 U.S.C. 1681 *et seq.*

[3] *See* Dodd-Frank Act, at section 1029 (a), (c).

[4] 15 U.S.C. 6801 *et seq.*

[5] ''The public disclosure of information originally supplied by the Federal government to the recipient for purpose of disclosure to the public is not included within [the definition of collection of information].'' 5 CFR 1320.3(c)(2).

[6] While the FTC shares enforcement authority with the Federal Reserve System, Commodity Futures Trading Commission, National Credit Union Administration, Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, for the Consumer Financial Protection Bureau's counterpart affiliate sharing rule, Regulation V (Subpart C), 12 CFR 1022.21, the CFPB has assumed 95% of the burden associated with its affiliate sharing rule. *See* Consumer Financial Protection Bureau, *Agency Information Collection Activities: Submission for OMB Review; Comment Request,* 82 FR 32,686 (2017); CFPB Supporting Statement, *Fair Credit Reporting Act (Regulation V) 12 CFR 1022,* OMB Control Number: 3170–0002 (2017). In addition, the CFPB has estimated that the burden associated with Regulation V's affiliate sharing provisions is *de minimis.*

[7] This figure is based on estimates by the National Automobile Dealers Association and the National Independent Automobile Dealers Association. *See, e.g., NADA Data 2018: Annual Report; NIADA.com.*

privacy notice regulation already provide privacy notices to their customers. Absent an exception, financial institutions must provide an initial privacy notice at the time the customer relationship is established and then annually so long as the relationship continues. 15 U.S.C. 6803. Staff's estimates assume that in all or nearly all cases covered institutions will choose to incorporate the affiliate marketing opt-out notice into the initial and annual GLBA privacy notices. In 2015, Congress, as part of the FAST Act, amended the GLBA to provide an exception under which financial institutions that meet certain conditions are not required to provide annual notices to customers.[8] Staff seeks comment on how the use of this exception by institutions that are required to provide an affiliate marketing notice will impact the burden estimates for these entities. Institutions that claim the FAST Act exemption and forego sending required annual privacy notices in some years will nonetheless be required to send a separate affiliate marketing notice to comply with their obligations under the Rule.

Staff estimates that the 1,834 covered motor vehicle business families will spend on average about 5 hours per year to comply with the Affiliate Sharing Rule beyond their separate obligations under the Privacy Rule, yielding a total annual hours burden of 9,170 hours. Staff's estimates take into account the time necessary to determine compliance obligations; create the notice and opt-out, in either paper or electronic form; and disseminate the notice and opt-out. Staff's estimates presume that the availability of model disclosures and opt-out notices will simplify the compliance review and implementation processes, thereby significantly reducing the compliance burden.

Staff estimates the associated labor cost by adding the hourly mean private sector wages for managerial, technical, and clerical work and multiplying that sum by the estimated number of hours. The private sector hourly wages for these classifications are $50.11, $41.51, and $17.19, respectively.[9] Estimated hours spent for each category are 2, 2, and 1, respectively. Multiplying each occupation's hourly wage by the associated time estimate, yields the annual labor cost burden per respondent which is then multiplied by the estimated number of respondents to determine the cumulative annual labor cost burden: $367,588 per year.

Hourly wage and labor category	Hours per respondent	Total hourly labor cost	Number of respondents	Approx. total annual labor costs
$50.11 Management Employees	2	$100.22	1,834	$183,803
41.51 Technical Staff	2	83.02	.....	152,259
17.19 Clerical Workers	1	17.19	.....	31,526
	.....	.....	.....	367,588

Because the FACT Act and the Rule contemplate that the affiliate marketing notice can be included in the GLBA notices, the capital and non-labor cost burden on regulated entities would be greatly reduced. Covered entities typically already provide notices to their customers so there are no new capital or non-labor costs, as the Affiliate Marketing notice may be consolidated into their annual privacy notice. Thus, Staff estimates that any capital or non-labor costs associated with compliance for these entities are *de minimis.*

Request for Comment

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invites comments on: (1) Whether the disclosure, recordkeeping, and reporting requirements are necessary, including whether the resulting information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and assumptions used are valid; (3) how to improve the quality, utility, and clarity of the disclosure requirements; and (4) how to minimize the burden of providing the required information to consumers. In addition, staff seeks comment on how the FAST Act exception that exempts certain institutions that are required to provide an affiliate marketing notice from sending annual privacy notices will impact the burden estimates for these entities.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before November 26, 2019. Write ''Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P0105411'' on your comment. Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it through the *https://www.regulations.gov* website by following the instructions on the web-based form provided. Your comment, including your name and your state—will be placed on the public record of this proceeding, including the *https://www.regulations.gov* website.

If you file your comment on paper, write ''Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P0105411'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610, Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other

[8] Fixing America's Surface Transportation Act (''FAST Act''), Public Law 114–94, 129 Stat. 1312, Section 75001 (Dec. 4, 2015) (amending 15 U.S.C. 6803 to exempt financial institutions from the annual notice requirement if they meet certain criteria, and if they have not changed their policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed in the most recent disclosure sent to consumers).

[9] The classifications used are ''Management Occupations'' for managerial employees, ''Computer and Mathematical Science Occupations'' for technical staff, and ''Office and Administrative Support'' for clerical workers. *See* OCCUPATIONAL EMPLOYMENT AND WAGES —MAY 2018, U.S. Department of Labor, released March 29, 2019, Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2018''): *http://www.bls.gov/news.release/ocwage.htm.*

state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 26, 2019. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Heather Hippsley,

Deputy General Counsel.

[FR Doc. 2019–20967 Filed 9–26–19; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[CFDA Number: 93.612]

Announcement of the Intent To Award an Emergency Single-Source Grant

AGENCY: Administration for Native Americans (ANA), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of intent to issue an emergency single-source award to 500 Sails, Inc. in Saipan, Commonweath of the Northern Mariana Islands.

SUMMARY: The ACF, ANA, Division of Program Operations (DPO) intends to award a grant of $106,638 to 500 Sails, Inc. in Saipan, Commonwealth of the Northern Mariana Islands. The purpose of the award is to support restoration of culturally significant sites and a digital storytelling project after the devastating effects of Typhoon Yutu in October, 2018.

DATES: The intended period of performance for this award is 09/30/2019 through 09/29/2020.

FOR FURTHER INFORMATION CONTACT: Carmelia Strickland, Director, Division of Program Operations, Administration for Native Americans, 330 C Street SW, Switzer Bldg. 4115, Washington, DC 20201. Telephone: 202–401–6741; Email: *Carmelia.Strickland@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: An emergency declaration by President Donald Trump was issued for the Commonwealth of the Northern Mariana Islands (CNMI) on October 27, 2018. In the spring of 2019, ANA's Pacific Basin Training and Technical Assistance Center performed an assessment of community needs that were not addressed by other federal agencies in response to the catastrophic storm. A report was prepared for ANA with a series of projects aiming to reduce the post-traumatic stress of 200 Chamorro and Carolinian community members through storytelling, and to repair and/or restore six culturally significant sites and two ANA project sites. Currently, the CNMI government is burdened with the reconstruction of homes and governmental infrastructure that were damaged by Typhoon Yutu. The award will be carried out by 500 Sails, Inc., a non-profit organization located in Saipan, CNMI, to serve as the grants administrator and project coordinator for the proposed projects. 500 Sails, Inc. is a current ANA grantee with an ending 3-year project period and has successfully administered an ANA award. They have the organizational capacity, including accounting and data management, as well as qualified staff in place. In addition, the organization has the community connections, partnerships, and experience to successfully implement the award. The Board of Directors for 500 Sails, Inc has included a board resolution in support of the application and the 9 proposed projects. The activities within the project are designed to incorporate cultural ways of supporting the recovery after Typhoon Yutu. The proposed projects include the cultural component that no other federal agency could provide, and it allows for a holistic approach to the recovery. Most of the projects include volunteer opportunities for community members to help in the rebuilding of their community. The application will be awarded in compliance with HHS policy for emergency awards, including after an objective review has been conducted.

Statutory Authority: Section 803(a) of the Native American Programs Act of 1974 (NAPA), 42 U.S.C. 2991b.

Elizabeth Leo,

Senior Grants Policy Specialist, Division of Grants Policy, Office of Administration.

[FR Doc. 2019–20996 Filed 9–24–19; 11:15 am]

BILLING CODE 4184–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–6294]

Changes to Existing Medical Software Policies Resulting From Section 3060 of the 21st Century Cures Act; Guidance for Industry and Food and Drug Administration Staff; 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 final guidance entitled ''Changes to Existing Medical Software Policies Resulting From Section 3060 of the 21st Century Cures Act.'' This guidance provides clarity on FDA's current thinking regarding changes made by the 21st Century Cures Act (Cures Act) to the definition of a medical device and the resulting effect on guidances related to medical device software.

DATES: The announcement of the guidance is published in the **Federal Register** on September 27, 2019.

ADDRESSES: You may submit either electronic or written comments on Agency guidances 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–2017–D–6294 for ''Changes to Existing Medical Software Policies Resulting from Section 3060 of the 21st Century Cures Act; Guidance for Industry and Food and Drug Administration Staff.'' 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)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Changes to Existing Medical Software Policies Resulting from Section 3060 of the 21st Century Cures Act'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002; or 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 that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Bakul Patel, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5458, Silver Spring, MD 20993–0002, 301–796–5528; 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, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA has long regulated software that meets the definition of a device. Section 3060(a) of the Cures Act, enacted on December 13, 2016 (Pub. L. 114–255), amended the Federal Food, Drug, and Cosmetic Act (FD&C Act) to exclude certain software functions from the definition of device under section 201(h) of the FD&C Act (21 U.S.C. 321(h)). The software functions that are removed from the definition of device are described in section 520(o)(1) of the FD&C Act (21 U.S.C. 360j(o)(1)), and the intended uses of such software functions can be summarized as follows: (1) For administrative support of a healthcare facility, (2) for maintaining or encouraging a healthy lifestyle, (3) to serve as electronic patient records, (4) for transferring, storing, converting formats, or displaying data, or (5) providing certain types of clinical decision support to a healthcare provider unless interpreting or analyzing a clinical test or other device data.

This guidance provides FDA's current thinking regarding the amended device definition and the resulting effect the amended definition has on published FDA guidance, including the policies expressed in guidance about mobile medical applications; medical device data systems used for the electronic transfer, storage, display, or conversion of medical device data; medical image storage devices, used to store or retrieve medical images electronically; and general wellness products. This guidance focuses on the first four categories of software functions that are excluded from the device definition. FDA will address the fifth category in a separate guidance. Elsewhere in this

issue of the **Federal Register**, FDA is announcing the availability of the draft guidance entitled ''Clinical Decision Support Software'' to provide clarification of its interpretation of section 520(o)(1)(E) of the FD&C Act, which describes certain software functions intended to provide decision support for the diagnosis, treatment, prevention, cure, or mitigation of disease or other conditions. Section 520(o)(2) of the FD&C Act describes the regulation of a product with multiple functions, including at least one device function and at least one software function that is not a device. FDA intends to provide recommendations on the regulation of such products with multifunctionality in a separate guidance document.

FDA considered comments received on the draft guidance that appeared in the **Federal Register** of December 8, 2017 (82 FR 57991). FDA revised the guidance as appropriate in response to the comments. FDA has provided additional clarity that hardware intended to transfer, store, convert formats, and display medical device data and results remain devices, while software functions intended to transfer, store, convert formats, or display data are no longer devices if they meet the definition in 520(o)(1)(D) of the FD&C Act. The examples included in the draft of this guidance that described alarms, alerts, or flags have been removed from this guidance, because they are not excluded from the definition of device under section 520(o)(1)(D) of the FD&C Act in that these functions involve analysis or interpretation of laboratory test or other device data and results. These functions are addressed in section 520(o)(1)(E) of the FD&C Act, the regulation of which will be described in the separate ''Clinical Decision Support Software'' guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Changes to Existing Medical Software Policies Resulting from Section 3060 of the 21st Century Cures Act.'' 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.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov* or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics.* Persons unable to download an electronic copy of ''Changes to Existing Medical Software Policies Resulting from Section 3060 of the 21st Century Cures Act'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 17030 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the following FDA regulations have been approved by OMB as listed in the following table:

21 CFR part	Topic	OMB Control No.
807, subparts A through D	Establishment Registration And Device Listing	0910–0625
807, subpart E	Premarket Notification	0910–0120
800, 801, and 809	Medical Device Labeling Regulations	0910–0485
803	Medical Devices; Medical Device Reporting; Manufacturer Reporting, Importer Reporting, User Facility Reporting, Distributor Reporting.	0910–0437
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation	0910–0073

Dated: September 23, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–21001 Filed 9–26–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–6569]

Clinical Decision Support Software; Draft Guidance for Industry and Food and Drug Administration Staff; 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 the draft guidance entitled ''Clinical Decision Support Software.'' This guidance clarifies the types of clinical decision support (CDS) functions that do not meet the definition of a device as amended by the 21st Century Cures Act (Cures Act). This guidance describes a risk-based approach for regulatory oversight of CDS software functions that remain devices using the categories defined by the International Medical Device Regulators Forum (IMDRF) final document entitled ''Software as a Medical Device: Possible Framework for Risk Categorization and Corresponding Considerations.'' The guidance also provides clarity on the types of CDS software functions on which FDA intends to focus its regulatory oversight for health care providers, patients, and caregivers. This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by December 26, 2019 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–2017–D–6569 for ''Clinical Decision Support Software; Draft Guidance for Industry and Food and Drug Administration Staff.'' 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)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Clinical Decision Support Software; Draft Guidance for Industry and Food and Drug Administration Staff'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002; or 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; or 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 request.

FOR FURTHER INFORMATION CONTACT: Bakul Patel, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5458, Silver Spring, MD 20993–0002, 301–796–5528; 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, 240–402–7911; or Kristina Lauritsen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6162, Silver Spring, MD 20993–0002, 301–796–8936.

SUPPLEMENTARY INFORMATION:

I. Background

FDA has long regulated software that meets the definition of a device in section 201(h) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 321(h)), including software that is intended to provide decision support to health care professionals, patients, or caregivers for the diagnosis, treatment, prevention, cure, or mitigation of diseases or other conditions (often referred to as CDS software). Section 3060(a) of the Cures Act, enacted on December 13, 2016 (Pub. L. 114–255), amended section 520 of the FD&C Act (21 U.S.C. 360j) to exclude certain medical software functions, including certain decision support software, from the definition of device under section 201(h) of the FD&C Act.

This draft guidance provides clarity on the types of CDS software functions that do not meet the device definition (Non Device CDS). This draft guidance also describes a risk-based approach for regulatory oversight of CDS software functions that meet the device definition (Device CDS) using categories established by the IMDRF final document entitled ''Software as a Medical Device: Possible Framework for Risk Categorization and Corresponding Considerations.'' The purpose of this draft guidance is to identify the types of CDS software functions that: (1) Do not meet the definition of a device as amended by the Cures Act; (2) may meet the definition of a device but for which, at this time and based on our current understanding of the risk of these devices, FDA does not intend to enforce compliance with the applicable device requirements of the FD&C Act, including, but not limited to, premarket clearance and premarket approval requirements; and (3) meet the definition of a device and on which FDA intends to focus its regulatory oversight. This guidance also provides examples of device software functions that are not CDS and on which FDA intends to focus its regulatory oversight. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the final guidance entitled ''Changes to Existing Medical Software Policies Resulting From

Section 3060 of the 21st Century Cures Act'' to provide clarification of its interpretation of section 520(o)(1)(A)–(D) of the FD&C Act (21 U.S.C. 360j(o)(1)(A)–(D)), as added by the Cures Act, for certain medical software functions that are not medical devices, including software functions that are intended: (1) For administrative support of a health care facility, (2) for maintaining or encouraging a healthy lifestyle, (3) to serve as electronic patient records, or (4) for transferring, storing, converting formats, or displaying data. Section 520(o)(2) of the FD&C Act describes the regulation of a product with multiple functions, including at least one device function and at least one software function that is not a device. FDA intends to provide recommendations on the regulation of such products with multifunctionality in a separate guidance document.

On December 8, 2017, FDA announced in the **Federal Register** a draft guidance entitled ''Clinical and Patient Decision Support Software'' (82 FR 57987). FDA is issuing a revised draft guidance, now entitled ''Clinical Decision Support Software,'' after considering comments received on the draft guidance that issued December 8, 2017. This draft guidance provides FDA's risk-based policy for Device CDS software functions in response to comments received.

II. Significance of Guidance

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 ''Clinical Decision Support Software.'' 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.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products*. This guidance document is also available at *https://www.regulations.gov, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances,* or *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs*. Persons unable to download an electronic copy of ''Clinical Decision Support Software; Draft Guidance for Industry and Food and Drug Administration Staff'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1400062 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the following FDA regulations, guidance, and form have been approved by OMB as listed in the following table:

21 CFR part; guidance; or FDA form	Topic	OMB Control No.
807, subpart E	Premarket Notification	0910–0120
814, subparts A through E	Premarket Approval	0910–0231
814, subpart H	Humanitarian Device Exemption	0910–0332
812	Investigational Device Exemption	0910–0078
''De Novo Classification Process (Evaluation of Automatic Class III Designation)''.	De Novo Classification Process	0910–0844
800, 801, and 809	Medical Device Labeling Regulations	0910–0485
314	Applications for FDA Approval to Market a New Drug	0910–0001
601; Form FDA 356h	Biologics License; Application to Market a New Drug or Abbreviated New Drug or Biologic for Human Use—Form FDA 356h.	0910–0338

Dated: September 23, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–21000 Filed 9–26–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Therapeutic Approaches to Genetic Diseases Study Section.

Date: October 24, 2019.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.

Contact Person: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892, 301–827–7088, *methode.bacanamwo@nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Xenobiotic and Nutrient Disposition and Action Study Section.

Date: October 24–25, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2190, MSC, 7850 Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 23, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–20965 Filed 9–26–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Chris Kornak at 240–627–3705 or *Chris.Kornak@nih.gov.* Licensing information may be obtained by communicating with the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished information related to the invention.

SUPPLEMENTARY INFORMATION: Technology description follows:

Improvement of Broadly HIV-Neutralizing Antibodies; Anti-HIV–1 Antibody VRC01.23 for Prevention or Treatment of HIV Infection

Description of Technology:

Scientists at NIAID have developed broadly neutralizing antibodies (bNAbs) with enhanced neutralizing activity against HIV–1. Specifically, previously unknown gp120 interactions with a newly elucidated quaternary receptor (CD4)-binding site in the HIV–1 envelope have been discovered by engrafting the extended heavy-chain framework region 3 (FR3) loop of VRC03 onto several potent bNAbs (including VRC01, VRC07 and N6). The new antibodies show improved binding with CD4 by interacting with both binding sites and as a result show improved neutralization of various HIV–1 strains. Furthermore, they show reduced autoreactivity and, as a result, have prolonged *in vivo* half-life.

One of several antibodies that were developed using this technology is VRC01.23. It combines the VRC03 framework 3 alteration, with a G54W mutation in the heavy chain, and a 3 amino acid deletion in the light chain. The modifications improved the potency while reducing the autoreactivity. In particular, VRC01.23 is capable of neutralizing 96% of HIV–1 viruses tested at geometric mean IC50 =0.042 ug/ml, which is ~10-fold more potent than VRC01.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as for further development and evaluation under a research collaboration.

Potential Commercial Applications:

- Improving human monoclonal antibodies for HIV treatment or prevention
- New candidates for use as a therapeutic or as a prophylactic

Competitive Advantages:

- Interaction with multiple HIV binding sites
- Reduced autoreactivity when using the VRC03 framework 3 region mutation
- Improved neutralization breadth and potency over existing antibodies
- Extended in vivo half-life

Development Stage:

- Pre-clinical

Inventors: Paolo Lusso, Qingbo Liu, Peter Kwong, Young Do Kwon, and John Mascola, all of NIAID.

Publications: Liu, Qingbo, et al. ''Improvement of antibody functionality by structure-guided paratope engraftment.'' Nature communications 10.1 (2019): 721.

Intellectual Property: HHS Reference No. E–034–2018–0–PCT–01—PCT Application No. PCT/US2019/019021 filed on 21 February 2019.

Licensing Contact: To license this technology, please contact Chris Kornak at 240–627–3705 or *Chris.Kornak@nih.gov,* and reference E–034–2018.

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this technology. For collaboration opportunities, please contact Chris Kornak at 240–627–3705 or *Chris.Kornak@nih.gov.*

Dated: September 18, 2019.

Wade W. Green,

Acting Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2019–20994 Filed 9–26–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development.

FOR FURTHER INFORMATION CONTACT: Licensing information may be obtained by emailing the indicated licensing contact at the National Heart, Lung, and Blood, Office of Technology Transfer and Development Office of Technology Transfer, 31 Center Drive, Room 4A29, MSC2479, Bethesda, MD 20892–2479; telephone: 301–402–5579. A signed Confidential Disclosure Agreement may be required to receive any unpublished information.

SUPPLEMENTARY INFORMATION: Technology description follows.

Antagonists of Hyaluronan Signaling for Treatment of Airway Diseases, such as Asthma and Chronic Obstructive Pulmonary Disease (COPD), constitute a major health burden in the development word. It is estimated that nearly15.0% of the adult population in the US are affected with such diseases, and the economic cost burden is over $23 billion annually. Unfortunately, the current options for treatment of such diseases are quite limited, consisting only of bronchodilators and inhaled steroids. The need for a novel and more effective class of therapeutics agents is imperative. The subject invention provides for a potentially more specific and effective treatment of airway diseases as compared with existing treatments. It is based on the inhibition of Hyaluronan (HA), a structural polysaccharide that plays a role in the signaling pathway that leads to the

onset of airway diseases. Such inhibition blocks the development of airway inflammation and airway hyperresponsiveness (AHR), two of the components associated with airway diseases, and thus may be useful in the treatment of such diseases. The invention discloses two antagonists of HA, *i.e.* heparosan, and Hyaluronan oligosaccharides (oHAs). Their administration to a human subject in need can be accomplished *via* the use of an inhaler or nebulizer.

Potential Commercial Applications:

- Treatment of Airway Diseases

Development Stage:

- *In Vitro* data available

Inventors: Stavros Garantziotis (NIEHS), John Hollingsworth (Duke), Brian P. Toole (UMSC), Jian Liu (UNC)

Intellectual Property: HHS Reference E–080–2012: Issued Patents: US Patent No. 9,717,752 issued 08/01/2017; European Patent No. 2827877 issued 05/08/2019 and validated in Germany, France, and the United Kingdom. Pending application: Canadian Patent Application No. 2872569 filed 03/08/2013.

Licensing Contact: Uri Reichman, Ph.D., MBA, 301–435–4616; *uri.reichman@nih.gov.*

Dated: September 17, 2019.

Uri Reichman Sr.,

Senior Licensing and Patenting Manager, National Heart, Lung, and Blood Institute, Office of Technology Transfer and Development.

[FR Doc. 2019–20993 Filed 9–26–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive Patent License: Capsid-Free AAV Vectors, Compositions, and Methods for Vector Production and Gene Delivery

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Heart, Lung and Blood Institute (NHLBI), National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to Generation Bio Co. (''Generation Bio''), a company based in Cambridge, Massachusetts (in the exclusive field specified below), and a co-exclusive license to Generation Bio and Spark Therapeutics, a company based in Philadelphia, Pennsylvania (in the co-exclusive field specified below), to practice the inventions embodied in the patent application listed in the Supplementary Information section of this notice.

DATES: Only written comments and/or applications for a license which are received by the NHLBI Office of Technology Transfer and Development within 15 days from the date of publication of this notice in the **Federal Register** will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated exclusive patent license should be directed to: Uri Reichman, Ph.D., MBA, Senior Licensing and Patenting Manager, 31 Center Drive, Room 4A29, MSC2479, Bethesda, MD 20892–2479, phone number 301–435–4616, or *uri.reichman@nih.gov*.

SUPPLEMENTARY INFORMATION: The following and all continuing U.S. and foreign patents/patent applications thereof are included in the intellectual property to be licensed under the prospective agreements to Generation Bio and Spark Therapeutics: NIH reference #E–241–2010.

U.S. patent 9,598,703 issued March 03, 2017; Israeli patent 228328 issued December 01, 2018; Australian patent 2012228376 issued October 05, 2017, and pending applications in Brazil (BR 11 2013 023185 8 A2), Canada (application 2829518), China (application 201280022523.5), Europe (application 12 708035.6), India (application 8000/DELNP/2013), Japan (application 2013–557138), and S. Korea (application10–2013–7026982).

The invention is jointly owned by the Government of the United States and by the following French institutions: Association Institut De Myologie, Sorbonne University, INSERM, and CNRS. The patent rights in these inventions have been assigned to the Government of the United States of America, and to the French institutions by their respective employees who are the inventors of the subject matter claimed in the patent rights. The prospective patent license will be granted worldwide and in fields of use not broader than the following:

Exclusive field: Electroporation-mediated delivery of DNA-based vectors to express therapeutic molecules for the treatment or prevention of human diseases.

Co-exclusive field: The treatment or prevention of cancer by administration of DNA-based vectors (with the exception of electroporation mediation) to express therapeutic molecules.

All Fields of Use with the exception of the aforementioned fields are available for licensing by other parties on nonexclusive terms.

The subject technology provides DNA-based constructs for human therapeutics or preventative therapies. Such DNA-based constructs may be useful in gene therapy for treating genetic disorders, or other diseases by expressing therapeutic molecules. These constructs are AAV genome-based, where the gene of interest (therapeutic payload) is inserted between two ITRs (Inverted Terminal Repeats). The resulting constructs are devoid of the AAV capsid, and thus nonviral. They are advantageous over conventionally used AAV vectors, as they are non-immunogenic. They are also advantageous over plasmid-based expression constructs since they are of eukaryotic origin and thus devoid of the bacterial-type DNA methylation as typically present in plasmids.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive patent license will be royalty bearing and may be granted unless within fifteen (15) days from the date of this published notice, the NHLBI receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404. Complete applications for a license in the prospective field of use that are timely filed in response to this notice will be treated as objections to the grant of the contemplated exclusive patent license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the *Freedom of Information Act,* 5 U.S.C. 552.

Dated: September 17, 2019.

Uri Reichman Sr.,

Senior Licensing and Patenting Manager, National Heart, Lung, and Blood Institute, Office of Technology Transfer and Development.

[FR Doc. 2019–20992 Filed 9–26–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2019–N109; FXES11140100000–190–FF01E00000]

Final Environmental Impact Statement for Amending the 1997 Washington State Trust Lands Habitat Conservation Plan To Include a Marbled Murrelet Long-Term Conservation Strategy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), and the Washington State Department of Natural Resources (WDNR) have jointly developed a final environmental impact statement (FEIS), which analyzes the WDNR's proposal to amend the 1997 State Trust Lands Habitat Conservation Plan (HCP) to include a long-term conservation strategy (LTCS) for the federally listed marbled murrelet. This FEIS is intended to satisfy both the National Environmental Policy Act and the State Environmental Policy Act. The WDNR has requested an amendment to its existing incidental take permit (ITP) under section 10 of the Endangered Species Act. The proposed ITP amendment would allow the WDNR to implement a LTCS, and would replace the interim conservation strategy for the marbled murrelet, which is currently being implemented under the HCP. If approved, the LTCS is expected to be in place for the remainder of the ITP term, which is approximately 50 years.

DATES: The Service's ITP decision will occur no sooner than 30 days after publication of the U.S. Environmental Protection Agency's (EPA) notice of availability of the FEIS in the **Federal Register**, and will be documented in a record of decision (ROD).

ADDRESSES: You may obtain copies of the documents by any of the following methods:

- *Internet: https://www.fws.gov/wafwo/* or *www.dnr.wa.gov/non-project-actions.*
- *Upon Request:* You may call Tim Romanski, at 360–753–5823, or Heidi Tate, WDNR, 360–902–1662 to request alternative formats of the documents, or to make an appointment to inspect the documents during normal business hours at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Dr. SE, Suite 102, Lacey, WA 98503 or Washington Department of Natural Resources, SEPA Center, 1111 Washington Street, Olympia, WA 98504–7015.

FOR FURTHER INFORMATION CONTACT: Tim Romanski, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **ADDRESSES**); telephone: 360–753–5823; email: *Tim_Romanski@fws.gov.* Hearing or speech impaired individuals may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a final environmental impact statement (FEIS) addressing the Washington Department of Natural Resources' (the applicant's) proposed amendments to their Habitat Conservation Plan (HCP). The applicant is seeking an amendment to their incidental take permit (ITP) authorizing take of marbled murrelet (*Brachyramphus marmoratus*), listed as threatened under the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*). If issued, the ITP would authorize take of the marbled murrelet that may occur incidental to forest management activities on 1.38 million acres of Washington State trust lands managed by WDNR within the range of the marbled murrelet. The original ITP also authorized take of several other species, including the northern spotted owl (*Strix occidentalis caurina*) and the bull trout (*Salvelinus confluentus*); no changes to the take authorization for these species have been requested.

The proposed HCP amendment describes the anticipated amount of take of the marbled murrelet, and the steps the applicant will implement to minimize and mitigate the impacts of that taking. The HCP amendment also describes the life history and ecology of the marbled murrelet, the impact of the anticipated taking on affected murrelet populations, adaptive management procedures, and take monitoring procedures.

The Service prepared the FEIS in response to an ITP application from WDNR. The Service considered comments received on the draft environmental impact statement (DEIS), and a revised draft environmental impact statement (RDEIS), in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*).

Background

The marbled murrelet, a seabird, was listed as threatened in 1992 under the ESA. In 1996, the WDNR released its draft HCP addressing the conservation of multiple fish and wildlife species, including the marbled murrelet, and forest management activities on 1.6 million acres of forested State Trust lands within the range of the northern spotted owl in Washington.

A DEIS, dated March 1996, was jointly developed by the Service, the National Marine Fisheries Service (NMFS), and the WDNR to address the issuance of two proposed ITPs (one by the Service and one by NMFS) for the HCP, and was announced in the **Federal Register** on April 5, 1996 (61 FR 15297). The 1996 DEIS analyzed a reasonable range of alternatives, including the HCP, for forest management activities on forested State Trust lands that would be covered by the ITPs. A notice of availability for the FEIS was published in the **Federal Register** on November 1, 1996 (61 FR 56563). On January 30, 1997, the Service issued its ITP (Permit No. 812521) for the WDNR HCP. The Service's ITP decision and the availability of related decision documents were announced in the **Federal Register** on February 27, 1997 (62 FR 8980).

The WDNR HCP commits the WDNR to developing a long-term conservation strategy (LTCS). At the time the HCP was being developed, the Service and WDNR determined that producing an LTCS was not yet possible because of the lack of scientific information about the marbled murrelet and its relationship to State Trust lands. For this reason, the WDNR developed an interim conservation strategy for the marbled murrelet, which is currently being implemented. Briefly, pursuant to the interim marbled murrelet conservation strategy: (1) Suitable murrelet habitat blocks were identified and deferred from harvest; (2) a habitat relationship study was conducted using marbled murrelet occupancy surveys to determine the relative importance and quality of occupied habitats; (3) the lowest quality habitat blocks were made available for timber harvest (these were expected to contain about 5 percent of the marbled murrelet occupied sites on covered lands); (4) the higher quality habitat blocks were surveyed for marbled murrelet occupancy, and occupied (along with some unoccupied) habitats were protected; and (5) the WDNR developed an LTCS for WDNR lands. The HCP and ITP amendment process is the final step in considering and potentially approving implementation of a LTCS.

If approved, the LTCS is expected to be in place for the remainder of the permit term, until January 2067. Additionally, the term of the ITP may be extended up to three times. Each extension would be for an additional 10-year term.

Endangered Species Act

Section 9 of the ESA and its implementing regulations prohibit ''take'' of fish and wildlife species listed as endangered. The ESA implementing regulations extend, under certain circumstances, the prohibition of take to threatened species (50 CFR 17.31). Under section 3 of the ESA, the term ''take'' means to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct'' (16 U.S.C. 1538). Under section 10(a) of the ESA, the Service may issue permits to authorize incidental take of listed fish and wildlife species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Section 10(a)(1)(B) of the ESA contains provisions for issuing ITPs to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

1. The taking will be incidental;
2. The applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
3. The applicant will ensure that adequate funding for the plan will be provided;
4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. The applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

National Environmental Policy Act

The proposed amendment of the WDNR ITP and the 1997 WDNR HCP to cover a marbled murrelet LTCS is a Federal action that triggers the need for compliance with NEPA (42 U.S.C. 4321 *et seq.*). The Service and WDNR have jointly developed the FEIS for the purpose of analyzing the impacts of the LTCS on the human environment for the different alternatives. The FEIS analyzes the Service's and WDNR's preferred alternative, six additional alternatives, and a no action alternative.

WDNR manages approximately 1.38 million acres within 55 miles of marine waters, which is the known inland limit of the nesting range for the marbled murrelet. The alternatives in the FEIS would all occur within this area. The alternatives represent a reasonable range of approaches to long-term marbled murrelet habitat conservation on WDNR lands. The alternatives differ in the amount and location of WDNR-managed forest land designated for long-term conservation of the murrelet, and also include a variety of conservation measures proposed to protect marbled murrelet habitat. The alternatives also differ in the amount and quality of marbled murrelet habitat that will be removed through timber harvest. The alternatives are discussed in detail in the FEIS.

Public Involvement

A **Federal Register** notice of intent (77 FR 23743) to conduct public scoping meetings and to prepare an EIS for WDNR's LTCS was published on April 20, 2012. Four public information meetings were held in Olympia, Sedro-Wooly, Cathlamet, and Forks, Washington.

A **Federal Register** notice of availability (81 FR 89135) for the DEIS was published with a 90-day comment period on December 9, 2016. The 2016 DEIS did not specify a preferred alternative. Four public information meetings were held on the DEIS in Sedro-Wolley, Seattle, Port Angeles, and Cathlamet, Washington.

In 2017, the WDNR selected a preferred alternative based on direction from the Washington Board of Natural Resources and public comments received on the DEIS. This action necessitated the development of a revised DEIS (RDEIS). A **Federal Register** notice of availability (83 FR 45458) for the RDEIS for the LTCS was published for a 60-day comment period on September 7, 2018. Four public information meetings were held in Ballard, Burlington, Cathlamet, and Forks, Washington. A **Federal Register** notice (83 FR 55394) was published on November 5, 2018, notifying the public the Service was extending the comment period on the RDEIS for 30 additional days.

EPA's Role in the EIS Process

The EPA is charged with reviewing all Federal agencies' EISs and commenting on the adequacy and acceptability of the environmental impacts of proposed actions in EISs. Therefore, EPA is publishing a notice in the **Federal Register** announcing this EIS, as required under section 309 of the Clean Air Act (42 U.S.C. 7401). EPA's notices are published on Fridays. EPA serves as the repository (EIS database) for EISs prepared by Federal agencies. All EISs must be filed with EPA. You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

Next Steps

The Service will evaluate the permit amendment application, associated documents, and public comments in reaching a final decision on whether the application meets the requirements of section 10(a) of the ESA (16 U.S.C. 1531 *et seq.*). We will evaluate whether the proposed permit action would comply with section 7 of the ESA by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue an ITP amendment. If ESA section 10 ITP issuance criteria are met, we will issue the ITP amendment to the applicant. We will issue a ROD and issue or deny the ITP no sooner than 30 days after publication of the EPA's notice of availability of the FEIS in the **Federal Register**.

Public Review

We are not requesting public comments on the FEIS and HCP amendment, but any written comments received will 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 your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. 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.

Authority

We provide this notice in accordance with the requirements of section 10(c) of the ESA and its implementing regulations (50 CFR 17.22 and 17.32) and NEPA and its implementing regulations (40 CFR 1506.6).

Robyn Thorson,

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2019–20903 Filed 9–26–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK940000.L14100000.BX0000.19X. LXSS001L0100]

Filing of Plats of Survey: Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of lands described in this notice are scheduled to be officially filed in the Bureau of Land Management (BLM), Alaska State Office, Anchorage, Alaska. These surveys were executed at the request of the BLM, and are necessary for the management of these lands.

DATES: The BLM must receive protests by October 28, 2019.

ADDRESSES: You may buy a copy of the plats from the BLM Alaska Public Information Center, 222 W 7th Avenue, Mailstop 13, Anchorage, AK 99513. Please use this address when filing written protests. You may also view the plats at the BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W 8th Avenue, Anchorage, Alaska, at no cost.

FOR FURTHER INFORMATION CONTACT: Douglas N. Haywood, Chief, Branch of Cadastral Survey, Alaska State Office, Bureau of Land Management, 222 W 7th Avenue, Anchorage, AK 99513; 907–271–5481; *dhaywood@blm.gov*. People who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the BLM during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lands surveyed are:

U.S. Survey No. 1152, accepted July 15, 2019, situated within:

Seward Meridian, Alaska

T. 18 N, R. 2 E

U.S. Survey No. 14483, accepted June 11, 2019, situated within:

Copper River Meridian, Alaska

T. 28 S, R. 34 E

U.S. Survey No. 14484, accepted June 11, 2019, situated within:

Copper River Meridian, Alaska

T. 26 S, R. 35 E

Copper River Meridian, Alaska

T. 3 N, R. 1 W, accepted July 11, 2019
T. 3 N, R. 7 W, accepted September 4, 2019
T. 26 S, R. 34 E, accepted June 11, 2019
T. 55 S, R. 72 E, accepted June 11, 2019
T. 58 S, R. 71 E, accepted June 12, 2019
T. 65 S, R. 76 E, accepted June 12, 2019
T. 65 S, R. 77 E, accepted June 11, 2019
T. 66 S, R. 77 E, accepted June 11, 2019
T. 75 S, R. 83 E, accepted June 11, 2019
T. 75 S, R. 84 E, accepted June 11, 2019
T. 75 S, R. 85 E, accepted June 11, 2019
T. 76 S, R. 85 E, accepted June 11, 2019
T. 76 S, R. 91 E, accepted June 11, 2019
T. 78 S, R. 81 E, accepted July 15, 2019

Seward Meridian, Alaska

T. 6 S, R. 4 W, accepted September 3, 2019
T. 15 N, R. 1 W, accepted July 15, 2019
T. 15 N, R. 2 W, accepted July 15, 2019
T. 16 N, R. 3 W, accepted July 15, 2019
T. 17 N, R. 2 W, accepted July 15, 2019
T. 18 N, R. 3 W, accepted July 15, 2019

Umiat Meridian, Alaska

T. 8 N, R. 19 E, accepted September 3, 2019

A person or party who wishes to protest one or more plats of survey identified above must file a written notice of protest with the State Director for the BLM in Alaska. The notice of protest must identify the plat(s) of survey that the person or party wishes to protest. You must file the notice of protest before the scheduled date of official filing for the plat(s) of survey being protested. The BLM will not consider any notice of protest filed after the scheduled date of official filing. A notice of protest is considered filed on the date it is received by the State Director for the BLM in Alaska during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director for the BLM in Alaska within 30 calendar days after the notice of protest is filed.

If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personally identifiable information in a notice of protest or statement of reasons, you should be aware that the documents you submit, including your personally identifiable information, may be made publicly available in their entirety at any time. While you can ask the BLM to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. Chap. 3.

Douglas N. Haywood,

Chief Cadastral Surveyor, Alaska.

[FR Doc. 2019–21028 Filed 9–26–19; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD06000 L51010000.ER0000 LVRWB09B2920 19X (MO#4500135014)]

Notice of Availability of the Final Environmental Impact Statement and Environmental Impact Report and Proposed Land Use Plan Amendment to the California Desert Conservation Area Plan for the Desert Quartzite Solar Project

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared Final Environmental Impact Statement (EIS) and Proposed Land Use Plan Amendment to the California Desert Conservation Area (CDCA) Plan for the Desert Quartzite Solar Project, and by this notice is announcing its availability. This document is also an Environmental Impact Report (EIR) prepared by Riverside County under the California Environmental Quality Act.

DATES: BLM planning regulations state that any person who meets the conditions as described in the regulations may protest the BLM's Proposed Land Use Plan Amendment and Final EIS. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: You may review the Final EIS and Proposed Land Use Plan Amendment at *https://tinyurl.com/yy8o33ld*. Instructions for filing a protest with the Director of the BLM regarding the Proposed RMP Amendments may be found online at: *https://www.blm.gov/programs/planning-and-nepa/public-participation/filing-a-plan-protest* and at 43 CFR 1610.6–2.

FOR FURTHER INFORMATION CONTACT: Brandon G. Anderson, BLM Project Manager, telephone (951) 697–5215; address Bureau of Land Management, California Desert District Office, 22835

Calle San Juan de Los Lagos, Moreno Valley, CA 92553; email: *blm_ca_desert_quartzite_solar_project@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at (800) 877–8339 to contact Mr. Anderson during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Desert Quartzite, LLC, a wholly owned subsidiary of First Solar Inc., applied for a Right-of-Way (ROW) from the BLM to construct, operate, maintain, and decommission a 450 megawatt (MW) solar photovoltaic (PV) facility near the City of Blythe, Riverside County, California. The proposed project includes construction of a 2.8 mile, 230 kilovolt generation interconnection (gen-tie) transmission line connecting the project to the Southern California Edison Colorado River Substation. The BLM is also considering an amendment to the CDCA Plan that would be necessary to authorize the project.

On August 8, 2018, the BLM issued the Draft EIS/EIR and Draft Land Use Plan Amendment, which analyzed the impacts of the Proposed Action and two action alternatives, in addition to a No Action Alternative. Alternative 2, Resource Avoidance Alternative, would be a 450 MW solar PV array on about 2,800 acres. It reduces effects to portions of the sand corridor and cultural resources. Alternative 3, Reduced Project Alternative, would be a 285 MW solar PV project on about 2,100 acres. Like the Proposed Action, under each of these alternatives, the BLM would amend the CDCA Plan to allow the project. Under the No-Action Alternative, the BLM would deny the ROW application, and would not amend the CDCA Plan to allow the project.

The Draft EIS/EIR and Draft Land Use Plan Amendment included analysis of the ROW application as it related to the following issues: (1) Impacts to cultural resources and tribal concerns; (2) Impacts to the sand transport corridor and Mojave fringe-toed lizard habitat and washes; (3) Impacts to BLM sensitive plants; (4) Impacts to avian species; (5) Impacts to visual resources; (6) Impacts to air and water quality; and (7) The relationship between the proposed project and the CDCA Plan, as amended.

The Draft EIS/EIR and Draft Land Use Plan Amendment was available for a 90-day public comment period. The BLM held public meetings on September 26, 2018, and September 27, 2018, in Palm Desert and Blythe, California, respectively. Fourteen individuals attended the meeting on September 26, 2018, and 19 individuals attended the meeting on September 27, 2018. The BLM received 22 comment letters during the comment period.

The BLM considered and incorporated, as appropriate, public comments on the Draft EIS/EIR and Draft Land Use Plan Amendment and internal agency review into the proposed plan amendment. Public comments resulted in the addition of clarifying text, but did not significantly change proposed land use plan decisions. Responses to the substantive comments are included in the Final EIS/EIR and Proposed Land Use Plan Amendment. The gen-tie alignment for Alternative 2 and Alternative 3 was adjusted to avoid a potential conflict with another proposed transmission line project. The adjustment does not substantially change the environmental effects analysis. The BLM has selected Alternative 2, the Resource Avoidance Alternative, as the Agency Proposed Alternative in the Final EIS/EIR and Proposed Land Use Plan Amendment.

All protests must be in writing and submitted, as set forth in the **DATES** and **ADDRESSES** sections. The BLM Director will render a written decision on each protest. The decision will be mailed to the protesting party. The decision of the BLM Director shall be the final decision of the Department of the Interior on each protest. Responses to protest issues will be compiled and formalized in a Director's Protest Resolution Report made available following issuance of the decisions.

Upon resolution of all protests, the BLM will issue a Record of Decision, which will include information on any further opportunities for public involvement. Before including your phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2, 43 CFR 1610.5.

Danielle Chi,

Deputy State Director.

[FR Doc. 2019–20941 Filed 9–26–19; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–566 and 731–TA–1342 (Final) (Remand)]

Softwood Lumber From Canada

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the remand of its final determinations in the antidumping duty and countervailing duty investigations of softwood lumber from Canada. For further information concerning the conduct of these remand proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207).

DATES: This remand is effective as of September 23, 2019.

FOR FURTHER INFORMATION CONTACT: Nannette Christ (202–205–3263), Office of Investigations, or Jane Dempsey (202–205–3142), Office of General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record of Investigation Nos. 701–TA–566 and 731–TA–1342 (Final) may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In December 2017, the Commission issued its unanimous determination in *Softwood Lumber from Canada,* Inv. Nos. 701–TA–566 and 731–TA–1342, USITC Pub. 4749 (December 2017). Respondents Government of Canada, Government of Alberta, Government of British Columbia, Government of Ontario, Government of Quebec, Alberta Softwood Lumber Trade Council, British Columbia Lumber Trade Council, Canfor Corporation, J.D. Irving Limited, West Fraser Mills Ltd., Western Forest Products Inc., Resolute FP Canada Inc., the Conseil de l'industrie forestiere du Quebec, and the Ontario Forest Industries Association contested the Commission's determinations

concerning subject imports from Canada before a bi-national Panel established pursuant to Article 1904 of the North American Free Trade Agreement. The Panel affirmed in part and remanded in part the Commission's determinations. *In the Matter of Softwood Lumber from Canada: Interim Decision and Order of the Panel,* Secretariat File No. USA–CDA–2018–1903–03 (September 4, 2019). Specifically, the Panel remanded for the Commission to reconsider certain aspects of its analysis and findings concerning the conditions of competition and the volume of subject imports and their price effects.

Participation in the proceeding.—Only those persons who were interested parties that participated in the investigations (*i.e.,* persons listed on the Commission Secretary's service list) and also parties to the appeal may participate in the remand proceedings. Such persons need not make any additional notice of appearances or applications with the Commission to participate in the remand proceedings, unless they are adding new individuals to the list of persons entitled to receive business proprietary information (''BPI'') under administrative protective order. BPI referred to during the remand proceedings will be governed, as appropriate, by the administrative protective order issued in the investigations. The Secretary will maintain a service list containing the names and addresses of all persons or their representatives who are parties to the remand proceedings, and the Secretary will maintain a separate list of those authorized to receive BPI under the administrative protective order during the remand proceedings.

Written Submissions.—The Commission is not reopening the record and will not accept the submission of new factual information for the record. The Commission will permit the parties to file comments concerning how the Commission could best comply with the Panel's remand instructions.

The comments must be based solely on the information in the Commission's record. The Commission will reject submissions containing additional factual information or arguments pertaining to issues other than those on which the Panel has remanded this matter. The deadline for filing comments is October 15, 2019. Comments shall be limited to no more than thirty (30) double-spaced and single-sided pages of textual material, inclusive of attachments and exhibits.

Parties are advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission. All written submissions must conform to the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on E-Filing,* available on the Commission's website at *http://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, will not be accepted unless good cause is shown for accepting such submissions or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

By order of the Commission.
Issued: September 23, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–20976 Filed 9–26–19; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–573]

Global Economic Impact of Missing and Low Pesticide Maximum Residue Levels Institution of Investigation and Scheduling of Hearing

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and scheduling of public hearing.

SUMMARY: Following receipt of a request from the U.S. Trade Representative (USTR) on August 30, 2019, under the Tariff Act of 1930, the U.S. International Trade Commission has instituted Investigation No. 332–573, *Global Economic Impact of Missing and Low Pesticide Maximum Residue Levels,* for the purpose of providing a report that examines the global economic impact of maximum residue level (MRL) policies.

DATES:

October 17, 2019: Deadline for filing requests to appear at the public hearing
October 21, 2019: Deadline for filing prehearing briefs and statements
October 29, 2019: Public hearing
November 5, 2019: Deadline for filing posthearing briefs
December 13, 2019: Deadline for filing all other written submissions for volume 1
April 30, 2020: Transmittal of volume 1 of Commission report to the USTR
June 5, 2020: Deadline for filing all other written submissions for volume 2
October 31, 2020: Transmittal of volume 2 of Commission report to the USTR (Delivered Monday, November 2, 2020)

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW, Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov/edis3-internal/app.*

FOR FURTHER INFORMATION CONTACT: Project Leader Sabina Neumann (volumes 1 and 2) (202–205–3000 or *sabina.neumann@usitc.gov*) or Deputy Project Leader (volume 1) Steven LeGrand (202–205–3094 or *steven.legrand@usitc.gov*) or Deputy Project Leader (volume 2) Justin Choe (202–205–3229 or *justin.choe@usitc.gov*) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website (*https://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2002.

Background: As requested by the USTR, under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), the Commission will conduct an

investigation and prepare a report on the global economic impact of national maximum residue level (MRL) policies on plant protection products, with a focus on the impacts that low and missing standards have on agricultural trade. The USTR requested that the report include, to the extent practicable, information and analysis regarding the economic impact of pesticide MRLs on farmers in countries representing a range of income classifications (*e.g.,* low income, lower middle income, upper middle income, etc.) as well as the United States. The letter further requested that, to the extent information is available, the report cover the years 2016–2019, or the latest three years that data are available, but may, where appropriate, examine longer-term trends.

More specifically, the USTR asked that the report include the following:

(1) An overview of the role of plant protection products and their MRLs in relation to global production, international trade, and food safety for consumers. Describe the current and expected challenges to global agricultural production, including the impact of evolving pest and diseases pressures in differing regions and climates.

(2) A broad description of the approaches taken in setting national and international MRLs for crops. Describe the risk-based approach to setting MRLs in the context of agricultural trade, including the guidelines and principles of the Codex Alimentarius. Describe the procedures in the Codex Alimentarius for setting pesticide MRLs, including the role of the FAO/WHO Joint Meeting on Pesticide Residues (JMPR) in conducting risk assessments. Compare this risk-based approach to a hazard-based approach. Describe U.S. efforts to advance the use of lower-risk pesticides globally.

(3) A description of how MRLs for plant protection products are developed and administered in major markets for U.S. agricultural exports. Describe the specific regulations, processes, practices, and timelines in these major markets for establishing, modifying, and administering MRLs. Describe specific MRL enforcement practices and processes, including practices and procedures for addressing non-compliant imported plant products. Provide examples of how Codex MRLs are adopted into national legislation or regulation. Identify trade-facilitative practices and processes.

(4) A description of challenges and concerns faced by exporting countries in meeting importing country pesticide MRLs, such as when MRLs are missing or low. Explain the reasons for missing and low MRLs.

(5) Through case studies, describe the costs and effects of MRL compliance and non-compliance for producers in countries representing a range of income classifications, such as uncertainty in planting decisions, segregation of products, crop protection costs, yield implications, storage issues, product losses, and consequences of MRL violations. Include information on costs of adopting new plant protection products or those related to establishing, modifying, or testing for new or existing MRLs in export markets. To the extent possible, include effects on producers in countries with tropical climates where products are subject to high levels of pest and disease pressure.

(6) A review of the economic literature that assesses both qualitatively and quantitatively how missing and low MRLs affect countries representing a range of income classifications, particularly low income countries, with regard to production, exports, farmer income, and prices.

(7) Through case studies, describe the costs and effects or MRL compliance and non-compliance for U.S. producers, such as uncertainty in planting decisions, segregation of products, crop protection costs, yield implications, storage issues, product losses, and consequences of MRL violations. Include information on costs of adopting new plant protection products or those related to establishing, modifying, or testing for new or existing MRLs in export markets. To the extent possible, include effects on U.S. producers of specialty crops.

(8) To the extent possible, quantitatively and qualitatively assess how missing and low MRLs affect production, exports, farmer income, and prices, both on the national level and, to the extent possible, for small and medium size farms.

The USTR asked that the Commission prepare its report in two volumes, with volume 1 covering bullets (1)–(6) above transmitted by April 30, 2020, and volume 2 covering bullets (7)–(8) transmitted by October 31, 2020 (delivered on Monday, November 2, 2020).

Public Hearing: The Commission will hold a public hearing in connection with this investigation at the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC, beginning at 9:30 a.m. on October 29, 2019. Persons wishing to appear at the public hearing should file a request to appear with the Secretary, no later than 5:15 p.m., October 17, 2019, in accordance with the requirements in the ''Submissions'' section below. All pre-hearing briefs and statements should be filed no later than 5:15 p.m., October 21, 2019; and all post-hearing briefs and statements responding to matters raised at the hearing should be filed no later than 5:15 p.m., November 5, 2019. In the event that, as of the close of business on October 17, 2019, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202–205–2000 after October 17, 2019, for information concerning whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, the Commission invites interested parties to submit written statements concerning this investigation. All written submissions should be addressed to the Secretary, and should be received no later than 5:15 p.m., December 13, 2019 for matters to be covered by volume 1 of the Commission's report, and June 3, 2020 for matters to be covered by volume 2 of the Commission's report. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 of the Rules (as further explained in the Commission's *Handbook on Filing Procedures*) requires that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 p.m. Eastern Time on the next business day. In the event that confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information or ''CBI''). Persons with questions regarding electronic filing should contact the Office of the Secretary, Docket Services Division (202–205–1802).

Confidential Business Information (CBI): Any submissions that contain CBI must also conform to the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the Rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the CBI is clearly identified using brackets. The Commission will make all written submissions, except for those (or

portions thereof) containing CBI, available for inspection by interested parties.

In his request letter, the USTR stated that his office intends to make the Commission's report available to the public in its entirety, and asked that the Commission not include any CBI in the report that it delivers to the USTR.

The Commission will not include any of the CBI submitted in the course of this investigation in the report it sends to the USTR. However, all information, including CBI, submitted in this investigation may be disclosed to and used (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission, including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel for cybersecurity purposes. The Commission will not otherwise disclose any CBI in a manner that would reveal the operations of the firm supplying the information.

Summaries of Written Submissions: The Commission intends to publish any summaries of written submissions filed by interested persons. Persons wishing to have a summary of their submission included in the report should include a summary with their written submission, titled ''Public Summary,'' and should mark the summary as having been provided for that purpose. The summary may not exceed 500 words, should be in MSWord format or a format that can be easily converted to MSWord, and should not include any CBI. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. The Commission will identify the name of the organization furnishing the summary and will include a link to the Commission's Electronic Document Information System (EDIS) where the full written submission can be found.

By order of the Commission.

Issued: September 23, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–20959 Filed 9–26–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended

On September 19, 2019, the United States of America (''United States''), through attorneys for the Department of Justice, and the Commonwealth of Pennsylvania, Department of Environmental Protection (''PADEP''), lodged a proposed Consent Decree with the United States District Court for the Middle District of Pennsylvania in the lawsuit entitled *United States et al.* v. *Foster Wheeler Energy Corporation,* Civil Action No. 3:19–cv–01620–UN4.

In their Complaint, also filed on September 19, 2019, pursuant to Sections 106, 107(a), and 113(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9606, 9607(a), and 9613(g), and pursuant to Sections 507 and 1103 of the Hazardous Sites Cleanup Act, Act of October 18, 1988, Public Law 756, 35 P.S. §§ 6020.507 and 6020.1103 (''HSCA''), the United States and PADEP (''Plaintiffs'') allege that Defendant Foster Wheeler Energy Corporation (''FWEC'') is liable for cleanup costs incurred and to be incurred by the United States and PADEP in connection with the cleanup of the Foster Wheeler Energy Corporation/Church Road TCE Superfund Alternative Site (''Site'') in Mountain Top, Luzerne County, Pennsylvania. The Site includes a former industrial site used to manufacture and fabricate large pressure vessels that was formerly owned and operated by FWEC (the ''Former FWEC Facility''). The Site also includes any areas at which hazardous substances released at or from this facility have come to be located, including an area of groundwater contamination located south and southwest of the Former FWEC Facility and encompassing approximately 295 acres of mixed land use (mainly residential), which extends from east to west along Church Road and Watering Run, and eight surrounding industrial properties located immediately south and west of the Former FWEC Facility.

The proposed Consent Decree resolves all allegations asserted in the Plaintiffs' Complaint and provides for FWEC to pay to the United States Environmental Protection Agency (''EPA'') $950,000.00 in past response costs incurred with respect to the Site, and to pay to PADEP $56,051.21 in past state response costs incurred with respect to the Site. These payments are due within thirty (30) days after the Consent Decree becomes effective as a judgment, if it is entered by the Court. The proposed Consent Decree also requires FWEC to pay the United States' and PADEP's future response costs and to perform the Interim Remedy selected in EPA's Interim Record of Decision for the Site. In exchange, FWEC receives from both Plaintiffs covenants not to sue for the interim remedial work performed and payment of past and future federal and state response costs, subject to certain reservations and limitations.

The publication of this notice opens a federal period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States et al.* v. *Foster Wheeler Energy Corporation,* D.J. Ref. No. 90–11–3–12044. All comments must be submitted no later than 30 days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $39.50 (0.25 cents per page reproduction cost) payable to the United States Treasury for a copy of the full Consent Decree with appendices. For a paper copy without the appendices, the cost is $12.00.

Jeffrey Sands,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–20966 Filed 9–26–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Records To Be Kept by Employers—Fair Labor Standards Act

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Wage and Hour Division (WHD) sponsored information collection request (ICR) titled, ''Records to be Kept by Employers—Fair Labor Standards Act,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 2019.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1235-001* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–WHD, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Department of Labor is updating and revising the regulations issued under the Fair Labor Standards Act implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. The Department is submitting to OMB for approval a revision to this ICR, ''Records to be Kept by Employers—Fair Labor Standards Act,'' incorporating certain recordkeeping provisions in the associated final rule, ''Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,'' RIN 1235–AA20. OMB asked the Department to resubmit the information collection request upon promulgation of the final rule and after considering public comments on the proposed rule.

OMB authorization for an ICR cannot be for more than three (3) years without renewal and the current approval for this collection is scheduled to expire on December 31, 2019. The DOL seeks to extend PRA authorization for the current information collection for three (3) more years and incorporate a revision to the burden requirements stemming from the Final Rule.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB, under the PRA, approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1235–0018. New requirements would only take effect upon OMB approval of the ICR and publication of the final rule.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1235–0018. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–WHD.

Title of Collection: Records to be Kept by Employers—Fair Labor Standards Act.

OMB Control Number: 1235–0018.

Affected Public: Private sector businesses or other for-profits, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Total Estimated Number of Respondents: 5,621,961.

Total Estimated Number of Responses: 46,959,856.

Total Estimated Annual Time Burden: 3,625,986 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 16, 2019.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2019–20354 Filed 9–26–19; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employment Information Form

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Wage and Hour Division (WHD) sponsored information collection request (ICR) titled, ''Employment Information Form,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 2019.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201905-1235-001* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–WHD, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Department of Labor is updating and revising the regulations issued under the Fair Labor Standards Act (FLSA) implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. The Department uses the Employment Information Form to obtain information from complainants regarding FLSA violations; the ICR covers complaints alleging violations of various labor standards that the agency administers and enforces, and will incorporate the provisions in the final rule, ''Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,'' RIN 1235–AA20, applicable to complaints. OMB asked the Department to resubmit the information collection request upon promulgation of the associated final rule and after considering public comments on the proposed rule. Additionally, this ICR seeks approval for a revision related to the Payroll Audit Independent Determination (PAID) program.

OMB authorization cannot be for more than three (3) years and the current approval for this collection is scheduled to expire on December 31, 2019. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, with change to the existing requirements stemming from the PAID program and a revision to the burden requirements stemming from the Final Rule and PAID program.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB, under the PRA, approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1235–0021. New requirements would only take effect upon OMB approval of the ICR and publication of the final rule.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1235–0021. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–WHD.

Title of Collection: Employment Information Form.

OMB Control Number: 1235–0021.

Affected Public: Private sector businesses or other for-profits, not-for-profit institutions.

Total Estimated Number of Respondents: 36,278.

Total Estimated Number of Responses: 36,278.

Total Estimated Annual Time Burden: 12,155 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 16, 2019.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2019–20350 Filed 9–26–19; 8:45 am]

BILLING CODE 4510–27–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 19–06]

Report on Countries That Are Candidates for Millennium Challenge Account Eligibility in Fiscal Year 2020 and Countries That Would Be Candidates But for Legal Prohibitions

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: Section 608(a) of the Millennium Challenge Act of 2003 requires the Millennium Challenge Corporation to publish a report that identifies countries that are ''candidate countries'' for Millennium Challenge Account assistance during FY 2020. The report is set forth in full below.

Dated: September 23, 2019.

Brian Finkelstein,

Acting General Counsel.

Report on Countries that are Candidates for Millennium Challenge Compact Eligibility for Fiscal Year 2020 and Countries that would be Candidates but for Legal Prohibitions

Summary

This report to Congress is provided in accordance with section 608(a) of the Millennium Challenge Act of 2003, as amended, 22 U.S.C. 7701, 7707(a) (the Act).

The Act authorizes the provision of assistance for global development through the Millennium Challenge Corporation (MCC) for countries that enter into a Millennium Challenge Compact with the United States to support policies and programs that advance the progress of such countries

to achieve lasting economic growth and poverty reduction. The Act requires MCC to take a number of steps in selecting countries with which MCC will seek to enter into a compact, including determining the countries that will be eligible countries for fiscal year (FY) 2020 based on (a) a country's demonstrated commitment to (i) just and democratic governance, (ii) economic freedom, and (iii) investments in its people; and (b) the opportunity to reduce poverty and generate economic growth in the country, and (c) the availability of funds to MCC. These steps include the submission to the congressional committees specified in the Act and publication in the **Federal Register** of reports on the following:

- The countries that are ''candidate countries'' for FY 2020 based on their per capita income levels and their eligibility to receive assistance under U.S. law and countries that would be candidate countries but for specified legal prohibitions on assistance (section 608(a) of the Act);
- The criteria and methodology that the MCC Board of Directors (Board) will use to measure and evaluate the relative policy performance of the ''candidate countries'' consistent with the requirements of subsections (a) and (b) of section 607 of the Act in order to determine ''eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act); and
- The list of countries determined by the Board to be ''eligible countries'' for FY 2020, identification of such countries with which the Board will seek to enter into compacts, and a justification for such eligibility determination and selection for compact negotiation (section 608(d) of the Act).

This report is the first of three required reports listed above.

Candidate Countries for FY 2020

The Act requires the identification of all countries that are candidate countries for FY 2020 and the identification of all countries that would be candidate countries but for specified legal prohibitions on assistance. Under sections 606(a) and (b) of the Act, candidate countries must qualify as low income or lower middle income countries as defined in the Act.

Specifically, a country will be a candidate country in the low income category for FY 2020 if it

- has a per capita income that is not greater than the World Bank's lower middle income country threshold for such fiscal year ($3,995 gross national income per capita for FY 2020);
- is among the 75 countries identified by the World Bank as having the lowest per capita income; and
- is not ineligible to receive United States economic assistance under part I of the Foreign Assistance Act of 1961, as amended (the Foreign Assistance Act), by reason of the application of the Foreign Assistance Act or any other provision of law.

A country will be a candidate country in the lower middle income category for FY 2020 if it

- has a per capita income that is not greater than the World Bank's lower middle income country threshold for such fiscal year ($3,995 gross national income per capita for FY 2020);
- is not among the 75 countries identified by the World Bank as having the lowest per capita income; and
- is not ineligible to receive United States economic assistance under part I of the Foreign Assistance Act by reason of the application of the Foreign Assistance Act or any other provision of law.

Under section 606(c) of the Act as applied for FY 2020, a country with per capita income changes from FY 2019 to FY 2020 such that the country would be reclassified from the low income category to the lower middle income category or vice versa will retain its income status in its former category for FY 2020 and two subsequent fiscal years (FY 2021 and FY 2022). A country that has transitioned to the upper middle income category does not qualify as a candidate country.

Pursuant to section 606(d) of the Act, the Board identified the following countries as candidate countries under the Act for FY 2020. In so doing, the Board referred to the prohibitions on assistance to countries for FY 2019 under the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019 (FY 2019 SFOAA).

Candidate Countries: Low Income Category

1. Afghanistan
2. Angola
3. Bangladesh
4. Benin
5. Bhutan *
6. Burkina Faso
7. Cabo Verde
8. Cameroon
9. Central African Republic
10. Chad
11. Côte d'Ivoire
12. Djibouti
13. Egypt
14. Eswatini
15. Ethiopia
16. Gambia, The *
17. Ghana
18. Guinea
19. Guinea-Bissau
20. Haiti
21. Honduras
22. India
23. Indonesia
24. Kenya
25. Kiribati
26. Kyrgyzstan
27. Laos
28. Lesotho
29. Liberia
30. Madagascar
31. Malawi
32. Mali
33. Micronesia, Federated States of
34. Moldova
35. Morocco
36. Mozambique
37. Nepal
38. Niger
39. Nigeria
40. Pakistan
41. Papua New Guinea *
42. Philippines
43. Republic of the Congo
44. Rwanda
45. São Tomé and Principe
46. Senegal
47. Sierra Leone
48. Solomon Islands
49. Somalia
50. Tajikistan
51. Tanzania
52. Timor-Leste
53. Togo
54. Uganda
55. Ukraine
56. Uzbekistan
57. Vanuatu
58. Vietnam
59. Yemen
60. Zambia

Candidate Countries: Lower Middle Income Category

1. Mongolia
2. El Salvador
3. Tunisia

Countries that Would Be Candidate Countries but for Legal Provisions that Prohibit Assistance

Countries that would be considered candidate countries for FY 2020 but are

* Bhutan, The Gambia, and Papua New Guinea were included on the list of Tier 3 countries in the 2019 Trafficking in Persons Report. If the President determines to withhold non-humanitarian nontrade-related assistance to such countries under section 110 of the Trafficking Victims Protection Act of 2000, each would no longer be a candidate country for FY 2020.

ineligible to receive United States economic assistance under part I of the Foreign Assistance Act by reason of the application of any provision of the Foreign Assistance Act or any other provision of law are listed below. This list is based on legal prohibitions against economic assistance that apply as of July 19, 2019.

Prohibited Countries: ***Low Income Category***

- **Bolivia** is ineligible to receive foreign assistance pursuant to section 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107-228), regarding adherence to obligations under international counternarcotics agreements and other counternarcotics measures.
- **Burma** is ineligible to receive foreign assistance, including due to concerns relative to its record on human rights.
- **Burundi** is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 et seq.).
- **Cambodia** is ineligible to receive foreign assistance pursuant to section 7043(b)(1)(A) of the FY 2019 SFOAA, which restricts assistance to the Government of Cambodia unless the Secretary of State certifies that the Government of Cambodia is taking effective steps to strengthen regional security and stability and respect the rights and responsibilities enshrined in the Constitution of the Kingdom of Cambodia.
- **Comoros** is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 et seq.).
- **Democratic Republic of Congo** is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 et seq.).
- **Eritrea** is ineligible to receive foreign assistance, including due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 et seq.).
- **Mauritania** is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 et seq.).
- **Nicaragua** is ineligible to receive foreign assistance pursuant to section 7047(c) of the FY 2019 SFOAA, which prohibits assistance for the central government of a country that the Secretary of State determines has recognized the independence of, or has established diplomatic relations with, the Russian occupied Georgian territories of Abkhazia and Tskhinvali Region/South Ossetia.
- **North Korea** is ineligible to receive foreign assistance, including pursuant to section 7007 of the FY 2019 SFOAA, which prohibits direct assistance to the government of North Korea.
- **South Sudan** is ineligible to receive foreign assistance, including pursuant to section 7042(f) of the FY 2019 SFOAA, which prohibits (with limited exceptions) assistance to the central government of South Sudan.
- **Sudan** is ineligible to receive foreign assistance, including pursuant to section 7042(g) of the FY 2019 SFOAA, which prohibits (with limited exceptions) assistance to the government of Sudan.
- **Syria** is ineligible to receive foreign assistance, including pursuant to section 7007 of the FY 2019 SFOAA, which prohibits direct assistance to the government of Syria.
- **Zimbabwe** is ineligible to receive foreign assistance, including pursuant to section 7042(h)(2) of the FY 2019 SFOAA, which prohibits (with limited exceptions) assistance for the central government of Zimbabwe unless the Secretary of State certifies and reports to Congress that the rule of law has been restored, including respect for ownership and title to property, and freedoms of expression, association, and assembly.

Countries identified above as candidate countries, as well as countries that would be considered candidate countries but for the applicability of legal provisions that prohibit U.S. economic assistance, may be the subject of future statutory restrictions or determinations, or changed country circumstances, that affect their legal eligibility for assistance under part I of the Foreign Assistance Act by reason of application of the Foreign Assistance Act or any other provision of law for FY 2020.

[FR Doc. 2019–20977 Filed 9–24–19; 11:15 am]

BILLING CODE 9211–03–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 19–07]

Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance for Fiscal Year 2020

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This report to Congress is provided in accordance with the Millennium Challenge Act of 2003, as amended (Act). The Millennium Challenge Act of 2003 requires the Millennium Challenge Corporation to publish a report that identifies the criteria and methodology that MCC intends to use to determine which candidate countries may be eligible to be considered for assistance under the Act for fiscal year 2020. The report is set forth in full below.

Dated: September 23, 2019.

Brian Finkelstein,

Acting General Counsel.

Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2020

Summary

In accordance with section 608(b)(2) of the Act (22 U.S.C. 7707(b)(2)), the Millennium Challenge Corporation (MCC) is submitting the enclosed report. This report identifies the criteria and methodology that MCC intends to use to determine which candidate countries may be eligible to be considered for assistance under the Act for fiscal year 2020.

Under section 608(c)(1) of the Act (22 U.S.C. 7707(c)(1)), MCC will, for a thirty-day period following publication, accept and consider public comment for purposes of determining eligible countries under section 607 of the Act (22 U.S.C. 7706).

This document explains how the Board of Directors (the Board) of the Millennium Challenge Corporation (MCC) will identify, evaluate, and select eligible countries for fiscal year (FY) 2020. Specifically, this document discusses the following:

I. Which countries MCC will evaluate?
II. How the Board evaluates these countries?
A. Overall Evaluation
B. For Selection of an Eligible Country for a First Compact
C. For Selection of an Eligible Country for a Second or Subsequent Compact
D. For Selection of an Eligible Country for a Concurrent Compact
E. For Threshold Program Assistance
F. A Note on Potential Transition to Upper Middle Income Country Status After Initial Selection

This report is provided in accordance with section 608(b) of the Millennium Challenge Act of 2003, as amended (the Act), as more fully described in Appendix A.

I. Which countries are evaluated?

MCC evaluates the policy performance of all candidate countries and statutorily-prohibited countries by dividing them into two income categories for the purposes of creating ''scorecards.'' These categories are used to account for the income bias that occurs when countries with more per capita resources perform better than countries with fewer. In FY 2020, those scorecard evaluation income categories [1] are:

- Countries whose gross national income (GNI) per capita is $1,925 or less; and
- Countries whose GNI per capita is between $1,926 and $3,995.

Appendix B lists all candidate countries and statutorily-prohibited countries for scorecard evaluation purposes.

II. How does the Board evaluate these countries?

A. Overall Evaluation

The Board looks at three legislatively-mandated factors when it evaluates any candidate country for compact eligibility: (1) Policy performance; (2) the opportunity to reduce poverty and generate economic growth; and (3) the availability of MCC funds.

(1) Policy Performance

Appendix C describes all 20 indicators, their definitions, what is required to ''pass,'' their source, and their relationship to the legislative criteria. Because of the importance of evaluating a country's policy performance in a comparable, cross-country way, the Board relies to the maximum extent possible upon the best-available objective and quantifiable policy performance indicators. These indicators act as proxies for a country's commitment to just and democratic governance, economic freedom, and investing in its people, per MCC's founding legislation. Comprised of 20 third-party indicators in the categories of ruling justly, encouraging economic freedom, and investing in people, MCC scorecards are created for all candidate countries and statutorily-prohibited countries. To ''pass'' most indicators on its scorecard, a country's score on each indicator must be above the median score *in its income group* (as defined above for scorecard evaluation purposes). For the inflation, political rights, civil liberties, and immunization rates [2] indicators, however, minimum or maximum scores for ''passing'' have been established. In particular, the Board considers whether a country

- passed at least 10 of the 20 indicators, with at least one pass in each of the three categories,
- passed either the Political Rights or Civil Liberties indicator; and
- passed the Control of Corruption indicator.

While satisfaction of all three aspects means a country is termed to have ''passed'' the scorecard, the Board also considers whether the country performs ''substantially worse'' in any one policy category than it does on the scorecard overall.

The mandatory passing of either the Political Rights or Civil Liberties indicators is called the Democratic Rights ''hard hurdle'' on the scorecard, while the mandatory passing of the Control of Corruption indicator is called the Control of Corruption ''hard hurdle.'' Not passing either ''hard hurdle'' results in not passing the scorecard overall, regardless of whether at least 10 of the 20 other indicators are passed.

- *Democratic Rights ''hard hurdle:''* This hurdle sets a minimum bar for democratic rights below which the Board will not consider a country for eligibility. Requiring that a country pass *either* the Political Rights *or* Civil Liberties indicator creates a democratic incentive for countries, recognizes the importance democracy plays in driving poverty-reducing economic growth, and holds MCC accountable to working with the best governed, poorest countries. When a candidate country is only passing one of the two indicators comprising the hurdle (instead of both), the Board will also closely examine why it is not passing the other indicator to understand what the score implies for the broader democratic environment and trajectory of the country. This examination will include consultation with both local and international civil society experts, among others.
- *Control of Corruption ''hard hurdle:''* Corruption in any country is an unacceptable tax on economic growth and an obstacle to the private sector investment needed to reduce poverty. Accordingly, MCC seeks out partner countries that are committed to combatting corruption. It is for this reason that MCC also has the Control of Corruption ''hard hurdle,'' which helps ensure that MCC is working with countries where there is relatively strong performance in controlling corruption. Requiring the passage of the indicator provides an incentive for countries to demonstrate a clear commitment to controlling corruption, and allows MCC to better understand the issue by seeing how the country performs relative to its peers and over time.

Together, the 20 policy performance indicators are the predominant basis for determining which eligible countries will be selected for MCC assistance, and the Board expects a country to be passing its scorecard at the point the Board decides to select the country for either a first or second/subsequent compact. The Board, however, also recognizes that even the best-available data has inherent challenges. Data gaps, real-time events versus data lags, the absence of narratives and nuanced detail, and other similar weaknesses affect each of these indicators. As such, the Board uses its judgment to interpret policy performance as measured by the scorecards. The Board may also consult other sources of information to enhance its understanding of a country's policy performance beyond scorecard issues (*e.g.,* specific policy issues related to trade, the treatment of civil society, other U.S. aid programs, financial sector performance, and security/foreign policy concerns). The Board uses its judgment on how best to weigh such information in assessing overall policy performance.

(2) The Opportunity To Reduce Poverty and Generate Economic Growth

While the Board considers a range of other information sources depending on the country, specific areas of attention typically include better understanding issues and trends in, and trajectory of:

- The state of democratic and human rights (especially vulnerable groups [3]);
- civil society's perspective on salient governance issues;
- the control of corruption and rule of law;
- the potential for the private sector (both local and foreign) to lead investment and growth;
- poverty levels within a country; and
- the country's institutional capacity.

[1] These income groups correspond to the definitions of low income countries and lower middle countries using the historical International Development Association (IDA) threshold published by the World Bank. MCC has used these categories to evaluate country performance since FY 2004. Our amended statute no longer uses those definitions for funding purposes, but we will continue to use them for evaluation purposes.

[2] A minimum score required to pass has been established for the immunization rates indicator only for countries in the scorecard income pool defined as countries whose GNI per capita is between $1,926 and $3,995 in FY 2020. Countries in the other scorecard income pool, defined as those whose GNI per capita is $1,925 or less in FY 2020, must score above the median score in their income pool on the immunization rates indicator.

[3] For example: Women; children; LGBT individuals; people with disabilities; and workers.

Where applicable, the Board also considers MCC's own experience and ability to reduce poverty and generate economic growth in a given country—such as considering MCC's core skills versus a country's needs, and MCC's capacity to work with a country.

This information provides greater clarity on the likelihood that MCC programs will have an appreciable impact on reducing poverty by generating economic growth in a given country. The Board has used such information to better understand when a country's performance on a particular indicator may not be up to date or is about to change. It has also used it to decline to select countries that are otherwise passing their scorecards. More details on this subject (sometimes referred to as ''supplemental information'') can be found on MCC's website: *https://www.mcc.gov/.*

(3) The Availability of MCC Funds

The final factor that the Board must consider when evaluating countries is the available funds. The agency's budget allocation is constrained, and often specifically limited, by provisions in our authorizing legislation and appropriations acts. MCC has a continuous pipeline of countries in compact development, compact implementation, threshold programs, and compact closure. Consequently, the Board factors in MCC's overall portfolio when making its selection decisions given the funding available for each planned or existing program.

* * *

The following subsections describe how each of these three legislatively-mandated factors are applied by the Board at the December Board meeting: Selection of countries for a compact, selection of countries for a second or subsequent compact, selection of countries for the threshold program, and selection of countries for a concurrent compact. A note follows on considerations for countries that might transition to upper middle income country status after initial selection.

B. Evaluation for Selection of Eligible Countries for a First Compact

When selecting eligible countries for a compact, the Board looks at all three legislatively-mandated aspects described in the previous section: (1) Policy performance, first and foremost as measured by the scorecards and bolstered through additional information (as described in the previous section); (2) the opportunity to reduce poverty and generate economic growth, examined through the use of other supporting information (as described in the previous section); and (3) available funding.

At a minimum, the Board considers whether a country passes its scorecard. It also examines supporting evidence that a country's commitment to just and democratic governance, economic freedom, and investing in its people is on a sound footing and performance is on a positive trajectory (especially on the ''hard hurdles'' of Democratic Rights and Control of Corruption), and that MCC has the funds to support a meaningful compact with that country. Where applicable, previous threshold program information is also considered. The Board then weighs the information described above across each of the three dimensions.

During the compact development period following initial selection, the Board reevaluates a selected country based on this same approach.

C. Evaluation for Selection of Eligible Countries for a Second or Subsequent Compact

Section 609(l) of the Act specifically authorizes MCC to enter into ''one or more subsequent Compacts.'' MCC does not consider the eligibility of a country for a subsequent compact, however, before the country has completed its compact or is within 18 months of compact completion, (*e.g.,* a second compact if it has completed or is within 18 months of completing its first compact). Selection for a subsequent compact is not automatic and is intended only for countries that (1) exhibit successful performance on their previous compact; (2) exhibit improved scorecard policy performance during the partnership; and (3) exhibit a continued commitment to further their sector reform efforts in any subsequent partnership. As a result, the Board has an even higher standard when selecting countries for subsequent compacts.

(1) Successful Implementation of the Previous Compact

To evaluate the previous compact's success, the Board examines whether the compact succeeded within its budget and time limits, in particular by looking at three aspects:

- *The degree to which there is evidence of strong political will and management capacity:* Is the partnership characterized by the country ensuring that both policy reforms and the compact program itself are both being implemented to the best of that country's ability?
- *The degree to which the country has exhibited commitment and capacity to achieve program results*: Are the financial and project results being achieved; to what degree is the country committing its own resources to ensure the compact is a success; to what extent is the private sector engaged (if relevant); and other compact-specific issues?
- *The degree to which the country has implemented the compact in accordance with MCC's core policies and standards:* Is the country adhering to MCC's policies and procedures, including in critical areas such as: Remediating unresolved claims of fraud, corruption, or abuse of funds; procurement; and monitoring and evaluation?

Details on the specific information types examined and sources used in each of the three areas are provided in Appendix D. Overall, the Board is looking for evidence that the previous compact will be or has been completed on time and on budget, and that there is a commitment to continued, robust reform going forward.

(2) Improved Scorecard Policy Performance

The Board also expects the country to have improved its overall scorecard policy performance during the partnership, and to pass the scorecard in the year of selection for the subsequent compact. The Board focuses on the following:

- The overall scorecard pass/fail rate over time, and what this suggests about underlying policy performance, as well as an examination of the underlying reasons;
- The progress over time on policy areas measured by both hard-hurdle indicators—Democratic Rights and Control of Corruption—including an examination of the underlying reasons; and
- Other indicator trajectories deemed relevant by the Board.

In all cases, while the Board expects the country to be passing its scorecard, other sources of information are examined to understand the nuance and reasons behind scorecard or indicator performance over time, including any real-time updates, methodological changes within the indicators themselves, shifts in the relevant candidate pool, or alternative policy performance perspectives (such as gleaned through consultations with civil society and related stakeholders). Other information sources are also consulted to look at policy performance over time in areas not covered by the scorecard, but that are deemed important by the Board (such as trade, foreign policy concerns, etc.).

(3) A Commitment To Further Sector Reform

The Board expects that subsequent compacts will endeavor to tackle deeper policy reforms necessary to unlock an identified constraint to growth. Consequently, the Board considers its own experience during the previous compact in considering how committed the country is to reducing poverty and increasing economic growth, and tries to gauge the country's commitment to further sector reform should it be selected for a subsequent compact. This includes:

- Assessing the country's delivery of policy reform during the previous compact (as described above);
- Assessing expectations of the country's ability and willingness to continue embarking on sector policy reform in a subsequent compact;
- Examining both other information sources describing the opportunity to reduce poverty by generating growth (as outlined in A.2 above), and the first compact's relative success overall, as already discussed; and
- Finally, considering how well funding can be leveraged for impact, given the country's experience in the previous compact.

* * *

Through this overall approach to selection for a subsequent compact, the Board applies the three legislatively mandated evaluation criteria (policy performance, the opportunity to reduce poverty and generate economic growth, and available funds) in a way that assesses the previous partnership from a compact success standpoint, a commitment to improved scorecard policy performance standpoint, and a commitment to continued sector policy reform standpoint. The Board then weighs all of the information described above in making a decision.

During the compact development period following initial selection, the Board reevaluates a selected country based on this same approach.

D. Evaluation for Concurrent Compacts

Section 609(k) of the Act authorizes MCC to enter into one additional concurrent compact with a country if one or both of the compacts with the country is for the purpose of regional economic integration, increased regional trade, or cross-border collaborations.

The fundamental criteria and process for the selection of countries for such compacts remains the same as those for the selection of countries for non-concurrent compacts: Countries continue to be evaluated and selected individually, as described in sections II.A, II.B, II.C, and II.F.

Section 609(k) also requires as a precondition for a concurrent compact that the Board determine that the country is making ''considerable and demonstrable progress in implementing the terms of the existing Compact and supplementary agreements thereto.'' This statutory requirement is fully consistent with prior Board practice regarding the selection of a country for a non-concurrent compact. For a country where a concurrent compact is contemplated, the Board will take into account whether there is clear evidence of success, as relevant to the phase of the current compact. Among other information, the Board will examine the evaluation criteria described in Section II.C.1 above, notably:

- The degree to which there is evidence of strong political will and management capacity;
- The degree to which the country has exhibited commitment and capacity to achieve program results; and
- The degree to which the country has implemented the compact in accordance with MCC's core policies and standards.

In addition to providing information to the Board so it can make its determination regarding the country's progress in implementing its current compact, MCC will provide the Board with additional information relating to the potential for regional economic integration, increased regional trade, or cross-border collaborations for any country being considered for a concurrent compact. This information may include items such as:

- The current state of a country's regional integration, such as common financial and political dialogue frameworks, integration of productive value chains, and cross-border flows of people, goods, and services.
- The current and potential level of trade between a country and its neighbors, including analysis of trade flows and unexploited potential for trade, and an assessment of the extent and significance of tariff and non-tariff barriers, including information regarding the patterns of trade.
- The potential gains from cross-border cooperation between a country and its neighbors to alleviate bilateral and regional bottlenecks to economic growth and poverty reduction, such as through physical infrastructure or coordinated policy and institutional reforms.

The Board can then weigh all information as a whole—the fundamental selection factors described in sections II.A, II.B, II.C, and II.F, the information regarding implementation of the current compact, and any additional relevant information regarding potential regional integration—to determine whether or not to direct MCC to seek to enter into a concurrent compact with a country.

E. Evaluation for Threshold Program Assistance

The Board may also evaluate countries for participation in the threshold program. Threshold programs provide assistance to candidate countries exhibiting a significant commitment to meeting the criteria described in the previous subsections, but failing to meet such requirements. Specifically, in examining a candidate country's policy performance, the opportunity to reduce poverty and generate economic growth, and available funds, the Board will consider whether a country appears to be on a trajectory to becoming viable for compact eligibility in the medium or short term.

F. A Note on Potential Transition to Upper Middle Income Country (UMIC) Status After Initial Selection

Some candidate countries may have a high per capita income or a high growth rate that implies there is a chance they could transition to UMIC status during the life of an MCC partnership. In such cases, it is not possible to accurately predict if or when such country may transition to UMIC status.

Nonetheless, such countries may have more resources at their disposal for funding their own growth and poverty reduction strategies. As a result, in addition to using the regular selection criteria described in the previous sections, the Board will also use its discretion to assess both the need and the opportunity presented by partnering with such a country, in order to ensure that there is a higher bar for possible selection.

Specifically, if a candidate country with a high probability of transitioning to UMIC status is under consideration for selection, the Board will examine additional data and information related to the following:

- Whether the country faces significant challenges accessing other sources of development financing (such as international capital, domestic resources, and other donor assistance) and, if so, whether MCC grant financing would be an appropriate tool;
- Whether the nature of poverty in the country (for example, high inequality or poverty headcount ratios relative to peer countries) presents a clear and strategic opportunity for MCC to assist the country in reducing such

poverty through projects that spur economic growth;

- Whether the country demonstrates particularly strong policy performance, including policies and actions that demonstrate a clear priority on poverty reduction; and
- Whether MCC can reasonably expect that the country would contribute a significant amount of funding to the compact.

These additional criteria would then be applied in any additional years of selection as the country continues to develop its compact. Should a country eventually transition to UMIC status during compact development, a country would no longer be a candidate for selection for that fiscal year. Continuing compact development beyond that point would then be at the Board's discretion.

Appendix A: Statutory Basis for This Report

This report to Congress is provided in accordance with section 608(b) of the Millennium Challenge Act of 2003, as amended (the Act), 22 U.S.C. 7707(b).

Section 605 of the Act authorizes the provision of assistance to countries that enter into a Millennium Challenge Compact with the United States to support policies and programs that advance the progress of such countries in achieving lasting economic growth and poverty reduction. The Act requires MCC to take a number of steps in selecting countries for compact assistance for FY 2020 based on the countries' demonstrated commitment to just and democratic governance, economic freedom, and investing in their people, MCC's opportunity to reduce poverty and generate economic growth in the country, and the availability of funds. These steps include the submission of reports to the congressional committees specified in the Act and publication of information in the **Federal Register** that identify:

(1) The countries that are ''candidate countries'' for assistance for FY 2020 based on per capita income levels and eligibility to receive assistance under U.S. law (section 608(a) of the Act; 22 U.S.C. 7707(a));

(2) The criteria and methodology that MCC's Board of Directors (Board) will use to measure and evaluate policy performance of the candidate countries consistent with the requirements of section 607 of the Act (22 U.S.C. 7706) in order to determine ''eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act; 22 U.S.C. 7707(b)); and

(3) The list of countries determined by the Board to be ''eligible countries'' for FY 2020, with justification for eligibility determination and selection for compact negotiation, including those eligible countries with which MCC will seek to enter into compacts (section 608(d) of the Act; 22 U.S.C. 7707(d)).

This report satisfies item 2 above.

Appendix B: Lists of all Candidate Countries and Statutorily-Prohibited Countries for Evaluation Purposes

Income Groups for Scorecards

Since MCC was created, it has relied on the *World Bank's gross national income (GNI) per capita income data* (Atlas method) and the historical ceiling for eligibility as set by the World Bank's International Development Association (IDA) to divide countries into two income categories for purposes of creating scorecards. These categories are used to account for the income bias that occurs when countries with more per capita resources perform better than countries with fewer. Using the historical IDA eligibility ceiling for the scorecard evaluation groups ensures that the poorest countries compete with their income level peers and are not compared against countries with more resources to mobilize.

MCC will continue to use the historical IDA classifications for eligibility to categorize countries in two groups for purposes of FY 2020 scorecard comparisons:

- Countries with GNI per capita equal to or less than IDA's historical ceiling for eligibility (*i.e.,* $1,925 for FY 2020); and
- Countries with GNI per capita above IDA's historical ceiling for eligibility but below the World Bank's upper middle income country threshold (*i.e.,* $1,926 and $3,995 for FY 2020).

The list of countries for FY 2020 scorecard assessments is set forth below:

Countries With GNI Per Capita of $1,925 or Less

1. Afghanistan
2. Bangladesh
3. Benin
4. Burkina Faso
5. Burma
6. Burundi
7. Cambodia
8. Cameroon
9. Central African Republic
10. Chad
11. Comoros
12. Congo, Democratic Republic of the
13. Congo, Republic of the
14. Côte d'Ivoire
15. Eritrea
16. Ethiopia
17. Gambia, The
18. Guinea
19. Guinea-Bissau
20. Haiti
21. Kenya
22. Kyrgyzstan
23. Lesotho
24. Liberia
25. Madagascar
26. Malawi
27. Mali
28. Mauritania
29. Mozambique
30. Nepal
31. Niger
32. North Korea
33. Pakistan
34. Rwanda
35. São Tomé and Príncipe
36. Senegal
37. Sierra Leone
38. Somalia
39. South Sudan
40. Sudan
41. Syria
42. Tajikistan
43. Tanzania
44. Timor-Leste
45. Togo
46. Uganda
47. Yemen
48. Zambia
49. Zimbabwe

Countries With GNI Per Capita Between $1,926 and $3,995

1. Angola
2. Bhutan
3. Bolivia
4. Cabo Verde
5. Djibouti
6. Egypt
7. El Salvador
8. Eswatini
9. Ghana
10. Honduras
11. India
12. Indonesia
13. Kiribati
14. Laos
15. Micronesia, Federated States of
16. Moldova
17. Mongolia
18. Morocco
19. Nicaragua
20. Nigeria
21. Papua New Guinea
22. Philippines
23. Solomon Islands
24. Tunisia
25. Ukraine
26. Uzbekistan
27. Vanuatu
28. Vietnam

Statutorily-Prohibited Countries

1. Bolivia
2. Burma
3. Burundi
4. Cambodia
5. Comoros
6. Democratic Republic of Congo

7. Eritrea
8. Mauritania
9. Nicaragua
10. North Korea
11. South Sudan
12. Sudan
13. Syria
14. Zimbabwe

Appendix C: Indicator Definitions

The following indicators will be used to measure candidate countries' demonstrated commitment to the criteria found in section 607(b) of the Act. The indicators are intended to assess the degree to which the political and economic conditions in a country serve to promote broad-based sustainable economic growth and reduction of poverty and thus provide a sound environment for the use of MCC funds. The indicators are not goals in themselves; rather, they are proxy measures of policies that are linked to broad-based sustainable economic growth. The indicators were selected based on (i) their relationship to economic growth and poverty reduction; (ii) the number of countries they cover; (iii) transparency and availability; and (iv) relative soundness and objectivity. Where possible, the indicators are developed by independent sources. Listed below is a brief summary of the indicators (a detailed rationale for the adoption of these indicators can be found in the Public Guide to the Indicators on MCC's public website at *www.mcc.gov*).

Ruling Justly

1. Political Rights: Independent experts rate countries on the prevalence of free and fair electoral processes; political pluralism and participation of all stakeholders; government accountability and transparency; freedom from domination by the military, foreign powers, totalitarian parties, religious hierarchies and economic oligarchies; and the political rights of minority groups, among other things. Pass: Score must be above the minimum score of 17 out of 40. Source: *Freedom House*

2. Civil Liberties: Independent experts rate countries on freedom of expression and belief; association and organizational rights; rule of law and human rights; and personal autonomy and economic rights, among other things. Pass: Score must be above the minimum score of 25 out of 60. Source: *Freedom House*

3. Freedom of Information: Measures the legal and practical steps taken by a government to enable or allow information to move freely through society; this includes measures of press freedom, national freedom of information laws, and the extent to which a county is filtering internet content or tools. Pass: Score must be above the median score for the income group. Source: *Freedom House/ Reporters Without Borders/Centre for Law and Democracy.*

4. Government Effectiveness: An index of surveys and expert assessments that rate countries on the quality of public service provision; civil servants' competency and independence from political pressures; and the government's ability to plan and implement sound policies, among other things. Pass: Score must be above the median score for the income group. Source: *Worldwide Governance Indicators (World Bank/Brookings)*

5. Rule of Law: An index of surveys and expert assessments that rate countries on the extent to which the public has confidence in and abides by the rules of society; the incidence and impact of violent and nonviolent crime; the effectiveness, independence, and predictability of the judiciary; the protection of property rights; and the enforceability of contracts, among other things. Pass: Score must be above the median score for the income group. Source: *Worldwide Governance Indicators (World Bank/Brookings)*

6. Control of Corruption: An index of surveys and expert assessments that rate countries on: ''grand corruption'' in the political arena; the frequency of petty corruption; the effects of corruption on the business environment; and the tendency of elites to engage in ''state capture,'' among other things. Pass: Score must be above the median score for the income group. Source: *Worldwide Governance Indicators (World Bank/Brookings)*

Encouraging Economic Freedom

1. Fiscal Policy: General government net lending/borrowing as a percent of gross domestic product (GDP), averaged over a three year period. Net lending/ borrowing is calculated as revenue minus total expenditure. The data for this measure comes from the IMF's World Economic Outlook. Pass: Score must be above the median score for the income group. Source: *The International Monetary Fund's World Economic Outlook Database*

2. Inflation: The most recent average annual change in consumer prices. Pass: Score must be 15 percent or less. Source: *The International Monetary Fund's World Economic Outlook Database*

3. Regulatory Quality: An index of surveys and expert assessments that rate countries on the burden of regulations on business; price controls; the government's role in the economy; and foreign investment regulation, among other areas. Pass: Score must be above the median score for the income group. Source: *Worldwide Governance Indicators (World Bank/Brookings)*

4. Trade Policy: A measure of a country's openness to international trade based on weighted average tariff rates and non-tariff barriers to trade. Pass: Score must be above the median score for the income group. Source: *The Heritage Foundation*

5. Gender in the Economy: An index that measures the extent to which laws provide men and women equal capacity to generate income or participate in the economy, including factors such as the capacity to access institutions, get a job, register a business, sign a contract, open a bank account, choose where to live, to travel freely, property rights protections, protections against domestic violence, and child marriage, among others. Pass: Score must be above the median score for the income group. Source: *Women, Business, and the Law (World Bank)*

6. Land Rights and Access: An index that rates countries on the extent to which the institutional, legal, and market framework provide secure land tenure and equitable access to land in rural areas and the time and cost of property registration in urban and peri-urban areas. Pass: Score must be above the median score for the income group. Source: *The International Fund for Agricultural Development and World Bank*

7. Access to Credit: An index that rates countries on rules and practices affecting the coverage, scope, and accessibility of credit information available through either a public credit registry or a private credit bureau; as well as legal rights in collateral laws and bankruptcy laws. Pass: Score must be above the median score for the income group. Source: *World Bank*

8. Business Start-Up: An index that rates countries on the time and cost of complying with all procedures officially required for an entrepreneur to start up and formally operate an industrial or commercial business. Pass: Score must be above the median score for the income group. Source: *World Bank*

Investing in People

1. Public Expenditure on Health: Total current expenditures on health by government (excluding funding sourced from external donors) at all levels divided by GDP. Pass: Score must be above the median score for the income group. Source: *The World Health Organization*

2. Total Public Expenditure on Primary Education: Total expenditures on primary education by government at all levels divided by GDP. Pass: Score must be above the median score for the income group. Source: *The United Nations Educational, Scientific and Cultural Organization and National Governments*

3. Natural Resource Protection: Assesses whether countries are protecting up to 17 percent of all their biomes (*e.g.,* deserts, tropical rainforests, grasslands, savannas and tundra). Pass: Score must be above the median score for the income group. Source: *The Center for International Earth Science Information Network and the Yale Center for Environmental Law and Policy*

4. Immunization Rates: The average of DPT3 and measles immunization coverage rates for the most recent year available. Pass: Score must be above the median score for countries with a GNI/capita of $1,925 or less and 90 percent or higher for countries with a GNI/capita between $1,926 and $3,995. Source: *The World Health Organization and the United Nations Children's Fund*

5. Girls Education

a. Girls' Primary Completion Rate: The number of female students enrolled in the last grade of primary education minus repeaters divided by the population in the relevant age cohort (gross intake ratio in the last grade of primary). Countries with a GNI/capita of $1,925 or less are assessed on this indicator. Pass: Score must be above the median score for the income group. Source: *United Nations Educational, Scientific and Cultural Organization.*

b. Girls Secondary Enrollment Education: The number of female pupils enrolled in lower secondary school, regardless of age, expressed as a percentage of the population of females in the theoretical age group for lower secondary education. Countries with a GNI/capita between $1,926 and $3,995 are assessed on this indicator instead of Girls Primary Completion Rates. Pass: Score must be above the median score for the income group. Source: *United Nations Educational, Scientific and Cultural Organization.*

6. Child Health: An index made up of three indicators: (i) Access to improved water, (ii) access to improved sanitation, and (iii) child (ages 1–4) mortality. Pass: Score must be above the median score for the income group. Source: *The Center for International Earth Science Information Network and the Yale Center for Environmental Law and Policy*

Relationship to Legislative Criteria

Within each policy category, the Act sets out a number of specific selection criteria. A set of objective and quantifiable policy indicators is used to inform eligibility decisions for assistance and to measure the relative performance by candidate countries against these criteria. The Board's approach to determining eligibility ensures that performance against each of these criteria is assessed by at least one of the objective indicators. Most are addressed by multiple indicators. The specific indicators appear in parentheses next to the corresponding criterion set out in the Act.

Section 607(b)(1): Just and Democratic Governance, Including a Demonstrated Commitment to—

(A) promote political pluralism, equality and the rule of law (*Political Rights, Civil Liberties, Rule of Law, and Gender in the Economy*);

(B) respect human and civil rights, including the rights of people with disabilities (*Political Rights, Civil Liberties, and Freedom of Information*);

(C) protect private property rights (*Civil Liberties, Regulatory Quality, Rule of Law, and Land Rights and Access*);

(D) encourage transparency and accountability of government (*Political Rights, Civil Liberties, Freedom of Information, Control of Corruption, Rule of Law, and Government Effectiveness*);

(E) combat corruption (*Political Rights, Civil Liberties, Rule of Law, Freedom of Information, and Control of Corruption*); and

(F) the quality of the civil society enabling environment (*Civil Liberties, Freedom of Information, and Rule of Law*).

Section 607(b)(2): Economic Freedom, Including a Demonstrated Commitment to Economic Policies That—

(A) encourage citizens and firms to participate in global trade and international capital markets (*Fiscal Policy, Inflation, Trade Policy, and Regulatory Quality*);

(B) promote private sector growth (*Inflation, Business Start-Up, Fiscal Policy, Land Rights and Access, Access to Credit, Gender in the Economy, and Regulatory Quality*);

(C) strengthen market forces in the economy (*Fiscal Policy, Inflation, Trade Policy, Business Start-Up, Land Rights and Access, Access to Credit, and Regulatory Quality*); and

(D) respect worker rights, including the right to form labor unions (*Civil Liberties and Gender in the Economy*)

Section 607(b)(3): Investments in the People of Such Country, Particularly Women and Children, Including Programs That—

(A) promote broad-based primary education (*Girls' Primary Completion Rate, Girls' Secondary Education Enrollment Rate, and Total Public Expenditure on Primary Education*);

(B) strengthen and build capacity to provide quality public health and reduce child mortality (*Immunization Rates, Public Expenditure on Health, and Child Health*); and

(C) promote the protection of biodiversity and the transparent and sustainable management and use of natural resources (*Natural Resource Protection*).

Appendix D: Subsequent and Concurrent Compact Considerations

MCC reporting and data in the following chart are used to assess compact performance of MCC compact countries nearing the end of compact implementation (*i.e.,* within 18 months of compact end date), or for current MCC compact countries under consideration for a concurrent compact, where appropriate. Some reporting used for assessment may contain sensitive information and adversely affect implementation or MCC-partner country relations. This information is for MCC's internal use and is not made public. However, key implementation information is summarized in compact status and results reports that are published quarterly on MCC's website under MCC country programs (*https://www.mcc.gov/where-we-work*) or monitoring and evaluation (*https://www.mcc.gov/our-impact/m-and-e*) web pages.

For completed compacts, additional information is used to assess compact performance and is found in a country's Star Report. The Star Report and its associated quarterly business process capture key information to provide a framework for results and improve the ability to disseminate learning and evidence throughout the lifecycle of an MCC investment from selection to final evaluation. For each compact and threshold program, evidence is collected on performance indicators, evaluation results, partnerships, sustainability efforts, and learning, among other elements.

Topic	MCC reporting/data source	Published documents
COUNTRY PARTNERSHIP ..... **Political Will** • Status of major conditions precedent. • Program oversight/implementation. ○ project restructures. ○ partner response to accountable entity capacity issues. • Political independence of the accountable entity. **Management Capacity** • Project management capacity. • Project performance. • Level of MCC intervention/oversight. • Relative level of resources required.	• *Quarterly implementation reporting.* • *Quarterly results reporting.* • *Survey of MCC staff.* • *MCC Star Reports.*	• *Quarterly results published as "Table of Key Performance Indicators" (available by country): https://www.mcc.gov/our-impact/m-and-e.* • *Star Reports (available by country): https://www.mcc.gov/resources?fwp_resource_type=star-report.* • *Survey questions: https://www.mcc.gov/resources/doc/guide-to-the-compact-survey-summary-fy20.*
PROGRAM RESULTS ..... **Financial Results** • Commitments—including contributions to compact funding. • Disbursements. **Project Results** • Output, outcome, objective targets. • Accountable entity commitment to 'focus on results'. • Accountable entity cooperation on impact evaluation. • Percent complete for process/outputs. • Relevant outcome data. • Details behind target delays. **Target Achievements**	• *Indicator tracking tables* • *Quarterly financial reporting.* • *Quarterly implementation reporting.* • *Quarterly results reporting.* • *Survey of MCC staff.* • *Impact evaluations.* • *MCC Star Reports.*	• *Monitoring and Evaluation Plans (available by country): https://www.mcc.gov/our-impact/m-and-e.* • *Quarterly results published as "Table of Key Performance Indicators" (available by country): https://www.mcc.gov/our-impact/m-and-e.* • *Star Reports (available by country): https://www.mcc.gov/resources?fwp_resource_type=star-report.* • *Survey questions: https://www.mcc.gov/resources/doc/guide-to-the-compact-survey-summary-fy20.*
ADHERENCE TO STANDARDS ..... • Procurement. • Environmental and social. • Fraud and corruption. • Program closure. • Monitoring and evaluation. • All other legal provisions.	• *Audits (GAO and OIG)* ... • *Quarterly implementation reporting.* • *Survey of MCC staff.* • *MCC Star Reports.*	• *Published OIG and GAO audits.* • *Star Reports (available by country): https://www.mcc.gov/resources?fwp_resource_type=star-report.* • *Survey questions: https://www.mcc.gov/resources/doc/guide-to-the-compact-survey-summary-fy20.*
COUNTRY SPECIFIC ..... **Sustainability** • Implementation entity. • MCC investments. **Role of private sector or other donors**. • Other relevant investors/investments. • Other donors/programming. • Status of related reforms. • Trajectory of private sector involvement going forward.	• *Quarterly implementation reporting.* • *Quarterly results reporting.* • *Survey of MCC staff.* • *MCC Star Reports.*	• *Quarterly results published as "Table of Key Performance Indicators" (available by country): https://www.mcc.gov/our-impact/m-and-e.* • *Star Reports (available by country): https://www.mcc.gov/resources?fwp_resource_type=star-report.* • *Survey questions: https://www.mcc.gov/resources/doc/guide-to-the-compact-survey-summary-fy20.*

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NUCLEAR REGULATORY COMMISSION

[NRC–2019–0073]

Stakeholder Input on Best Practices for Establishment and Operation of Local Community Advisory Boards in Response to a Portion of the Nuclear Energy Innovation and Modernization Act

AGENCY: Nuclear Regulatory Commission.

ACTION: Public meetings and webinar; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is undertaking activities to develop a report identifying best practices for establishment and operation of local community advisory boards (CABs) associated with decommissioning activities, including lessons learned from existing boards, as required by the Nuclear Energy Innovation and Modernization Act (NEIMA). As part of developing the report, the NRC is hosting 11 public meetings and a public webinar to consult with host States, communities within the emergency planning zone of an applicable nuclear power reactor, and existing local CABs. In addition to these public meetings and public webinar, the NRC has developed a questionnaire to collect information regarding the areas identified in NEIMA with respect to the creation and operation of CABs. The results of the meetings, along with any other data received as a result of the NRC's information collection activities associated with the NEIMA Section 108, will be captured in a best practices report that will be submitted to Congress.

DATES: Comments must be filed by November 15, 2019. Public meetings and a public webinar to discuss best practices and lessons learned associated with CABs at decommissioning nuclear power reactors have been taking and will take place from August through October of 2019. Specific details regarding the dates, times, locations, and other logistical information for the public meetings and public webinar can be found on the NRC's public website at *https://www.nrc.gov/waste/decommissioning/neima-section-108.html.*

ADDRESSES: You may submit comments by any of the following methods:

• *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0073. Address

questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to*: Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Marlayna Vaaler Doell, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3178; email: *NEIMA108.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0073 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0073.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2019–0073 in your comment submission. The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC is coordinating activities in accordance with Section 108 of NEIMA to develop a report identifying best practices for establishment and operation of CABs. The contents of this report, scheduled to be issued to Congress no later than July 14, 2020, will include (1) a description of the type of topics that might be brought before a CAB; (2) how the board's input could inform the decision-making process of stakeholders for various decommissioning activities; how the board could interact with the NRC and other Federal regulatory bodies to promote dialogue between the licensee and affected stakeholders; and (3) how the board could offer opportunities for public engagement throughout all phases of the decommissioning process. The report will also include a discussion of the composition of existing CABs and best practices identified during the establishment and operation of such boards, including logistical considerations, frequency of meetings, the selection of board members, etc.

In developing a best practices report, and as required by NEIMA, the NRC is consulting with host States, communities within the emergency planning zone of an applicable nuclear power reactor, and existing CABs. This consultation includes hosting 11 Category 3 public meetings and at least 1 nationwide webinar. These public meetings are being held in locations that ensure geographic diversity across the United States, with priority given to States that (1) have a nuclear power reactor currently undergoing the decommissioning process; and (2) requested a public meeting under the provisions of NEIMA in accordance with the **Federal Register** (FR) notice published on March 18, 2019 (84 FR 9841). At NRC Category 3 public meetings, the public is invited to participate by providing comments and asking questions.

In addition to these public meetings, the NRC has developed a questionnaire to collect information regarding the areas identified in NEIMA with respect to the creation and operation of CABs. The NRC is requesting responses from existing CABs in the vicinity of power reactors undergoing decommissioning, similar established stakeholder groups, or local government organizations. The questionnaire is available at *https://www.nrc.gov/waste/decommissioning/neima-local-comm-advisory-board-questionnaire.html.*

III. Category 3 Public Meeting Dates and Locations

Consistent with the consultation requirements in NEIMA Section 108, the NRC received requests for and identified the areas surrounding 11 nuclear power reactors as locations to host public meetings to discuss best practices and lessons learned for establishment and operation of CABs.

Public meetings have been held near the following eight reactors:

(1) Palisades Nuclear Generating Station in Covert, Michigan, on August 21, 2019;

(2) Humboldt Bay Nuclear Power Plant in Eureka, California, on August 26, 2019;

(3) Diablo Canyon Power Plant in San Luis Obispo, California, on August 27, 2019;

(4) San Onofre Nuclear Generating Station in San Clemente, California, on August 29, 2019;

(5) Vermont Yankee Nuclear Power Plant in Vernon, Vermont, on September 10, 2019;

(6) Pilgrim Nuclear Power Station in Plymouth, Massachusetts, on September 11, 2019;

(7) Kewaunee Power Station in Kewaunee, Wisconsin, on September 24, 2019; and

(8) Zion Nuclear Power Station in Zion, Illinois, on September 26, 2019.

The three remaining public meetings will be held near the following reactors:

(1) Indian Point Energy Center in Buchanan, New York, on October 2, 2019 (ADAMS Accession No. ML19232A505);

(2) Oyster Creek Nuclear Generating Station in Forked River, New Jersey, on October 3, 2019 (ADAMS Accession No. ML19232A504); and

(3) Crystal River 3 Nuclear Power Plant in Crystal River, Florida, on October 10, 2019 (ADAMS Accession No. ML19232A502).

Additionally, the NRC hosted a public webinar held on August 8, 2019, to obtain comments from individuals in other areas of the country.

Specific details regarding the dates, times, locations, and other logistical information for each of the meetings can be found on the NRC's NEIMA Section 108 public website at *https://www.nrc.gov/waste/decommissioning/neima-section-108.html.* For information about attending the NEIMA Section 108 Category 3 public meetings, please see the public website listed above or contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

IV. Local Community Advisory Board Questionnaire

The NRC is seeking input from existing CABs in the vicinity of power reactors undergoing decommissioning, similar established stakeholder groups, or local government organizations regarding best practices and lessons learned associated with CABs at decommissioning nuclear power reactors. Comments may be submitted by November 15, 2019. Comments submitted after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received by this date.

Dated at Rockville, Maryland, this 24th day of September, 2019.

For the Nuclear Regulatory Commission.

Bruce A. Watson,

Chief, Reactor Decommissioning Branch, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2019–21012 Filed 9–26–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0157]

Applicability of Existing Regulatory Guides to the Design, Construction, and Operation of an Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide (RG) 3.53, ''Applicability of Existing Regulatory Guides to the Design, Construction, and Operation of an Independent Spent Fuel Storage Installation.'' This document is being withdrawn because the information included in the RG has been superseded by newer guidance and is therefore no longer needed.

DATES: The withdrawal of RG 3.53 takes effect on September 27, 2019.

ADDRESSES: Please refer to Docket ID NRC–2019–0157 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document, using the following methods:

- *Federal rulemaking website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2019–0157. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Document collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The basis for the withdrawal of this regulatory guide is found in ADAMS under Accession No. ML19177A369.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Haile Lindsay, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–0616; email: *Haile.Lindsay@nrc.gov,* or Harriet Karagiannis, Office of Nuclear Regulatory Research; telephone: 301–415–2493; email: *Harriet.Karagiannis@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: The NRC is withdrawing RG 3.53 because it has been superseded and is no longer needed. RG 3.53 was published in July 1982 to describe the applicability of existing regulatory guides that would aid in the design, construction, and operation of an independent spent fuel storage installation (ISFSI). At that time, there were no precedents for applications for ISFSIs, there was not a consolidated set of guidance, and information technology did not exist to provide guidance electronically for ISFSIs. The staff issued RG 3.53 to expedite the staff's reviews of ISFSI applications, which were anticipated under the new requirements in title 10 of the *Code of Federal Regulations* (10 CFR) part 72, ''Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High Level Radioactive Waste, and Reactor-Related Greater than Class C Waste.''

Since 1982, many of the guidance documents and regulatory positions listed in the RG have been withdrawn or superseded by more current guidance. Examples of new or revised staff guidance for ISFSIs include RG 3.48, ''Standard Format and Content for the Safety Analysis Report for an Independent Spent Fuel Storage Installation or Monitored Retrievable Storage Installation (Dry Storage),'' RG 3.50, ''Standard Format and Content for a Specific License Application for An Independent Spent Fuel Storage Installation or Monitored Retrievable Storage Facility,'' RG 3.60, ''Design of an Independent Spent Fuel Storage Installation (Dry Storage),'' and RG 3.62, ''Standard Format and Content for the Safety Analysis Report for Onsite Storage of Spent Fuel Storage Casks.'' These guidance documents incorporate the lessons learned during the licensing process and from operational experiences with ISFSIs. The current information technology available today makes the numerous RGs in the areas of design, construction, and operation of an ISFSI readily available electronically on the NRC's public website and it is easy for applicants to navigate and identify these guides.

Dated at Rockville, Maryland, this 23rd day of September, 2019.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2019–20972 Filed 9–26–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0103]

Information Collection: Criteria and Procedures for Determining Eligibility for Access to or Control Over Special Nuclear Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Criteria and Procedures for Determining Eligibility for Access to or Control Over Special Nuclear Material.''

DATES: Submit comments by October 28, 2019. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit comments directly to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0062), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0103 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2019–0103.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML19198A152.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov/* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, part 11 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Criteria and Procedures for Determining Eligibility for Access to or Control Over Special Nuclear Material.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on May 9, 2019, 84 FR 20439.

1. *The title of the information collection:* 10 CFR part 11, ''Criteria and Procedures for Determining Eligibility for Access to or Control Over Special Nuclear Material.''

2. *OMB approval number:* 3150–0062.

3. *Type of submission:* Extension.

4. *The form number if applicable:* N/A.

5. *How often the collection is required or requested:* On occasion.

6. *Who will be required or asked to respond:* Employees (including applicants for employment), contractors, and consultant for NRC licensees and contractors whose activities involves access to, or control over, special nuclear material at either fixed sites or for transportation activities.

7. *The estimated number of annual responses:* 357.

8. *The estimated number of annual respondents:* 2.

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 89.

10. *Abstract:* The NRC's regulations in 10 CFR part 11, establish requirements for access to special nuclear material, and the criteria and procedures for resolving questions concerning the eligibility of individuals to receive special nuclear material access authorization. The specific part 11 requirements covered under this OMB clearance include requests for exemptions to part 11 requirements, amendments to security plans that require incumbents to have material access authorizations, access authorization cancellations. In addition, licensees must keep records of the names and access authorization numbers of certain individuals assigned to shipments of special nuclear material. The information required by 10 CFR part 11 is needed to establish control over and maintain records of who is properly authorized to safeguard and have access to special nuclear material. Not knowing this information could cause harm to the public and national security.

Dated at Rockville, Maryland, this 24th day of September, 2019.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2019–20983 Filed 9–26–19; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87062; File No. SR–CboeBZX–2019–047]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Adopt BZX Rule 14.11(k) To Permit the Listing and Trading of Managed Portfolio Shares

September 23, 2019.

I. Introduction

On June 6, 2019, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt BZX Rule 14.11(k) to permit the listing and trading of Managed Portfolio Shares, which are shares of actively managed exchange-traded funds for which the portfolio is disclosed in accordance with standard mutual fund disclosure rules. The proposed rule change was published for comment in the **Federal Register** on June 25, 2019.[3] On August 2, 2019, pursuant to Section 19(b)(2) of the Exchange 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 September 20, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed. On September 23, 2019, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change as amended by Amendment No. 1.[6] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act [7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 2.

II. The Exchange's Description of 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

This Amendment No. 2 to SR–CboeBZX–2019–047 amends and replaces in its entirety the proposal as amended by Amendment No. 1, which was submitted on September 20, 2019, which amended and replaced in its entirety the proposal as originally submitted on June 5, 2019. The Exchange submits this Amendment No. 2 in order to clarify certain points and add additional details to the proposal. The Exchange submits this Amendment No. 2 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to add new Rule 14.11(k) for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges, of Managed Portfolio Shares, which are securities issued by an actively managed open-end management investment company.[8]

Proposed Listing Rules

The proposed change to Rule 14.11(a) would amend the rule to include any statements or representations regarding the Verified Intraday Indicative Values included in any filing to list a series of Managed Portfolio Shares as constituting continued listing requirements for such securities listed on the Exchange.

Proposed Rule 14.11(k)(1) provides that the Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Managed Portfolio Shares that meet the criteria of Rule 14.11(k).

Proposed Rule 14.11(k)(2) provides that Rule 14.11(k) is applicable only to Managed Portfolio Shares and that, except to the extent inconsistent with Rule 14.11(k), or unless the context otherwise requires, the rules and procedures of the Exchange's Board of Directors shall be applicable to the trading on the Exchange of such securities. Proposed Rule 14.11(k)(2) provides further that Managed Portfolio Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Rules of the Exchange.

Proposed Rule 14.11(k)(2)(A) provides that the Exchange will file separate proposals under Section 19(b) of the Act before the listing and trading of a series of Managed Portfolio Shares.

Proposed Rule 14.11(k)(2)(B) provides that transactions in Managed Portfolio Shares will occur only during Regular Trading Hours.[9]

Proposed Rule 14.11(k)(2)(C) provides that the Exchange will implement and maintain written surveillance procedures for Managed Portfolio Shares. As part of these surveillance procedures, the Investment Company's investment adviser will upon request make available to the Exchange and/or FINRA, on behalf of the Exchange, the daily portfolio holdings of each series of Managed Portfolio Shares.

Proposed Rule 14.11(k)(2)(D) provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86157 (June 19, 2019), 84 FR 29892.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 86157, 84 FR 39046 (August 8, 2019). The Commission designated September 23, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] Amendments No. 1 and No. 2 are available on the Commission's website at *www.sec.gov.*

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The basis of this proposal is an amended application for exemptive relief that was filed on April 4, 2019 (the ''Application'') and for which public notice was issued on April 8, 2019 (the ''Notice'') (File No. 812–14405) and subsequent order granting certain exemptive relief to Precidian Funds LLC (''Precidian''); Precidian ETFs Trust and Precidian ETF Trust II; and Foreside Fund Services, LLC issued on May 20, 2019 (the ''Order'' and, collectively, with the Application and the Notice, the ''Exemptive Order''). The Order specifically notes that ''granting the requested exemptions is appropriate in and consistent with the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. It is further found that the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and with the general purposes of the Act.'' *See* Investment Company Act Release Nos. 33440 and 33477.

[9] As defined in Rule 1.5(w), the term ''Regular Trading Hours'' means the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

concerning the composition and/or changes to such Investment Company portfolio and/or Creation Basket. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition, Creation Basket, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or Creation Basket.

Proposed Rule 14.11(k)(2)(E) provides that person or entity, including an AP Representative, custodian, pricing verification agent, reporting authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition, the Creation Basket, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.

Proposed Rule 14.11(k)(3)(A) defines the term ''Managed Portfolio Share'' as a security that (a) represents an interest in an investment company registered under the Investment Company Act of 1940 (''Investment Company'') organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a Creation Unit, or multiples thereof, in return for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value and delivered to the Authorized Participant (as defined in the Investment Company's Form N–1A filed with the SEC) through a Confidential Account; (c) when aggregated into a Redemption Unit, or multiples thereof, may be redeemed for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value delivered to the Confidential Account for the benefit of the Authorized Participant; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every calendar quarter.[10]

Proposed Rule 14.11(k)(3)(B) defines the term ''Verified Intraday Indicative Value'' (''VIIV'') as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during Regular Trading Hours by the Reporting Authority.

Proposed Rule 14.11(k)(3)(C) defines the term ''AP Representative'' as an unaffiliated broker-dealer with which an Authorized Participant has signed an agreement to establish a Confidential Account for the benefit of such Authorized Participant that will deliver or receive all consideration to or from the Investment Company in a creation or redemption. An AP Representative will be restricted from disclosing the Creation Basket.

Proposed Rule 14.11(k)(3)(D) defines the term ''Confidential Account'' as an account owned by an Authorized Participant and held with an AP Representative on behalf of the Authorized Participant. The account will be established and governed by contractual agreement between the AP Representative and the Authorized Participant solely for the purposes of creation and redemption, while keeping confidential the Creation Basket constituents of each series of Managed Portfolio Shares, including from the Authorized Participant. The books and records of the Confidential Account will be maintained by the AP Representative on behalf of the Authorized Participant.

Proposed Rule 14.11(k)(3)(E) defines the term ''Creation Basket'' as on any given business day the names and quantities of the specified instruments that are required for an AP Representative to deposit in-kind on behalf of an Authorized Participant in exchange for a Creation Unit and the names and quantities of the specified instruments that will be transferred in-kind to an AP Representative on behalf of an Authorized Participant in exchange for a Redemption Unit, which will be identical and will be transmitted to each AP Representative before the commencement of trading.

Proposed Rule 14.11(k)(3)(F) defines the term ''Creation Unit'' as a specified minimum number of Managed Portfolio Shares issued by an Investment Company at the request of an Authorized Participant in return for a designated portfolio of instruments and/or cash.

Proposed Rule 14.11(k)(3)(G) defines the term ''Redemption Unit'' as a specified minimum number of Managed Portfolio Shares that may be redeemed to an Investment Company at the request of an AP in return for a portfolio of instruments and/or cash.

Proposed Rule 14.11(k)(3)(H) defines the term ''Reporting Authority'' in respect of a particular series of Managed Portfolio Shares as the Exchange, the exchange that lists a particular series of Managed Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges), an institution, or a reporting service designated by the Investment Company as the official source for calculating and reporting information relating to such series, including, the NAV, the VIIV, or other information relating to the issuance, redemption or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

Proposed Rule 14.11(k)(3)(I) provides that the term ''Normal Market Conditions'' includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as natural or manmade disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

Proposed Rule 14.11(k)(4)(A) sets forth initial listing criteria applicable to Managed Portfolio Shares. Proposed Rule 14.11(k)(4)(A)(i) provides that, for each series of Managed Portfolio Shares, the Exchange will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading on the Exchange. In addition, proposed Rule 14.11(k)(4)(A)(ii) provides that the Exchange will obtain a representation from the Investment Company that issues each series of Managed Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time. Proposed Rule 14.11(k)(4)(A)(iii) provides that all Managed Portfolio Shares shall have a stated investment objective, which shall be adhered to under Normal Market Conditions.

[10] For purposes of this filing, references to a series of Managed Portfolio Shares are referred to interchangeably as a series of Managed Portfolio Shares or as a ''Fund'' and shares of a series of Managed Portfolio Shares are generally referred to as the ''Shares''.

Proposed Rule 14.11(k)(4)(B) provides that each series of Managed Portfolio Shares will be listed and traded subject to application of the following continued listing criteria. Proposed Rule 14.11(k)(4)(B)(i) provides that the VIIV for Managed Portfolio Shares will be widely disseminated by the Reporting Authority and/or by one or more major market data vendors in one second intervals during Regular Trading Hours and will be disseminated to all market participants at the same time. Proposed Rule 14.11(k)(4)(B)(ii) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, a series of Managed Portfolio Shares under any of the following circumstances: (a) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of Managed Portfolio Shares for 30 or more consecutive trading days; (b) if the Exchange has halted trading in a series of Managed Portfolio Shares because the VIIV is interrupted pursuant to Rule 14.11(k)(4)(B)(iii) and such interruption persists past the trading day in which it occurred or is no longer available; (c) if the Exchange has halted trading in a series of Managed Portfolio Shares because the NAV with respect to such series of Managed Portfolio Shares is not disseminated to all market participants at the same time, the holdings of such series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the Investment Company Act of 1940 (the ''1940 Act''), or such holdings are not made available to all market participants at the same time pursuant to Rule 14.11(k)(4)(B)(iii) and such issue persists past the trading day in which it occurred; (d) if the Investment Company issuing the Managed Portfolio Shares has failed to file any filings required by the Commission or if the Exchange is aware that the Investment Company is not in compliance with the conditions of any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares; (e) if any of the continued listing requirements set forth in Rule 14.11(k) are not continuously maintained; (f) if any of the applicable Continued Listing Representations, as defined in Rule 14.11(a), for the issue of Managed Portfolio Shares are not continuously met; or (g) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

Proposed Rule 14.11(k)(4)(B)(iii)(a) provides that, upon notification to the Exchange by the Investment Company or its agent of the existence of any condition or set of conditions specified in any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff that would require the Investment Company's investment adviser to request that the Exchange halt trading in the Managed Portfolio Shares, the Exchange shall halt trading in the Managed Portfolio Shares as soon as practicable. Such halt in trading shall continue until the Investment Company or its agent notifies the Exchange that the condition or conditions necessary for the resumption of trading have been met.[11]

Proposed Rule 14.11(k)(4)(B)(iii)(b) provides that, if the Exchange becomes aware that: (i) The Verified Intraday Indicative Value of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time, it will halt trading in such series until such time as the Verified Intraday Indicative Value, the net asset value, or the holdings are available to all market participants as required.

Proposed Rule 14.11(k)(4)(B)(iv) provides that, upon termination of an Investment Company, the Exchange requires that Managed Portfolio Shares issued in connection with such entity be removed from Exchange listing.

Proposed Rule 14.11(k)(4)(B)(v) provides that voting rights shall be as set forth in the applicable Investment Company prospectus and/or statement of additional information.

[11] As provided in the Application, such conditions would exist where either: (i) The intraday indicative values calculated by the pricing verification agent(s) differ by more than 25 basis points for 60 seconds in connection with pricing of the Verified Intraday Indicative Value; or (ii) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available market quotations. The Exchange shall halt trading in the Managed Portfolio Shares as soon as practicable after receipt of notification of the existence of such conditions. Such halt in trading shall continue until the Investment Company or its agent notifies the Exchange that these conditions no longer exist.

Proposed Rule 14.11(k)(5), which relates to limitation of Exchange liability, provides that neither the Exchange, the Reporting Authority, when the Exchange is acting in the capacity of a Reporting Authority, nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current portfolio value; the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Managed Portfolio Shares; the VIIV; the amount of any dividend equivalent payment or cash distribution to holders of Managed Portfolio Shares; NAV; or other information relating to the purchase, redemption, or trading of Managed Portfolio Shares, resulting from any negligent act or omission by the Exchange, the Reporting Authority when the Exchange is acting in the capacity of a Reporting Authority, or any agent of the Exchange, or any act, condition, or cause beyond the reasonable control of the Exchange, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission, or delay in the reports of transactions in one or more underlying securities.

Proposed Rule 14.11(k)(6), which relates to disclosures, provides that the provisions of subparagraph (k)(6) apply only to series of Managed Portfolio Shares that are the subject of an order by the Commission exempting such series from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 and are not otherwise subject to prospectus delivery requirements under the Securities Act of 1933. The Exchange will inform its Members regarding application of this subparagraph to a particular series of Managed Portfolio Shares by means of an information circular prior to commencement of trading in such series.

The Exchange requires that members provide to all purchasers of a series of Managed Portfolio Shares a written description of the terms and characteristics of those securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description

with any sales material relating to a series of Managed Portfolio Shares that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of Managed Portfolio Shares as an investment vehicle must include a statement in substantially the following form: ''A circular describing the terms and characteristics of (the series of Managed Portfolio Shares) has been prepared by the (open-end management investment company name) and is available from your broker. It is recommended that you obtain and review such circular before purchasing (the series of Managed Portfolio Shares).''

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Managed Portfolio Shares for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Managed Portfolio Shares.

Key Features of Managed Portfolio Shares

While each series of Managed Portfolio Shares will be actively managed and, to that extent, similar to Managed Fund Shares (as defined in Rule 14.11(i)),[12] Managed Portfolio Shares differ from Managed Fund Shares in the following important respects.[13] First, in contrast to Managed Fund Shares, which require a ''Disclosed Portfolio'' to be disseminated at least once daily,[14] the portfolio for a series of Managed Portfolio Shares will be disclosed at least quarterly in accordance with normal disclosure requirements otherwise applicable to open-end investment companies registered under the 1940 Act.[15] The composition of the portfolio of a series of Managed Portfolio Shares would not be available at commencement of Exchange listing and/or trading. Second, in connection with the creation and redemption of shares in Creation Unit or Redemption Unit size (as described below), the delivery of any portfolio securities in kind will be effected through a Confidential Account (as described below) for the benefit of the creating or redeeming AP (as described further below in ''Creation and Redemption of Shares'') without disclosing the identity of such securities to the AP.

For each series of Managed Portfolio Shares, an estimated value—the VIIV—that reflects an estimated intraday value of a fund's portfolio will be disseminated. Specifically, the VIIV will be based upon all of a series' holdings as of the close of the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, and will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during Regular Trading Hours. The dissemination of the VIIV will allow investors to determine the estimated intra-day value of the underlying portfolio of a series of Managed Portfolio Shares and will provide a close estimate of that value throughout the trading day.

The Exchange, after consulting with various Lead Market Makers (''LMMs'') [16] that trade exchange-traded funds (''ETFs'') on the Exchange, believes that market makers will be able to make efficient and liquid markets priced near the ETF's intraday value as long as a VIIV is disseminated in one second intervals,[17] and market makers employ market making techniques such as ''statistical arbitrage,'' including correlation hedging, beta hedging, and dispersion trading, which is currently used throughout the financial services industry, to make efficient markets in exchange-traded products.[18] For Managed Portfolio Shares, market makers may use the knowledge of a Fund's means of achieving its investment objective, as described in the applicable Fund registration statement (the ''Registration Statement''), to construct a hedging proxy for a Fund to

[12] The Commission approved a proposed rule change to adopt generic listing standards for Managed Fund Shares. *See* Securities Exchange Act Release No. 78396 (July 22, 2016), 81 FR 49698 (July 28, 2016 (SR–BATS–2015–100) (order approving proposed rule change to amend Rule 14.11(i) to adopt generic listing standards for Managed Fund Shares).

[13] The Exchange notes that these unique components of Managed Portfolio Shares were addressed in the Exemptive Order (specifically in the Application and Notice). Specifically, the Notice stated that the Commission ''believes that the alternative arbitrage mechanism proposed by Applicants can also work in an efficient manner to maintain an ActiveShares ETF's secondary market prices close to its NAV. The Commission recognizes, however, that the lack of full transparency may cause the ActiveShares ETFs to trade with spreads and premiums/discounts that are larger than those of comparable, fully transparent ETFs. Nonetheless, as long as arbitrage continues to keep the ActiveShares ETF's secondary market price and NAV close, and does so efficiently so that spreads remain narrow, the Commission believes that investors would benefit from the opportunity to invest in active strategies through a vehicle that offers the traditional benefits of ETFs.'' *See* Application at 19–20.

[14] BZX Rule 14.11(i)(3)(B) defines the term ''Disclosed Portfolio'' as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of NAV at the end of the business day. Rule 14.11(i)(4)(B)(ii)(a) requires that the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

[15] Form N–PORT requires reporting of a fund's complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end. Investors can obtain a fund's Statement of Additional Information, its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A fund's SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

[16] As defined in Exchange Rule 11.8(e)(1)(B), the term LMM means a Market Maker registered with the Exchange for a particular LMM Security that has committed to maintain Minimum Performance Standards in the LMM Security. As defined in Exchange Rule 11.8(e)(1)(C), the term ''LMM Security'' means an ETP that has an LMM. As defined in Rule 11.8(e)(1)(D), the term ''Minimum Performance Standards means a set of standards applicable to an LMM that may be determined from time to time by the Exchange. Such standards will vary between LMM Securities depending on the price, liquidity, and volatility of the LMM Security in which the LMM is registered. The performance measurements will include: (A) Percent of time at the NBBO; (B) percent of executions better than the NBBO; (C) average displayed size; and (D) average quoted spread.

[17] The Exchange notes that the Commission reached the same conclusion in the Notice, specifically stating: ''The Commission believes that the alternative arbitrage mechanism proposed by Applicants can also work in an efficient manner to maintain an ActiveShares ETF's secondary market prices close to its NAV.'' *See* the Notice at 19.

[18] Statistical arbitrage enables a trader to construct an accurate proxy for another instrument, allowing it to hedge the other instrument or buy or sell the instrument when it is cheap or expensive in relation to the proxy. Statistical analysis permits traders to discover correlations based purely on trading data without regard to other fundamental drivers. These correlations are a function of differentials, over time, between one instrument or group of instruments and one or more other instruments. Once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging proxy has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period making corrections where warranted. In the case of correlation hedging, the analysis seeks to find a proxy that matches the pricing behavior of a fund. In the case of beta hedging, the analysis seeks to determine the relationship between the price movement over time of a fund and that of another stock. Dispersion trading is a hedged strategy designed to take advantage of relative value differences in implied volatilities between an index and the component stocks of that index. Such trading strategies will allow market participants to engage in arbitrage between series of Managed Portfolio Shares and other instruments, both through the creation and redemption process and strictly through arbitrage without such processes.

manage a market maker's quoting risk in connection with trading Fund Shares. Market makers can then conduct statistical arbitrage between their hedging proxy (for example, the Russell 1000 Index) and Shares of a Fund, buying and selling one against the other over the course of the trading day. This ability should permit market makers to make efficient markets in an issue of Managed Portfolio Shares without precise knowledge [19] of a fund's underlying portfolio.[20] This is similar to certain other existing exchange traded products (for example, ETFs that invest in foreign securities that do not trade during U.S. trading hours), in which spreads may be generally wider in the early days of trading and then narrow as market makers gain more confidence in their real-time hedges.

To protect the identity and weightings of the portfolio holdings, a series of Managed Portfolio Shares would sell and redeem their shares in Creation Units and Redemption Units to APs only through an AP Representative. As such, on each business day, before commencement of trading in Shares on the Exchange, each series of Managed Portfolio Shares will provide to an AP Representative of each AP the names and quantities of the instruments comprising a Creation Basket, *i.e.,* the Deposit Instruments or ''Redemption Instruments'' and the estimated ''Balancing Amount'' (if any),[21] for that day (as further described below). This information will permit APs to purchase Creation Units or redeem Redemption Units through an in-kind transaction with a Fund, as described below.

Creations and Redemptions of Shares

In connection with the creation and redemption of Creation Units and Redemption Units, the delivery or receipt of any portfolio securities in-kind will be required to be effected through a Confidential Account [22] with an AP Representative,[23] which will be a broker-dealer such as broker-dealer affiliates of JP Morgan Chase, State Street Bank and Trust, or Bank of New York Mellon, for the benefit of an AP.[24] An AP must be a Depository Trust Company (''DTC'') Participant that has executed a ''Participant Agreement'' with the applicable distributor (the ''Distributor'') with respect to the creation and redemption of Creation Units and Redemption Units and formed a Confidential Account for its benefit in accordance with the terms of the Participant Agreement. For purposes of creations or redemptions, all transactions will be effected through the respective AP's Confidential Account, for the benefit of the AP without disclosing the identity of such securities to the AP. The Funds will offer and redeem Creation Units and Redemption Units on a continuous basis at the NAV per Share next determined after receipt of an order in proper form. The NAV per Share of each Fund will be determined as of the close of regular trading each business day. Funds will sell and redeem Creation Units and Redemption Units only on business days.

Each AP Representative will be given, before the commencement of trading each business day, the Creation Basket for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. In order to keep costs low and permit Funds to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and Redemption Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash under the circumstances required or determined permissible by the Fund, APs will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and APs redeeming their Shares will receive an in-kind transfer of Redemption Instruments through the AP Representative in their Confidential Account.[25]

In the case of a creation, the AP [26] would enter into an irrevocable creation order with a Fund and then direct the AP Representative to purchase the necessary basket of portfolio securities. The AP Representative would then purchase the necessary securities in the Confidential Account. In purchasing the necessary securities, the AP Representative would use methods such as breaking the purchase into multiple purchases and transacting in multiple marketplaces. Once the necessary basket of securities has been acquired, the purchased securities held in the Confidential Account would be contributed in-kind to the applicable Fund.

Other market participants that are not APs will not have the ability to create or redeem shares directly with a Fund. Rather, if other market participants wish to create or redeem Shares in a Fund, they will have to do so through an AP.

Placement of Purchase Orders

Each Fund will issue Shares through the Distributor on a continuous basis at

[19] Using the various trading methodologies described above, both APs and other market participants will be able to hedge exposures by trading correlative portfolios, securities or other proxy instruments, thereby enabling an arbitrage functionality throughout the trading day. For example, if an AP believes that Shares of a Fund are trading at a price that is higher than the value of its underlying portfolio based on the VIIV, the AP may sell Shares short and purchase securities that the AP believes will track the movements of a Fund's portfolio until the spread narrows and the AP executes offsetting orders or the AP enters an order through its AP Representative to create Fund Shares. Upon the completion of the Creation Unit, the AP will unwind its correlative hedge. Similarly, a non-AP market participant would be able to perform an identical function but, because it would not be able to create or redeem directly, would have to employ an AP to create or redeem Shares on its behalf.

[20] APs that enter into their own separate Confidential Accounts shall have enough information to ensure that they are able to comply with applicable regulatory requirements. For example, for purposes of net capital requirements, the maximum Securities Haircut applicable to the securities in a Creation Basket, as determined under Rule 15c3–1, will be disclosed daily on each Fund's website.

[21] The Balancing Amount is the cash amount necessary for the applicable Fund to receive or pay to compensate for the difference between the value of the securities delivered as part of a redemption and the NAV, to the extent that such values are different.

[22] Transacting through a Confidential Account is designed to be very similar to transacting through any broker-dealer account, except that the AP Representative will be bound to keep the names and weights of the portfolio securities confidential. Each service provider that has access to the identity and weightings of securities in a Fund's Creation Basket or portfolio securities, such as a Fund's custodian or pricing verification agent, shall be restricted contractually from disclosing that information to any other person, or using that information for any purpose other than providing services to the Fund. To comply with certain recordkeeping requirements applicable to APs, the AP Representative will maintain and preserve, and make available to the Commission, certain required records related to the securities held in the Confidential Account.

[23] Each AP shall enter into its own separate Confidential Account with an AP Representative.

[24] Each Fund will identify one or more entities to enter into a contractual arrangement with the Fund to serve as an AP Representative. In selecting entities to serve as AP Representatives, a Fund will obtain representations from the entity related to the confidentiality of the Fund's Creation Basket and portfolio securities, the effectiveness of information barriers, and the adequacy of insider trading policies and procedures. In addition, as a broker-dealer, Section 15(g) of the Act requires the AP Representative to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by the AP Representative or any person associated with the AP Representative.

[25] Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the 1933 Act.

[26] An AP will issue execution instructions to the AP Representative and be responsible for all associated profit or losses. Like a traditional ETF, the AP has the ability to sell the basket securities at any point during Regular Trading Hours.

NAV. The Exchange represents that the issuance of Shares will operate in a manner substantially similar to that of other ETFs. Each Fund will issue Shares only at the NAV per Share next determined after an order in proper form is received.

The Distributor will furnish acknowledgements to those placing orders that the orders have been accepted, but the Distributor may reject any order which is not submitted in proper form, as described in a Fund's prospectus or Statement of Additional Information (''SAI''). The NAV of each Fund is expected to be determined once each business day at a time determined by the board of the Investment Company (''Board''), currently anticipated to be as of the close of the regular trading session on the NYSE (ordinarily 4:00 p.m. E.T.) (the ''Valuation Time''). Each Fund will establish a cut-off time (''Order Cut-Off Time'') for purchase orders in proper form. To initiate a purchase of Shares, an AP must submit to the Distributor an irrevocable order to purchase such Shares after the most recent prior Valuation Time.

Purchases of Shares will be settled in-kind and/or cash for an amount equal to the applicable NAV per Share purchased plus applicable ''Transaction Fees,'' as discussed below.

Generally, all orders to purchase Creation Units must be received by the Distributor no later than the end of Regular Trading Hours on the date such order is placed (''Transmittal Date'') in order for the purchaser to receive the NAV per Share determined on the Transmittal Date. In the case of custom orders made in connection with creations or redemptions in whole or in part in cash, the order must be received by the Distributor, no later than the Order Cut-Off Time.[27]

Authorized Participant Redemption

The Shares may be redeemed to a Fund in Redemption Unit size or multiples thereof as described below. Redemption orders of Redemption Units must be placed by or through an AP (''AP Redemption Order''). Each Fund will establish an Order Cut-Off Time for redemption orders of Redemption Units in proper form. Redemption Units of a Fund will be redeemable at their NAV per Share next determined after receipt of a request for redemption by the Investment Company in the manner specified below before the Order Cut-Off Time. To initiate an AP Redemption Order, an AP must submit to the Distributor an irrevocable order to redeem such Redemption Unit after the most recent prior Valuation Time but not later than the Order Cut-Off Time.

In the case of a redemption, the AP would enter into an irrevocable redemption order, and then instruct the AP Representative to sell the underlying basket of securities that it will receive in the redemption. As with the purchase of securities, the AP Representative would be required to obfuscate the sale of the portfolio securities it will receive as redemption proceeds using similar tactics.

Consistent with the provisions of Section 22(e) of the 1940 Act and Rule 22e–2 thereunder, the right to redeem will not be suspended, nor payment upon redemption delayed, except for: (1) Any period during which the Exchange is closed other than customary weekend and holiday closings, (2) any period during which trading on the Exchange is restricted, (3) any period during which an emergency exists as a result of which disposal by a Fund of securities owned by it is not reasonably practicable or it is not reasonably practicable for a Fund to determine its NAV, and (4) for such other periods as the Commission may by order permit for the protection of shareholders.

It is expected that redemptions will occur primarily in-kind, although redemption payments may also be made partly or wholly in cash. The Participant Agreement signed by each AP will require establishment of a Confidential Account to receive distributions of securities in-kind upon redemption.[28] Each AP will be required to open a Confidential Account with an AP Representative in order to facilitate orderly processing of redemptions.

After receipt of a Redemption Order, a Fund's custodian (''Custodian'') will typically deliver securities to the Confidential Account with a value approximately equal to the value of the Shares [29] tendered for redemption at the Cut-Off time. The Custodian will make delivery of the securities by appropriate entries on its books and records transferring ownership of the securities to the AP's Confidential Account, subject to delivery of the Shares redeemed. The AP Representative of the Confidential Account will in turn liquidate the securities based on instructions from the AP. The AP Representative will pay the liquidation proceeds net of expenses plus or minus any cash Balancing Amount to the AP through DTC. The redemption securities that the Confidential Account receives are expected to mirror the portfolio holdings of a Fund pro rata. To the extent a Fund distributes portfolio securities through an in-kind distribution to more than one Confidential Account for the benefit of the accounts' respective APs, each Fund expects to distribute a pro rata portion of the portfolio securities selected for distribution to each redeeming AP.

If the AP would receive a security that it is restricted from receiving, for example if the AP is engaged in a distribution of the security, a Fund will deliver cash equal to the value of that security. APs and non-AP market participants will provide the AP Representative with a list of restricted securities applicable to the AP or non-AP market participants on a daily basis, and a Fund will substitute cash for those securities in the applicable Confidential Account.

The Investment Company will accept a Redemption Order in proper form. A Redemption Order is subject to acceptance by the Investment Company and must be preceded or accompanied by an irrevocable commitment to deliver the requisite number of Shares. At the time of settlement, an AP will initiate a delivery of the Shares plus or minus any cash Balancing Amounts, and less the expenses of liquidation.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of Managed Portfolio Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of Managed Portfolio Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products. The Exchange will require the issuer of each series of Managed Portfolio Shares listed on the Exchange to represent to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and,

[27] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis, as provided in the Registration Statement.

[28] The terms of each Confidential Account will be set forth as an exhibit to the applicable Participant Agreement, which will be signed by each AP. The Authorized Participant will be free to choose an AP Representative for its Confidential Account from a list of broker-dealers that have signed confidentiality agreements with the Fund. The Authorized Participant will be free to negotiate account fees and brokerage charges with its selected AP Representative. The Authorized Participant will be responsible to pay all fees and expenses charged by the AP Representative of its Confidential Account.

[29] If the NAV of the Shares redeemed differs from the value of the securities delivered to the applicable Confidential Account, the applicable Fund will receive or pay a cash Balancing Amount to compensate for the difference between the value of the securities delivered and the NAV.

pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Specifically, the Exchange will implement real-time surveillances that monitor for the continued dissemination of the VIIV. The Exchange will also have surveillances designed to alert Exchange personnel where shares of a series of Managed Portfolio Shares are trading away from the VIIV. As noted in proposed Rule 14.11(k)(2)(C), the Investment Company's investment adviser will upon request make available to the Exchange and/or FINRA, on behalf of the Exchange, the daily portfolio holdings of each series of Managed Portfolio Shares. The Exchange believes that this is appropriate because, while the Exchange can envision circumstances under which such information would be useful to the Exchange, specifically in testing for a Fund's compliance with any continued listing representations in the rule filing under Section 19(b) of the Act pursuant to which the Fund is listed on the Exchange, among others, the Exchange does not believe that there is value in the Exchange receiving such information every day, given its sensitivity. The Exchange does not believe that any of its real-time surveillances or reasons for halting a security, as further described below, would be enhanced by receiving such information and in addition does not believe that it makes sense to default to sharing the portfolio holdings unnecessarily on a daily basis.

The Exchange notes that the Exemptive Order restricts the investable universe for a series of Managed Portfolio Shares to include only certain instruments that trade on a U.S. exchange, contemporaneously with the Shares, and in cash and cash equivalents.[30] As such, any equity instruments or futures held by a Fund operating under the Exemptive Order or a substantively identical exemptive order would trade on markets that are a member of Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[31] While future exemptive relief applicable to Managed Portfolio Shares may expand the investable universe, the Exchange notes that proposed Rule 14.11(k)(2)(A) would require the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares and such proposal would describe the investable universe for any such series of Managed Portfolio Shares along with the Exchange's surveillance procedures applicable to such series.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Trading Halts

As proposed above, the Exchange would halt trading as soon as practicable under the following circumstances: (a) Upon notification to the Exchange by the Investment Company or its agent of the existence of any condition or set of conditions specified in any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff that would require the Investment Company's investment adviser to request that the Exchange halt trading in the Managed Portfolio Shares; and (b) where the Exchange becomes aware that: (i) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time, and will not resume trading in such series until such time as the VIIV, the net asset value, or the holdings are available to all market participants, as required (collectively, ''Publicly Available Information Halts'').

Availability of Information

As noted above, Form N–PORT requires reporting of a fund's complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end. Investors can obtain a fund's Statement of Additional Information, its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A fund's SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the VIIV, as defined in proposed Rule 14.11(k)(3)(B), will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during Regular Trading Hours.

Trading Rules

The Exchange deems Managed Portfolio Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Managed Portfolio Shares will trade on the Exchange only during Regular Trading Hours as provided in proposed Rule 14.11(k)(2)(B). As provided in BZX Rule 11.11(a), the minimum price variation for quoting and entry of orders in securities traded on the Exchange is $0.01, with the exception of securities that are priced less than $1.00, for which the minimum price variation for order entry is $0.0001.

Information Circular

Prior to the commencement of trading of a series of Managed Portfolio Shares, the Exchange will inform its members in an Information Circular (''Circular'') of the special characteristics and risks associated with trading the Shares. Specifically, the Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares; (2) BZX Rule 3.7, which imposes

[30] As described in the Notice, each series would invest only in ETFs and exchange-traded notes, common stocks, preferred stocks, American depositary receipts, real estate investment trusts, commodity pools, metals trusts, currency trusts and futures. All of these instruments will trade on a U.S. exchange contemporaneously with the Shares. The reference assets of the exchange-traded futures in which a Fund may invest would be assets that the Fund could invest in directly, or in the case of an index future, based on an index of a type of asset that the Fund could invest in directly. A Fund may also invest in cash and cash equivalents. No Fund would buy securities that are illiquid investments (as defined in rule 22e–4(a)(8) under the 1940 Act) at the time of purchase, borrow for investment purposes or hold short positions. *See* Notice at 12, footnote 24.

[31] For a list of the current members of ISG, see *www.isgportal.com.* The Exchange notes that cash equivalents may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (3) how information regarding the VIIV is disseminated; (4) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) trading information; and (6) that the portfolio holdings of the Shares are not disclosed on a daily basis.

In addition, the Circular will reference that Funds are subject to various fees and expenses described in the Registration Statement. The Circular will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Circular will also disclose that the NAV for the Shares will be calculated after 4:00 p.m., E.T. each trading day.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act [32] in general and Section 6(b)(5) of the Act [33] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that proposed Rule 14.11(k) is designed to prevent fraudulent and manipulative acts and practices in that the proposed rules relating to listing and trading of Managed Portfolio Shares provide specific initial and continued listing criteria required to be met by such securities. Proposed Rule 14.11(k)(4) sets forth initial and continued listing criteria applicable to Managed Portfolio Shares. Proposed Rule 14.11(k)(4)(A)(i) provides that, for each series of Managed Portfolio Shares, the Exchange will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading on the Exchange. In addition, proposed Rule 14.11(k)(4)(A)(ii) provides that the Exchange will obtain a representation from the Investment Company that issues each series of Managed Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time.[34] Proposed Rule 14.11(k)(4)(A)(iii) provides that all Managed Portfolio Shares shall have a stated investment objective, which shall be adhered to under normal market conditions.

Proposed Rule 14.11(k)(4)(B) provides that each series of Managed Portfolio Shares will be listed and traded subject to application of the specified continued listing criteria, as described above. Proposed Rule 14.11(k)(4)(B)(i) provides that the VIIV for Managed Portfolio Shares will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during Regular Trading Hours and will be disseminated to all market participants at the same time. Proposed Rule 14.11(k)(4)(B)(ii) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, a series of Managed Portfolio Shares under any of the following circumstances: (a) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of Managed Portfolio Shares for 30 or more consecutive trading days; (b) if the Exchange has halted trading in a series of Managed Portfolio Shares because the Verified Intraday Indicative Value is interrupted pursuant to Rule 14.11(k)(4)(B)(iii) and such interruption persists past the trading day in which it occurred or is no longer available; (c) if the Exchange has halted trading in a series of Managed Portfolio Shares because the net asset value with respect to such series of Managed Portfolio Shares is not disseminated to all market participants at the same time, the holdings of such series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act, or such holdings are not made available to all market participants at the same time pursuant to Rule 14.11(k)(4)(B)(iii) and such issue persists past the trading day in which it occurred; (d) if the Investment Company issuing the Managed Portfolio Shares has failed to file any filings required by the Commission or if the Exchange is aware that the Investment Company is not in compliance with the conditions of any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares; (e) if any of the continued listing requirements set forth in Rule 14.11(k) are not continuously maintained; (f) if any of the applicable Continued Listing Representations, as defined in Rule 14.11(a), for the issue of Managed Portfolio Shares are not continuously met; or (g) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable. *Proposed Rule 14.11(k)(4)(B)(iii)(a)* provides that, upon notification to the Exchange by the Investment Company or its agent of the existence of any condition or set of conditions specified in any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff that would require the Investment Company's investment adviser to request that the Exchange halt trading in the Managed Portfolio Shares, the Exchange shall halt trading in the Managed Portfolio Shares as soon as practicable. Such halt in trading shall continue until the Investment Company or its agent notifies the Exchange that the condition or conditions necessary for the resumption of trading have been met.[35]

Proposed Rule 14.11(k)(4)(B)(iii)(b) provides that, if the Exchange becomes aware that: (i) The Verified Intraday Indicative Value of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time, it will halt trading in such series until such time as the Verified Intraday Indicative Value, the net asset value, or the holdings are available to all market participants as required. Proposed Rule 14.11(k)(4)(B)(iv) provides that, upon

[32] 15 U.S.C. 78f.

[33] 15 U.S.C. 78f(b)(5).

[34] Proposed Rule 14.11(k)(4)(B)(iii)(b) provides that if the Exchange becomes aware that the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants at the same time.

[35] As provided in the Application, such conditions would exist where either: (i) The intraday indicative values calculated by the pricing verification agent(s) differ by more than 25 basis points for 60 seconds in connection with pricing of the Verified Intraday Indicative Value; or (ii) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available market quotations. The Exchange shall halt trading in the Managed Portfolio Shares as soon as practicable after receipt of notification of the existence of such conditions. Such halt in trading shall continue until the Investment Company or its agent notifies the Exchange that these conditions no longer exist.

termination of an Investment Company, the Exchange requires that Managed Portfolio Shares issued in connection with such entity be removed from Exchange listing. Proposed Rule 14.11(k)(4)(B)(v) provides that voting rights shall be as set forth in the applicable Investment Company prospectus and/or Statement of Additional Information. The Exchange also notes that the Notice provides that an issuer will comply with Regulation Fair Disclosure, which prohibits selective disclosure of any material non-public information, which otherwise do not apply to issuers of Managed Portfolio Shares.[36]

Proposed Rule 14.11(k)(2)(D) provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company portfolio and/or Creation Basket. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition, the Creation Basket, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or Creation Basket. Proposed Rule 14.11(k)(2)(E) provides that, any person or entity, including an AP Representative, custodian, pricing verification agent, reporting authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition, the Creation Basket, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.[37]

The Exchange believes that these proposed rules are designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares because they provide meaningful requirements about both the data that will be made publicly available about the Shares as well as the information that will only be available to certain parties and the controls on such information. Specifically, the Exchange believes that the requirements related to information protection enumerated under proposed Rule 14.11(k)(2)(E)[38] will act as a strong safeguard against any misuse and improper dissemination of information related to a Fund's portfolio composition, the Creation Basket, or changes thereto. The requirement that any person or entity implement procedures to prevent the use and dissemination of material nonpublic information regarding the portfolio or Creation Basket will act to prevent any individual or entity from sharing such information externally and the internal ''fire wall'' requirements applicable where an entity is a registered broker-dealer or affiliated with a broker-dealer will act to make sure that no entity will be able to misuse the data for their own purposes. As such, the Exchange believes that this proposal is designed to prevent fraudulent and manipulative acts and practices.

The Exchange, after consulting with various LMMs that trade ETFs on the Exchange, believes that market makers will be able to make efficient and liquid markets priced near the VIIV, as long as market makers have knowledge of a Fund's means of achieving its investment objective, even without daily disclosure of a fund's underlying portfolio.[39] The Exchange believes that market makers will employ risk-management techniques to make efficient markets in exchange traded products. This ability should permit market makers to make efficient markets in shares without knowledge of a fund's underlying portfolio.

The Exchange understands that traders use statistical analysis to derive correlations between different sets of instruments to identify opportunities to buy or sell one set of instruments when it is mispriced relative to the others. For Managed Portfolio Shares, market makers utilizing statistical arbitrage use the knowledge of a fund's means of achieving its investment objective, as described in the applicable fund registration statement, to construct a hedging proxy for a fund to manage a market maker's quoting risk in connection with trading fund shares. Market makers will then conduct statistical arbitrage between their

[36] *See* Notice at 15.

[37] The Exchange notes that the Order dismissed concerns raised by a third party related to potential violation of Section 10(b) of the Act, stating that ''Contrary to the contentions advanced in the third-party submissions, the provision of the basket composition information to the AP Representative or use of that information by the AP Representative as provided for in the Application should not give rise to insider trading violations under section 10(b) of the Exchange Act.'' The notice goes on to say that an AP Representative ''acting as an agent of another broker-dealer (''AP'') will be given information concerning the identity and weightings of the basket of securities that the ETF would exchange for its shares (but not information concerning the issuers of those underlying securities). The AP Representative is provided this information by the ETF so that, pursuant to instructions received from an AP, the AP Representative may undertake the purchase or redemption of the ETF's Shares (in the form of creation units) and the purchase or sale of the basket of securities that are exchanged for creation units. The ETFs will provide this information to an AP Representative on a confidential basis, the AP Representative is subject to a duty of non-disclosure (which includes an obligation not to provide this information to an AP), and the AP Representative may not use the information in any way except to facilitate the operation of the ETF by purchasing or selling the basket of securities and to exchange it with the ETF to complete an AP's orders to purchase or redeem the ETF's Shares. Furthermore, section 15(g) of the Exchange Act requires an AP Representative, as a registered broker, to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the AP Representative or any person associated with the AP Representative.'' The Order goes on to say ''For the foregoing reasons, it is found that granting the requested exemptions is appropriate in and consistent with the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. It is further found that the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and with the general purposes of the Act.'' *See* Order at 2, 3, and 4.

[38] As described above, proposed Rule 14.11(k)(2)(E) provides that any person or entity, including an AP Representative, custodian, pricing verification agent, reporting authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition, the Creation Basket, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.

[39] The Exchange notes that the Commission reached the same conclusion in the Notice, specifically stating: ''The Commission believes that the alternative arbitrage mechanism proposed by Applicants can also work in an efficient manner to maintain an ActiveShares ETF's secondary market prices close to its NAV.'' *See* the Notice at 19.

hedging proxy (for example, the Russell 1000 Index) and shares of a fund, buying and selling one against the other over the course of the trading day. Eventually, at the end of each day, they will evaluate how their proxy performed in comparison to the price of a fund's shares, and use that analysis as well as knowledge of risk metrics, such as volatility and turnover, to enhance their proxy calculation to make it a more efficient hedge.

Market makers have indicated to the Exchange that there will be sufficient data to run a statistical analysis which will lead to spreads being tightened substantially around the VIIV. This is similar to certain other existing exchange traded products (for example, ETFs that invest in foreign securities that do not trade during U.S. trading hours), in which spreads may be generally wider in the early days of trading and then narrow as market makers gain more confidence in their real-time hedges.

The LMMs also indicated that, as with some other new exchange-traded products, spreads would tend to narrow as market makers gain more confidence in the accuracy of their hedges and their ability to adjust these hedges in real-time relative to the published VIIV and gain an understanding of the applicable market risk metrics such as volatility and turnover, and as natural buyers and sellers enter the market. Other relevant factors cited by LMMs were that a fund's investment objectives are clearly disclosed in the applicable prospectus, the existence of quarterly portfolio disclosure and the ability to create shares in creation unit size or redeem in redemption unit size through an AP.

The real-time dissemination of a Fund's VIIV together with the right of APs to create and redeem each day at the NAV will be sufficient for market participants to value and trade Shares in a manner that will not lead to significant deviations between the shares' Bid/Ask Price and NAV.

The pricing efficiency with respect to trading a series of Managed Portfolio Shares will generally rest on the ability of market participants to arbitrage between the Shares and a fund's portfolio, in addition to the ability of market participants to assess a fund's underlying value accurately enough throughout the trading day in order to hedge positions in shares effectively. Professional traders can buy Shares that they perceive to be trading at a price less than that which will be available at a subsequent time, and sell Shares they perceive to be trading at a price higher than that which will be available at a subsequent time. It is expected that, as part of their normal day-to-day trading activity, market makers assigned to Shares by the Exchange, off-exchange market makers, firms that specialize in electronic trading, hedge funds and other professionals specializing in short-term, non-fundamental trading strategies will assume the risk of being ''long'' or ''short'' shares through such trading and will hedge such risk wholly or partly by simultaneously taking positions in correlated assets [40] or by netting the exposure against other, offsetting trading positions—much as such firms do with existing ETFs and other equities. Disclosure of a fund's investment objective and principal investment strategies in its prospectus and SAI, along with the dissemination of the VIIV in one second intervals, should permit professional investors to engage easily in this type of hedging activity.[41]

With respect to trading of the Shares, the ability of market participants to buy and sell Shares at prices near the VIIV is dependent upon their assessment that the VIIV is a reliable, indicative real-time value for a Fund's underlying holdings. Market participants are expected to accept the VIIV as a reliable, indicative real-time value because (1) the VIIV will be calculated and disseminated based on a Fund's actual portfolio holdings, (2) the securities in which a Fund plans to invest are generally highly liquid and actively traded and therefore generally have accurate real time pricing available, and (3) market participants will have a daily opportunity to evaluate whether the VIIV at or near the close of trading is indeed predictive of the actual NAV.[42]

In a typical index-based ETF, it is standard for APs to know what securities must be delivered in a creation or will be received in a redemption. For Managed Portfolio Shares, however, APs do not need to know the securities comprising the portfolio of a Fund since creations and redemptions are handled through the Confidential Account mechanism. In-kind creations and redemptions through a Confidential Account are expected to preserve the integrity of the active investment strategy and reduce the potential for ''free riding'' or ''front-running,'' while still providing investors with the advantages of the ETF structure.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the Investment Company that issues each series of Managed Portfolio Shares that the NAV per share of a fund will be calculated daily and that the NAV will be made available to all market participants at the same time. Investors can also obtain a fund's Statement of Additional Information, its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A fund's SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.* In addition, a large amount of information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares will be

[40] Price correlation trading is used throughout the financial industry. It is used to discover both trading opportunities to be exploited, such as currency pairs and statistical arbitrage, as well as for risk mitigation such as dispersion trading and beta hedging. These correlations are a function of differentials, over time, between one or multiple securities pricing. Once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging basket has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period, making corrections where warranted.

[41] With respect to trading in the Shares, market participants would manage risk in a variety of ways. It is expected that market participants will be able to determine how to trade Shares at levels approximating the VIIV without taking undue risk by gaining experience with how various market factors (*e.g.,* general market movements, sensitivity of the VIIV to intraday movements in interest rates or commodity prices, etc.) affect VIIV, and by finding hedges for their long or short positions in Shares using instruments correlated with such factors. Market participants will likely initially determine the VIIV's correlation to a major large capitalization equity benchmark with active derivative contracts, such as the Russell 1000 Index, and the degree of sensitivity of the VIIV to changes in that benchmark. For example, using hypothetical numbers for illustrative purposes, market participants should be able to determine quickly that price movements in the Russell 1000 Index predict movements in a Fund's VIIV 95% of the time (an acceptably high correlation) but that the VIIV generally moves approximately half as much as the Russell 1000 Index with each price movement. This information is sufficient for market participants to construct a reasonable hedge—buy or sell an amount of futures, swaps or ETFs that track the Russell 1000 equal to half the opposite exposure taken with respect to Shares. Market participants will also continuously compare the intraday performance of their hedge to a Fund's VIIV. If the intraday performance of the hedge is correlated with the VIIV to the expected degree, market participants will feel comfortable they are appropriately hedged and can rely on the VIIV as appropriately indicative of a Fund's performance.

[42] The statements in the Statutory Basis section of this filing relating to pricing efficiency, arbitrage, and activities of market participants, including market makers and APs, are based on statements in the Exemptive Order, representations by Precidian, and review by the Exchange.

available via the CTA high-speed line. Information regarding the VIIV will be widely disseminated in one second intervals throughout Regular Trading Hours by the Reporting Authority and/or one or more major market data vendors. The website for each Fund will include a form of the prospectus for the Fund that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis. Moreover, prior to the commencement of trading, the Exchange will inform its members in a Circular of the special characteristics and risks associated with trading the Shares.

The Exchange further believes that the proposal is designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares and to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange would halt trading under certain circumstances under which trading in the shares of a Fund may be inadvisable. Specifically, the Exchange would halt trading as soon as practicable under the following circumstances: (a) Upon notification to the Exchange by the Investment Company or its agent of the existence of any condition or set of conditions specified in any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff that would require the Investment Company's investment adviser to request that the Exchange halt trading in the Managed Portfolio Shares; and (b) where the Exchange becomes aware that: (i) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time, and will not resume trading in such series until such time as the VIIV, the net asset value, or the holdings are available to all market participants, as required.

The Exchange is proposing to rely on notice from the Investment Company or its agent of certain circumstances provided under the Investment Company's exemptive order or no-action relief to halt trading in a series of Managed Portfolio Shares (an ''Exemptive Halt'') and four scenarios under which the Exchange would halt trading upon becoming aware of certain circumstances. Specifically, the Exchange is proposing to rely on notice from the Investment Company or its agent to halt for an Exemptive Halt because the Exchange is not in a position to know or become aware of such circumstances without the Investment Company or its agent. As it relates to the Exemptive Halts provided in the Application and described above, the Exchange does not expect to act as a pricing verification agent and, as such, would not have access to such information without notice from the Investment Company or its agent and similarly will not have direct access to whether the pricing verification agent has readily available market quotations necessary to calculate the VIIV. Even if the Investment Company was providing the Exchange with the portfolio holdings on a daily basis,[43] the Exchange would not be in a position to determine whether market quotations are readily available to the Investment Company or its agent and whether such quotations are unavailable in holdings representing 10% or more of a Fund's portfolio. Further, the Exchange believes that it is appropriate for the Exchange to halt under such circumstances because prior to listing on the Exchange, the Commission would have issued an order determining that it is appropriate to halt in those scenarios.[44]

For each of the Publicly Available Information Halts, the scenario that triggers a halt is based on information that is available to the Exchange, either because the information is publicly available, the information will flow through the Exchange prior to being publicly disseminated, or both, and, thus, the Exchange is proposing that these halts should be subject to the Exchange becoming aware of such circumstances. The Exchange notes, however, that this is in addition to an Investment Company's obligation of disclosure of noncompliance under Rule 14.11(a), which requires that a ''Company with securities listed on the Exchange must provide the Exchange with prompt notification after the Company becomes aware of any noncompliance by the Company with the requirements of Rule 14.11.'' With this in mind, the Exchange becoming aware of any issue that would require a Publicly Available Information Halt could come through its own surveillances or through disclosure by an Investment Company. The Exchange further believes that these proposed reasons to halt trading in shares of a series of Managed Portfolio Shares are consistent with the Act because: (i) The Commission has already determined that the requirement that the VIIV be disseminated every second is appropriate; [45] (ii) the other Publicly Available Information Halts are generally consistent with and designed to address the same concerns about asymmetry of information that Rule 14.11(i)(4)(iv) related to trading halts in Managed Fund Shares [46] is intended to address, specifically that the availability of such information is intended to reduce the potential for manipulation and help ensure a fair and orderly market in Managed Portfolio Shares; [47] and (iii) the quarterly disclosure of portfolio holdings is a fundamental

[43] As described above under ''Surveillance,'' proposed Rule 14.11(k)(2)(C), the Investment Company's investment adviser will upon request make available to the Exchange and/or FINRA, on behalf of the Exchange, the daily portfolio holdings of each series of Managed Portfolio Shares, but it will not necessarily be providing such holdings on a daily basis.

[44] The Exemptive Halts are included in the Application and Notice on which the Order is based. *See* Application at 23 and 24, footnote 57, respectively, and Notice at 12, Footnote 25.

[45] *See* Application at 4 and Notice at 11.

[46] Rule 14.11(i)(4)(iv) provides that ''If the Intraday Indicative Value of a series of Managed Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed Portfolio is available to all market participants.'' These are generally consistent with the proposed Publicly Available Information Halts, specifically as it relates to whether the NAV or Disclosed Portfolio is not being made available to all market participants at the same time.

[47] *See, e.g.,* Securities Exchange Act Release No. 80169 (March 7, 2017), 82 FR 13536 (March 13, 2017); Securities Exchange Act Release Nos. 54739 (November 9, 2006), 71 FR 66993, 66997 (November 17, 2006) (SR–AMEX–2006–78) (approving generic listing standards for Portfolio Depositary Receipts and Index Fund Shares based on international or global indexes, and stating that ''the proposed listing standards are designed to preclude ETFs from becoming surrogates for trading in unregistered securities'' and that ''the requirement that each component security underlying an ETF be listed on an exchange and subject to last-sale reporting should contribute to the transparency of the market for ETFs'' and that ''by requiring pricing information for both the relevant underlying index and the ETF to be readily available and disseminated, the proposal is designed to ensure a fair and orderly market for ETFs''); 53142 (January 19, 2006), 71 FR 4180, 4186 (January 25, 2006) (SR–NASD–2006–001) (approving generic listing standards for Index-Linked Securities and stating that ''[t]he Commission believes that by requiring pricing information for both the relevant underlying index or indexes and the Index Security to be readily available and disseminated, the proposed listing standards should help ensure a fair and orderly market for Index Securities'').

component of Managed Portfolio Shares that allows market participants to better understand the strategy of the funds and to monitor how closely trading in the funds is tracking the value of the underlying portfolio and when such information is not being disclosed as required, trading in the shares is inadvisable and it is necessary and appropriate to halt trading.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The Exemptive Order also restricts the investable universe for a series of Managed Portfolio Shares to include only certain instruments that trade on a U.S. exchange, contemporaneously with the Shares, and in cash and cash equivalents.[48] As such, any equity instruments or futures held by a Fund operating under the Exemptive Order or substantively identical exemptive order would trade on markets that are a member of Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[49] While future exemptive relief applicable to Managed Portfolio Shares may expand the investable universe, the Exchange notes that proposed Rule 14.11(k)(2)(A) would require the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares and such proposal would describe the investable universe for any such series of Managed Portfolio Shares along with the Exchange's surveillance procedures applicable to such series. In addition, as noted above, investors will have ready access to information regarding the VIIV and quotation and last sale information for the Shares.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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 purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of a new type of actively-managed exchange-traded products that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

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. Proceedings To Determine Whether To Approve or Disapprove SR–CboeBZX–2019–047, as Modified by Amendment No. 2, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[50] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[51] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Exchange 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, . . . 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.'' [52]

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[53]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 2, should be approved or disapproved by October 18, 2019. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 1, 2019.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 2,[54] and any other issues raised by the proposed rule change, as modified by Amendment No. 2, under the Exchange Act. In this regard, the Commission seeks

[48] As described in the Notice, each series would invest only in ETFs and exchange-traded notes, common stocks, preferred stocks, American depositary receipts, real estate investment trusts, commodity pools, metals trusts, currency trusts and futures. All of these instruments will trade on a U.S. exchange contemporaneously with the Shares. The reference assets of the exchange-traded futures in which a Fund may invest would be assets that the Fund could invest in directly, or in the case of an index future, based on an index of a type of asset that the Fund could invest in directly. A Fund may also invest in cash and cash equivalents. No Fund would buy securities that are illiquid investments (as defined in rule 22e–4(a)(8) under the 1940 Act) at the time of purchase, borrow for investment purposes or hold short positions.

[49] The Exchange notes that cash equivalents may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[50] 15 U.S.C. 78s(b)(2)(B).

[51] *Id.*

[52] 15 U.S.C. 78f(b)(5).

[53] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[54] *See supra* note 7.

commenters' views regarding whether the Exchange's proposed rule to list and trade Managed Portfolio Shares, which are actively managed exchange-traded products for which the portfolio holdings would be disclosed on a quarterly, rather than daily, basis, is adequately 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, and is consistent with the maintenance of a fair and orderly market under the Exchange 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–CboeBZX–2019–047 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2019–047. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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–CboeBZX–2019–047 and should be submitted on or before October 18, 2019. Rebuttal comments should be submitted by November 1, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[55]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–20970 Filed 9–26–19; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87056; File No. SR–NYSE–2019–34]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, a Proposed Rule Change To Amend Exchange Rule 104 To Specify Designated Market Maker Requirements for Exchange Traded Products Listed on the Exchange

September 23, 2019.

I. Introduction

On June 7, 2019, New York Stock Exchange LLC (''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 104 to specify Designated Market Maker (''DMM'') requirements for Exchange Traded Products (''ETPs'') listed on the Exchange pursuant to Exchange Rules 5P and 8P. The proposed rule change was published for comment in the **Federal Register** on June 25, 2019.[3]

On July 24, 2019, the Commission extended to September 23, 2019, the time period in which to approve the proposal, disapprove the proposal, or institute proceedings to determine whether to approve or disapprove the proposal.[4] The Commission has received one comment on the proposal.[5] On September 18, 2019, the Exchange filed Amendment No. 1 to the proposal, which supersedes the original filing in its entirety. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Self-Regulatory Organization's Description of the Proposal, as Modified by Amendment No. 1

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 amend Rule 104 (Dealings and Responsibilities of DMMs) to specify DMM requirements for ETPs listed on the Exchange pursuant to Rules 5P and 8P.

Background

Currently, the Exchange trades securities, including ETPs, on its Pillar trading platform on an unlisted trading privileges (''UTP'') basis, subject to Pillar Platform Rules 1P–13P.[6] In the next phase of Pillar, the Exchange proposes to transition trading of Exchange-listed securities to the Pillar trading platform, which means that DMMs would be trading on Pillar in their assigned securities.[7] Once transitioned to Pillar, such securities will also be subject to the Pillar Platform Rules 1P–13P.

Rules 5P (Securities Traded) and 8P (Trading of Certain Exchange Traded Products) provide for the listing of certain ETPs [8] on the Exchange that (1)

[55] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86151 (June 19, 2019), 84 FR 29908 (June 25, 2019) (''Notice'').

[4] *See* Securities Exchange Act Release No. 86460 (July 24, 2019), 84 FR 36983 (July 30, 2019).

[5] *See* Letter from Bernard B. Fudim, to Secretary, Commission (June 19, 2019).

[6] ''UTP Security'' is defined as a security that is listed on a national securities exchange other than the Exchange and that trades on the Exchange pursuant to unlisted trading privileges. *See* Rule 1.1.

[7] The Exchange has announced that, subject to rule approvals, the Exchange will begin transitioning Exchange-listed securities to Pillar on August 5, 2019, available here: *https://www.nyse.com/publicdocs/nyse/markets/nyse/Revised_Pillar_Migration_Timeline.pdf.* The Exchange will publish by separate Trader Update a complete symbol migration schedule.

[8] Rule 1.1P(k) defines ''Exchange Traded Product'' as a security that meets the definition of

Continued

meet the applicable requirements set forth in those rules, and (2) do not have any component NMS Stock [9] that is listed on the Exchange or is based on, or represents an interest in, an underlying index or reference asset that includes an NMS Stock listed on the Exchange. ETPs listed under Rules 5P and 8P are ''Tape A'' listings and would be traded pursuant to the rules applicable to NYSE-listed securities.

The Exchange does not currently list any ETPs and anticipates that it would not do so until Exchange-listed securities transition to Pillar. Once an ETP is listed, it will be assigned to a DMM pursuant to Rule 103B. The DMMs' role with respect to ETPs assigned to them will be subject to the same DMM rules governing all other listed securities, including Rules 36, 98, and 104. For example, DMMs will be responsible for facilitating the opening, reopening, and close of trading for assigned ETPs as required by Rule 104(a)(2) and (3). To facilitate DMM trading of Exchange-listed ETPs pursuant to Rules 5P and 8P, with this proposed change, the Exchange proposes to amend Rule 104 relating specified DMM requirements.

Current Rule 104

Rule 104 sets forth the obligations of Exchange DMMs. Under Rule 104(a), DMMs registered in one or more securities traded on the Exchange are required to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market insofar as reasonably practicable. Rule 104(a) also enumerates the specific responsibilities and duties of a DMM, including: (1) Maintenance of a continuous two-sided quote, which mandates that each DMM maintain a bid or an offer at the National Best Bid (''NBB'') and National Best Offer (''NBO'') (together, the ''NBBO'' or ''inside'') at least 15% of the trading day for securities with a consolidated average daily volume of less than one million shares, and at least 10% for securities with a consolidated average daily volume equal to or greater than one million shares,[10] and (2) the facilitation of, among other things, openings, re-openings, and the close of trading for the DMM's assigned securities, all of which may include supplying liquidity as needed.[11]

Rule 104(f) imposes an affirmative obligation on DMMs to maintain, insofar as reasonably practicable, a fair and orderly market on the Exchange in assigned securities, including maintaining price continuity with reasonable depth and trading for the DMM's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated. The Exchange supplies DMMs with suggested Depth Guidelines for each security in which a DMM is registered, and DMMs are expected to quote and trade with reference to the Depth Guidelines.[12]

Rule 104(g) provides that transactions on the Exchange by a DMM for the DMM's account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. Rule 104(g)(1) also describes certain transactions on the Exchange by a DMM for the DMM's account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. In addition, if a DMM unit engages in an ''Aggressing Transaction,'' *i.e.,* a transaction that (i) is a purchase (sale) that reaches across the market to trade as the contra-side to the Exchange published offer (bid); and (ii) is priced above (below) the last-differently priced trade on the Exchange and above (below) the last differently-priced published offer (bid) on the Exchange, such DMM is subject to specified requirements to re-enter on the opposite side of the Aggressing Transaction. Rule 104(g) also sets forth the re-entry obligations for DMM transactions. Specifically, Rule 104(g)(2) provides that a DMM unit's obligation to maintain a fair and orderly market may require re-entry on the opposite side of the market after effecting one or more transactions and that such re-entry should be commensurate with the size of the transaction(s) and the immediate and anticipated needs of the market.

Rules 104(g)(2)(A) and (B) specify the re-entry obligations for Aggressing Transactions. Following an Aggressing Transaction, Rule 104(g)(2)(A) requires the DMM unit to re-enter the opposite side of the market at or before the applicable PPP for that security commensurate with the size of the Aggressing Transaction. Under Rule 104(g)(2)(B), immediate re-entry on the opposite side of the market at or before the applicable PPP for the security commensurate with the size of the Aggressing Transaction is required if the Aggressing Transaction (i) is 10,000 shares or more or has a market value of $200,000 or more, and (ii) exceeds 50% of the published offer (bid) size.

Proposed Rule Change

To reflect the differences in how ETPs trade and the unique role of exchange market makers in the trading of ETPs, in order to facilitate DMM trading of Exchange-listed ETPs pursuant to Rules 5P and 8P, the Exchange proposes certain amendments to Rule 104.

Unlike operating company securities listed on the Exchange, the value of ETPs are derived from the underlying assets owned. The end-of-day net asset value (''NAV'') of an ETP is a daily calculation based off the most recent closing prices of the underlying assets and an accounting of the ETP's total cash position at the time of calculation. The NAV generally is calculated by taking the sum of fund assets, including any securities and cash, subtracting liabilities, and dividing by the number of outstanding shares. Additionally, ETPs are generally subject to a creation and redemption mechanism to ensure that the ETP's price does not fluctuate too far away from NAV, which mechanisms mitigate the potential for exchange trading to impact the price of an ETP.

Moreover, each business day, ETPs make publicly available a creation and redemption ''basket'' which may, for example, be in the form of a portfolio composition file (*i.e.,* a specific list of names and quantities of securities or other assets designed to track the performance of the portfolio as a whole). ETP shares are created when an Authorized Participant, typically a market maker or other large institutional investor, deposits the daily creation basket or cash with the issuer. In return for the creation basket or cash (or both), a ''creation unit'' is issued to the Authorized Participant that consists of a specified number of ETF shares.[13]

The principal, and perhaps most important, feature of ETPs is their

''derivative securities product'' in Rule 19b–4(e) under the Act.

[9] NMS Stock is defined in Rule 600 of Regulation NMS, 17 CFR 242.600(b)(47).

[10] *See* Rule 104(a)(1)(A).

[11] *See* Rule 104(a)(2)–(3). Rule 104(e) further provides that DMM units must provide contra-side liquidity as needed for the execution of odd-lot quantities eligible to be executed as part of the opening, reopening, and closing transactions but that remain unpaired after the DMM has paired all other eligible round lot sized interest.

[12] *See* Rule 104(f)(3).

[13] For example, assume a given ETP is designed to track the performance of a specific index. An Authorized Participant will generally purchase certain of the constituent securities of that index, then deliver those shares to the issuer. In exchange, the issuer gives the Authorized Participant a block of equally valued ETP shares, on a one-for-one fair value basis. This process also works in reverse. A redemption is achieved when the Authorized Participant accumulates a sufficient number of shares to constitute a creation unit and then exchanges these shares with the issuer, thereby decreasing the supply of ETP shares in the marketplace.

reliance on an ''arbitrage function'' performed by market participants that influences the supply and demand of shares and, thus, trading prices relative to NAV. As noted above, new ETP shares can be created and existing shares redeemed based on investor demand; thus, ETP supply is generally open-ended. As the Commission has acknowledged, the arbitrage function helps to keep an ETP's price in line with the value of its underlying portfolio, *i.e.,* it minimizes deviation from NAV.[14] Generally, the higher the liquidity and trading volume of an ETP, the more likely the ETP's price will not deviate from the value of its underlying portfolio. Market makers registered in ETPs play a key role in this arbitrage function and DMMs, along with other market participants, would perform this role for ETPs listed on the Exchange. In short, the Exchange believes that the arbitrage mechanism is generally an effective and efficient means of ensuring that intraday pricing in ETPs closely tracks the value of the underlying portfolio or reference assets.

To reflect the role of market makers—including DMMs—in the trading of ETPs, the Exchange proposes to amend Rule 104 in several respects. First, the Exchange proposes to exclude ETPs from the re-entry obligations for Aggressing Transactions in Rule 104(g)(2) (Re-Entry Obligations). The Exchange believes that because of the unique characteristics of ETPs—in particular, that ETPs trade at intra-day market prices rather than at NAV and the existence of arbitrage pricing mechanisms that are designed to help ensure that secondary market prices of ETP shares do not vary substantially from the NAV—the re-entry obligations set forth in Rule 104(g)(2) not only are not necessary, but also could impede the ability of a DMM to effectively make markets in ETPs. For example, a market maker engaging in the arbitrage function may need to update the quote for an ETP to bring the price of the security in line with the underlying assets. If updating the quote consistent with that arbitrage function were to require the DMM to first to engage in an Aggressing Transaction (*i.e.,* to trade with the existing BBO in order to post a new quote), the Exchange believes that the current re-entry obligations for Aggressing Transactions would defeat the purpose of the DMM engaging in such Aggressing Transaction to update the quote in the first place. More specifically, the re-entry obligation could be inconsistent with the new quote that the DMM is seeking to post as part of the arbitrage function. Indeed, the Exchange believes that without the proposed changes, DMMs assigned to ETPs would be at a competitive disadvantage vis-à-vis registered market makers in the same ETP on competing exchanges as well as other market participants on the NYSE and would be impeded in their ability to effectively make competitive markets in their assigned ETP securities.

To maintain the balance between DMM benefits and obligations under Rule 104, the Exchange proposes to amend Rule 104 to require heightened DMM quoting obligations for Exchange-listed ETPs. As proposed, for listed ETPs, DMMs would be required to maintain a bid or offer at the NBB and NBO at least 25% of the trading day. Time at the inside for ETPs would be calculated in the same way as other securities in which DMM units are registered as the average of the percentage of time the DMM unit has a bid or offer at the inside. In other words, this would be a portfolio-based quoting requirement. Orders entered by the DMM in ETPs that are not displayed would not be included in the inside quote calculation as is also currently the case for other securities in which DMM units are registered. Reserve or other non-displayed orders entered by the DMM in their assigned ETP would not be included in the inside quote calculations.

To effectuate this change, Rule 104(a)(1)(A) would be amended as follows:

- The phrase ''for securities in which the DMM unit is registered'' would be added following the first sentence in Rule 104(a)(1)(A) and the comma following that initial sentence would be removed;
- New subsections (i), (ii) and (iii) would be created;
- The phrase ''that are not ETPs'' would be added following ''at least 15% of the trading day for securities'' in new subsection (i) and ''in which the DMM unit is registered'' would be deleted;
- The phrase ''of the trading day'' [15] would added after ''at least 10%'' and ''that are not ETPs'' would be added after ''for securities'' in new subsection (ii). The phrase ''in which the DMM unit is registered'' would be deleted since it would appear in the first sentence of the amended rule;
- New subdivision (iii) providing that DMM units must maintain a bid or an offer at the inside ''at least 25% of the trading day for ETPs'' would be added;
- The phrase ''respective percentage'' would replace ''15% and 10%'' in the next to last sentence of Rule 104(a)(1)(A) and ''non-displayed'' would replace ''hidden'' in the last sentence of the rule; and
- The phrase ''other than Aggressing Transactions involving an ETP'' would be added to Rule 104(g)(2)(A) and (B) following ''Following an Aggressing Transaction.''

The Exchange also proposes non-substantive amendments to replace the terms ''stock'' and ''stocks'' in Rule 104(f)(2) (Function of DMMs) with the terms ''security'' and ''securities,'' respectively, and to replace the term ''stock'' in Rule 104(g)(1) with ''security.'' The Exchange would also add a new subsection (5) to Rule 104(f) providing that, for those ETPs in which they are registered, DMM units will be responsible for the affirmative obligation of maintaining a fair and orderly market, including maintaining price continuity with reasonable depth for their registered ETPs in accordance with Depth Guidelines published by the Exchange. To provide the Exchange time to collect trading data adequate to calculate appropriate Depth Guidelines for listed ETPs, the Exchange proposes that these provisions would not be operative until 18 weeks after the approval of the proposed rule change by the Commission.[16]

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[17] in general, and furthers the objectives of Sections 6(b)(5) of the

[14] *See* Securities Exchange Act Release No. 75165, 80 FR 34729, 34733 (June 17, 2015) (S7–11–15) (arbitrage ''generally helps to prevent the market price of ETP Securities from diverging significantly from the value of the ETP's underlying or reference assets''). *See also generally id.,* 80 FR at 34739 (''In the Commission's experience, the deviation between the daily closing price of ETP Securities and their NAV, averaged across broad categories of ETP investment strategies and over time periods of several months, has been relatively small[,]'' although it had been ''somewhat higher'' in the case of ETPs based on international indices.).

[15] This is a non-substantive conforming change that would mirror the current rule text for the 15% requirement.

[16] *See, e.g.,* Securities Exchange Act Release Nos. 62479 (July 9, 2010), 75 FR 41264, 41265 (July 15, 2010) (SR–NYSEAmex–2010–31) (providing for a delayed implementation of Depth Guidelines to enable the collection of trading data adequate to calculate the guidelines in connection with the Floor-based DMM trading of Nasdaq securities on a UTP basis). Such an approach is necessary so that appropriate Depth Guidelines may be calculated based on actual trading data on the Exchange. Accordingly, following implementation and roll-out of the pilot program, the Exchange proposes to collect 60 trading days of trade data before implementing Depth Guidelines for trading ETPs securities on the Exchange within 30 calendar days of the collection of the trade data. *See generally id.,* 75 FR at 41267 & n. 19.

[17] 15 U.S.C. 78f(b).

Act,[18] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that proposed requirements for DMM trading of ETPs would remove impediments to and perfect the mechanism of a free and open market and a national market system by facilitating market making by DMMs in listed ETPs and maintaining the Exchange's current structure to trade listed securities. The Exchange believes that the proposed exclusion of listed ETPs from the requirements of Rule 104(g)(2) would not be inconsistent with the public interest and the protection of investors because the unique characteristics of ETPs, including that ETPs trade at intra-day market prices rather than end-of-day NAV and are constrained by arbitrage pricing mechanisms that are designed to ensure that secondary market prices of ETP shares do not vary substantially from the NAV, render those obligations unnecessary or potentially even harmful. As discussed above, the Exchange also believes the DMM obligations set forth in Rule 104(g)(2) could impede the ability of a DMM to effectively make markets in ETPs.

The Exchange believes that the proposed heightened quoting obligations for DMMs in listed ETPs requiring maintenance of a bid or offer at the inside of at least 25% of the trading day would maintain the balance of benefits and obligations under Rule 104 because exclusion of listed ETPs from the re-entry requirements for Aggressing Transactions under Rule 104(g)(2) would be offset by the heightened DMM quoting obligations for listed ETPs. DMMs would also be required to facilitate the opening, reopening, and closing of listed ETPs assigned to them, as required by Rule 104(a)(2) and (3), which is an obligation unique to the Exchange. As noted, listed ETPs would also be subject to the requirement that DMM transactions be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. These safeguards are designed to ensure that DMM transactions in listed ETPs bear a reasonable relationship to overall market conditions and that DMMs cannot destabilize, inappropriately influence or manipulate a security. For the same reasons, the proposal would not alter or disrupt the balance between DMM benefits and obligations of being an Exchange DMM.

The proposed heightened quoting obligation for listed ETPs assigned to a DMM would also encourage additional stable displayed liquidity on the Exchange in listed securities, thereby promoting price discovery and transparency. The Exchange further believes that by establishing distinct requirements for DMMs, the proposal is also designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.

The Exchange believes that the proposal would not be inconsistent with the public interest and the protection of investors. As noted, the proposal would subject DMMs to the Exchange's current structure for trading listed securities and the responsibilities and duties of DMMs set forth in Rule 104, including facilitating openings, reopenings, and closings and adding a heightened quoting obligation at the inside. In addition, the proposed rule would subject listed ETPs to the requirement that all DMM transactions be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. Although the implementation of Depth Guidelines will be delayed, DMM units will still have the obligation once ETPs are listed and begin trading to maintain a fair and orderly market. The Exchange believes that the delayed implementation of Depth Guidelines will allow it to develop guidelines that are appropriately tailored for how ETPs will trade on the Exchange, which should improve the DMM units' ability to maintain a fair and orderly market and also the broader market for those securities here on the Exchange and on other markets.[19]

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[20] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change would promote competition by facilitating the listing and trading of ETPs on the Exchange. The Exchange believes that without this proposed change, DMMs assigned to ETPs would be at a competitive disadvantage vis-à-vis registered market makers in the same ETP on competing exchanges or other market participants on the NYSE because if they were required to comply with the re-entry requirements for Aggressing Transactions in Rule 104(g)(2), they would be impeded in their ability to effectively make markets in their assigned ETP securities. The Exchange believes that the proposed heightened DMM quoting obligations in listed ETPs would promote competition by promoting the display of liquidity on an exchange, which would benefit all market participants. These proposed rule changes would facilitate the trading of Exchange-listed ETPs by DMMs on Pillar, which would enable the Exchange to further compete with unaffiliated exchange competitors that also trade ETPs.

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. Discussion and Commission Findings

After careful review of the proposal, as modified by Amendment No. 1, and the comments received, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[21] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[22] 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, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the

[18] 15 U.S.C. 78f(b)(5).

[19] *See* note 16, *supra*.

[20] 15 U.S.C. 78f(b)(8).

[21] In approving this proposed rule change, the Commission has considered the propose rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78f(b)(5).

mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(8) of the Act, which provides that the rules of a national securities exchange must not ''impose any burden on competition not necessary or appropriate in furtherance of the purposes of'' the Act.[23]

The Exchange has proposed to alter certain requirements of NYSE Rule 104 (Dealings and Responsibilities of DMMs) with respect to ETPs. Currently, under NYSE Rule 104(g)(1), DMMs are prohibited from engaging in Aggressing Transactions in the last ten minutes prior to the scheduled close of trading that would result in a new high (low) price for a security on the Exchange for the day at the time of the DMM's transaction (''Prohibited Transactions''). Furthermore, DMMs are subject to certain quote re-entry obligations, following an Aggressing Transaction, under NYSE Rule 104(g)(2).

In its original proposal, the Exchange proposed to exclude DMM transactions in ETPs from the definition of ''Aggressing Transactions'' in NYSE Rule 104(g)(1) and, by extension, to exempt DMM transactions in ETPs from the rule on Prohibited Transactions. The Exchange also proposed to exclude Aggressing Transactions in ETPs from the DMM re-entry obligations in NYSE Rule 104(g)(2). The Exchange also proposed to require DMMs in ETPs to meet heightened quoting obligations for listed ETPs, requiring DMMs to maintain a quote at the national best bid or offer at least 25% of the trading day for ETPs (rather than the current requirement of 15% of the trading day for non-ETPs).

In Amendment No. 1, the Exchange amended its original proposal significantly to no longer seek to exclude DMM transactions in ETPs from definition of Aggressing Transactions and thereby no longer seek to exempt DMM transactions in ETPs from the rule on Prohibited Transactions.[24] As amended, the proposal would make two main substantive changes: (1) Exclude Aggressing Transactions in ETPs from the quote re-entry obligations in NYSE Rule 104(g)(2), and (2) require DMMs to meet heightened quoting obligations for ETPs during the trading day (maintaining bids or offers at the inside at least 25% of the trading day, instead of 15% of the trading day as required for non-ETPs).[25]

While the Exchange proposes to relieve DMMs in ETPs from the quote re-entry obligations in NYSE Rule 104(g)(2), the Exchange has argued that such an exclusion is necessary because DMMs engaging in an arbitrage function to keep an ETP's share price in line with the value of the ETP's underlying assets may need to update their quotes to align the price of the ETP and the value of the underlying assets, and may need to engage in Aggressing Transactions in the process. Therefore, the Exchange argues that requiring a DMM to re-enter a quote on the opposite side of the Aggressing Transaction would defeat the purpose of entering into the Aggressing Transaction to update its quote as part of the arbitrage function.[26] Although the Exchange proposes to ease these DMM quoting obligations, it also proposes to strengthen other DMM quoting obligations in ETPs (*i.e.,* increasing the inside quoting obligation from 15% to 25%).

The Commission believes that the Exchange's amended proposal with respect to DMMs in ETPs is consistent with the Act. In 2015, when the Commission approved the NYSE's proposal to make the New Market Model permanent,[27] the Commission noted the Prohibited Transactions rule,[28] among other aspects of the New Market Model, and reiterated that the pilot program had been conducted, among other reasons, to seek ''further evidence that the benefits proposed for DMMs are not disproportionate to their obligations.'' [29] Given that the Exchange has proposed to offset relief from one quoting obligation with another heightened quoting obligation, and in light of the other requirements of NYSE Rule 104 that would continue to apply to DMM transactions in ETPs—particularly the requirements that DMMs assist in the maintenance of fair and orderly markets and that transactions by DMMs be effected in a reasonable and orderly manner in relation to the condition of the general market and the market of a particular security [30]—the Commission believes that the proposal would not substantially alter the balance of DMM benefits and obligations previously approved by the Commission.[31]

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Sections 6(b)(5) and 6(b)(8) of the Act and the rules and regulations thereunder applicable to a national securities exchange.

VI. Accelerated Approval of Proposed Rule Change, as Modified By Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register**. As discussed above, Amendment No. 1 substantially modifies the original proposed rule change with respect to excluding ETPs Rule from the requirements in Rule 104(g) relating to Aggressing Transactions, narrowing the proposed rule change significantly so that the only substantive change to the existing rule would be to exclude Aggressing Transactions by DMMs in ETPs from the quote re-entry obligations and to increase the requirements for DMM quoting at the inside market in ETPs. As noted above, the Commission does not believe that the proposal substantially alters the balance of DMM benefits and obligations previously approved by the

[23] 15 U.S.C. 78f(b)(8).

[24] In the one comment letter received on the proposed rule change, the commenter states that ''any rule changes that might negatively affect the ability of the designated market manager to maintain the best interests of the investing public should not be impaired [sic].'' *See supra* note 5. As noted above, the Commission believes that Amendment No. 1 to the proposed rule change is consistent with the protection of investors and the public interest.

[25] As in the original proposal, the Exchange further proposes to apply the requirements pertaining to the function of DMMs in NYSE Rule 104(f)(2) and (3) to DMMs in ETPs on a delayed basis—upon implementation of the Depth Guidelines, but in no event later than eighteen weeks after the approval of this proposed rule change by the Commission. Similarly, the Exchange also proposes certain non-substantive changes to the rule text of NYSE Rule 104 (*e.g.,* replacing the term ''stock'' with ''security'') to accommodate the listing of ETPs.

[26] The Exchange also asserts that, without this proposed change, DMMs assigned to ETPs would be at a competitive disadvantage as compared to registered market makers in the same ETP on competing exchanges on the Exchange and would be impeded in their ability to effectively make competitive markets in their assigned ETP securities.

[27] *See* Securities Exchange Act Release No. 75578 (July 31, 2015), 80 FR 47008 (Aug. 6, 2015) (SR–NYSE–2015–26) (''NMM Approval Order'').

[28] *See* NMM Approval Order, 80 FR at 47010.

[29] *See id.* at 47013.

[30] *See* NYSE Rule 104(a) and (g), respectively.

[31] The proposal would delay the operation of NYSE Rule 104(f)(2) and (3) to DMMs in ETPs until the implementation of Depth Guidelines by the Exchange (but in no event later than eighteen weeks after the approval of this proposed rule change by the Commission). The Exchange represents that this delay is necessary to provide the Exchange time to collect trading data adequate to calculate the appropriate Depth Guidelines for listed ETPs. The Commission notes that this aspect of the proposal is consistent with a previous proposal approved by the Commission. *See* Securities Exchange Act Release Nos. 62479 (July 9, 2010), 75 FR 41264, 41265 (July 15, 2010) (SR–NYSEAmex-2010–31).

Commission.[32] Amendment No. 1 made no other substantive changes to proposal as published in the original Notice.[33]

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[34] to approve the proposed rule change, SR–NYSE–2018–34, as modified by Amendment No. 1, on an accelerated basis.

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to 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–2019–34 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–2019–34. 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–NYSE–2019–34 and should be submitted on or before October 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–20969 Filed 9–26–19; 8:45 am]

BILLING CODE 8011–01–P

[32] *See supra* note 31 and accompanying text.

[33] *See* Notice, *supra* note 3.

[34] 15 U.S.C. 78s(b)(2).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87058; File No. SR–NYSEArca–2019–14]

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 Relating to the Permitted Investments of the PGIM Ultra Short Bond ETF

September 23, 2019.

On March 13, 2019, NYSE Arca, Inc. (''Exchange'' or ''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 make certain changes to the listing rule for shares (''Shares'') of the PGIM Ultra Short Bond ETF (''Fund''). The proposed rule change was published for comment in the **Federal Register** on April 2, 2019.[3] On May 10, 2019, 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 approve or disapprove the proposed rule change.[5] On June 27, 2019, 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] In the Order Instituting Proceedings, the Commission solicited comments to specified matters related to the proposal.[8] The Commission has not received any comments on the proposed rule change.

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 the filing of the proposed rule change. The Commission may, however, extend the period for issuing an order approving or disapproving the proposed rule change 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 April 2, 2019.[10] The 180th day after publication of the notice of the filing of the proposed rule change in the **Federal Register** is September 29, 2019.

The Commission finds that it is 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 the proposed rule change.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[11] designates November 28, 2019, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSEArca–2019–14).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–20968 Filed 9–26–19; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85430 (Mar. 27, 2019), 84 FR 12646 (Apr. 2, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 85829 (May 10, 2019), 84 FR 22221 (May 16, 2019). The Commission designated July 1, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 77871, 81 FR 26265 (May 2, 2016) (''Order Instituting Proceedings''). 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.,* 81 FR at 26268.

[8] *See id.*

[9] 15 U.S.C. 78s(b)(2).

[10] *See supra* note 3.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting; Cancellation

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 84 FR 49778, September 23, 2019.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Wednesday, September 25, 2019 at 10:00 a.m.

CHANGES IN THE MEETING: The Open Meeting scheduled for Wednesday, September 25, 2019 at 10:00 a.m., has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: September 24, 2019.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2019–21095 Filed 9–25–19; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87060; File No. SR–CboeEDGX–2019–047]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Rule 21.21 (Solicitation Auction Mechanism)

September 23, 2019.

I. Introduction

On July 31, 2019, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 adopt Rule 21.21, the Solicitation Auction Mechanism (''SAM''), a solicited order mechanism for larger-sized orders. The proposed rule change was published for comment in the **Federal Register** on August 15, 2019.[3] On September 9, 2019, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission has received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

As described more fully in the Notice,[5] the Exchange proposes to adopt Rule 21.21 [6] establishing a solicited order mechanism. The proposal permits an Options Member (the ''Initiating Member'') to execute electronically a larger-sized order it represents as agent (''Agency Order'') against a solicited order(s) (''Solicited Order(s)''), provided that it submits both the Agency Order and Solicited Order(s) into the SAM.[7]

A. Eligibility and SAM Auction Process

The Initiating Member may initiate a SAM in any class traded on the Exchange.[8] The order size of an Agency Order marked for SAM processing must be at least the minimum size designated by the Exchange, which may not be less than 500 standard option contracts or 5,000 mini-option contracts. The size of the Solicited Order(s) must be for/total the same size as the Agency Order.[9] In addition, the Initiating Member must designate each of the Agency Order and Solicited Order as all-or-none (''AON''),[10] and the price of the Agency Order and Solicited Order must be in an increment of $0.01.[11] Also, an Initiating Member may not designate an Agency Order or Solicited Order as Post Only.[12]

The Solicited Order must stop the entire buy (sell) Agency Order at a price that is at or better than the then-current NBO (NBB).[13] Regarding resting orders that are on the same side as the Agency Order, the proposal provides that if the Agency Order is to buy (sell), the stop price must be at least $0.01 better than the Exchange best bid (offer), unless the Agency Order is a Priority Customer order and the resting order is a non-Priority Customer order, in which case the stop price must be at or better than the Exchange best bid (offer).[14] Regarding resting orders that are on the opposite side as the Agency Order, the proposal provides that if the Agency Order is to buy (sell) and the Exchange best offer (bid) represents (i) a Priority Customer order on the EDGX Book, the stop price must be at least $0.01 better than the Exchange best offer (bid); or (ii) a quote or order that is not a Priority Customer order on the EDGX Book, the stop price must be at or better than the Exchange best offer (bid).[15]

A ''SAM sweep order'' or ''SAM ISO'' is the submission of two orders for crossing in a SAM without regard for better-priced Protected Quotes (as defined in Exchange Rule 27.1) because the submitting Options Member routed an ISO(s) simultaneously with the routing of the SAM ISO to execute against the full displayed size of any Protected Quote that is better than the stop price and has swept all interest in the EDGX Book with a price better than the stop price. If the Initiating Member submits a SAM sweep order to a SAM, the stop price, SAM responses, and executions will be permitted at a price inferior to the Initial NBBO. Any execution(s) resulting from these sweeps will accrue to the SAM Agency Order.[16]

The Exchange system will initiate the SAM process by sending a SAM auction notification message detailing the side, size, price, origin code, Auction ID, and options series of the Agency Order to all Options Members that elect to receive SAM auction notification messages.[17] SAM auction notification messages will not be included in the disseminated BBO or disseminated to the Options Price Reporting Authority (''OPRA'').[18] The SAM auction will last for a period of time determined by the Exchange (the ''SAM auction period''), which may be no less than 100 milliseconds and no more than one second.[19] An Initiating Member may not modify or cancel an

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86621 (August 9, 2019), 84 FR 41779 (''Notice'').

[4] Amendment No. 1 revises the proposal to correct a citation signal and to add an explanatory sentence regarding the requirements of Rule 11a2–2(T) under the Act. Because Amendment No. 1 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, it is not subject to notice and comment. Amendment No. 1 is available at *https://www.sec.gov/comments/sr-cboeedgx-2019-047/srcboeedgx2019047-6090026-191882.pdf.*

[5] *See* Notice, *supra* note 3.

[6] For purposes of proposed Rule 21.21, the term ''NBBO'' means the national best bid or national best offer at the particular point in time applicable to the reference, and the term ''Initial NBBO'' means the national best bid or national best offer at the time a SAM auction is initiated.

[7] The solicited order(s) cannot be for the same EFID as the Agency Order or for the account of any Options Market Maker with an appointment in the applicable class on the Exchange. The Agency Order and Solicited Order cannot both be for the accounts of a customer.

[8] *See* proposed Rule 21.21(a)(1).

[9] *See* proposed Rule 21.21(a)(3).

[10] *See id.*

[11] *See* proposed Rule 21.21(a)(4).

[12] *See* proposed Rule 21.21(a)(5). *See also* Exchange Rule 21.19(a)(5).

[13] *See* proposed Rule 21.21(b)(1).

[14] *See* proposed Rule 21.21(b)(2). The Exchange notes that these conditions regarding orders on the same side as the Agency Order are the same as those applicable to AIM for orders of 50 contracts or more. *See* Exchange Rule 21.19(b).

[15] *See* proposed Rule 21.21(b)(3).

[16] *See* proposed Rule 21.21(b)(4). The Exchange notes that ISOs are similarly permitted for AIM auctions, and the proposed definition of a SAM ISO is consistent with linkage rules. *See* Exchange Rules 21.19(b)(3)(A) and 27.1.

[17] *See* proposed Rule 21.21(c)(2).

[18] *See id.*

[19] *See* proposed Rule 21.21(c)(3). Pursuant to Exchange Rule 16.3, the Exchange will announce the length of the SAM auction period via specification, Exchange Notice, or Regulatory Circular.

Agency Order or Solicited Order after submission to a SAM auction.[20]

Any User other than the Initiating Member (determined by EFID) may submit responses to a SAM auction that are properly marked specifying size, side of the market, and the Auction ID for the SAM auction to which the User is submitting the response.[21] A SAM response may specify a limit price or be treated as market. SAM responses must be on the opposite side of the market as the Agency Order, [22] and the minimum price increment for SAM responses is $0.01.[23] SAM buy (sell) responses are capped at the Exchange best offer (bid), or $0.01 better than the Exchange best offer (bid) if it is represented by a Priority Customer order resting on the EDGX Options Book (unless the Agency Order is a SAM ISO), that exists at the conclusion of the SAM auction. For purposes of the SAM auction, the system will aggregate all of a User's orders and quotes resting on the EDGX Book and SAM responses for the same EFID at the same price.[24] The System will cap the size of a SAM response, or the aggregate size of a User's orders and quotes resting on the EDGX Book and SAM responses for the same EFID at the same price, at the size of the Agency Order (*i.e.,* the System will ignore size in excess of the size of the Agency Order when processing a SAM auction).[25] SAM responses will not be visible to SAM auction participants or disseminated to OPRA.[26] A User may modify or cancel its SAM responses during the SAM auction.

One or more SAM auctions in the same series may occur at the same time. To the extent there is more than one SAM in a series underway at a time, the SAM auctions will conclude sequentially based on the exact time each SAM commenced, unless terminated early pursuant to proposed Rule 21.21(d). At the time each SAM concludes, the system will allocate the Agency Order pursuant to proposed Rule 21.21(e) and will take into account all SAM responses and unrelated orders in place at the exact time of conclusion. In the event there are multiple SAM auctions underway that are each terminated early pursuant to proposed Rule 21.21(d), the system will process the SAM auctions sequentially based on the exact time each SAM commenced.[27]

B. Conclusion of the SAM Auction

The SAM will conclude at the sooner of the following: (i) The end of the SAM auction period; (ii) upon receipt by the system of a Priority Customer order on the same side of the market with a price the same as or better than the stop price that would post to the EDGX Book; (iii) upon receipt by the system of an unrelated order or quote that is not a Priority Customer order on the same side of the market as the Agency Order that would cause the stop price to be outside of the EDGX BBO; (iv) the market close; and (v) any time the Exchange halts trading in the affected series, provided, however, that in such instance the SAM auction will conclude without execution.[28]

An unrelated market or marketable limit order (against the EDGX BBO), including a Post Only Order,[29] on the opposite side of the Agency Order received during the SAM will not cause the SAM auction to end early and will execute against interest outside of the SAM auction. If contracts remain from such unrelated order at the time the SAM ends, they may be allocated for execution against the Agency Order pursuant to proposed Rule 21.21(e).[30]

C. Priority and Allocation

At the conclusion of the SAM auction, the system will execute the Agency Order against the Solicited Order or contra-side interest (which includes orders and quotes resting in the EDGX Book and SAM responses) at the best price(s) as follows (provided that any execution price(s) must be at or between the EDGX BBO existing at the conclusion of the SAM auction and at or between the Initial NBBO): [31]

- The system will execute the Agency Order against the Solicited Order at the stop price if there are no Priority Customer orders (including Priority Customer AON orders) on the opposite side of the Agency Order resting in the EDGX Book at the stop price and the aggregate size of contra-side interest at an improved price(s) is insufficient to satisfy the Agency Order.[32]
- The system will execute the Agency Order against contra-side interest (and cancel the Solicited Order) if (A) there is a Priority Customer order (including a Priority Customer AON order) on the opposite side of the Agency Order resting on the EDGX Book at the stop price and the aggregate size of the Priority Customer order and other contra-side interest at the stop price or an improved price(s) is sufficient to satisfy the Agency Order; or (B) the aggregate size of contra-side interest at an improved price(s) is sufficient to satisfy the Agency Order. The Agency Order execution against such contra-side interest will occur at each price level, to the price at which the balance of the Agency Order can be fully executed, in the following order:
  - Priority Customer orders (including Priority Customer AON orders) on the EDGX Book (non-AON orders before AON orders, each in time priority);
  - remaining contra-side trading interest (including non-Priority Customer orders and quotes on the EDGX Book and SAM responses) pursuant to Exchange Rule 21.8(c);
  - any nondisplayed Reserve Quantity (Priority Customer before non-Priority Customer, each in time priority); and
  - any non-Priority Customer AON orders, if there is sufficient size to satisfy the AON order.[33]
- The system will cancel the Agency Order and Solicited Order with no execution if (i) execution of the Agency Order against the Solicited Order at the stop price would not be at or between the EDGX BBO at the conclusion of the SAM auction or at or between the Initial NBBO; or (ii) there is a Priority

[20] *See* proposed Rule 21.21(c)(4).

[21] The Exchange notes that the system will disregard any Post Only instruction applied to a SAM response, as that instruction is inconsistent with the purpose of a SAM response, which is to execute against the Agency Order at the conclusion of a SAM auction (and thus not post to the EDGX Book). *See* Notice, *supra* note 3, at 41781 n.25. As a result, the system will handle a SAM response with a Post Only instruction in the same manner as all other SAM responses, which is as a provider of liquidity (*i.e.,* maker). *See id.*

[22] *See* proposed Rule 21.21(c)(5)(E). The Exchange notes that this is the same as the corresponding provision for the Exchange's AIM auction. *See* Exchange Rule 21.19(c)(5)(E).

[23] *See* proposed Rule 21.21(c)(5)(A).

[24] *See* proposed Rule 21.21(c)(5)(C). The Exchange notes that this is the same as the corresponding provision for the Exchange's AIM auction. *See* Exchange Rule 21.19(c)(5)(C). The Exchange also notes that this (combined with the proposed size cap) is intended to prevent an Options Member from submitting multiple orders, quotes, or responses at the same price to obtain a larger pro-rata share of the Agency Order. *See* Notice, *supra* note 3, at 41781.

[25] *See* proposed Rule 21.21(c)(5)(D). The Exchange notes that this is the same as the corresponding provision for the Exchange's AIM auction. *See* Exchange Rule 21.19(c)(5)(D). The Exchange notes that this is intended to prevent an Options Member from submitting an order, quote, or response with an extremely large size in order to obtain a larger pro-rata share of the Agency Order. *See* Notice, *supra* note 3, at 41781.

[26] *See* proposed Rule 21.21(c)(5)(F).

[27] *See* proposed Rule 21.21(c)(1). *See also* Notice, *supra* note 3, at 41780.

[28] *See* proposed Rule 21.21(d)(1).

[29] The Exchange notes that any Post Only order resting on the EDGX Book at the conclusion of a SAM auction that executes against the Agency Order pursuant to proposed Rule 21.21(e) will execute in the same manner as any other type of order resting on the EDGX Book, which is as a provider of liquidity (*i.e.,* maker). *See* Notice, *supra* note 3, at 41782 n.34.

[30] *See* proposed Rule 21.21(d)(2). The Exchange notes that the proposed reasons why a SAM auction may conclude early are the same as those that will cause an AIM auction to conclude early. *See* Exchange Rule 21.19(d).

[31] *See* proposed Rule 21.21(e).

[32] *See* proposed Rule 21.21(e)(1).

[33] *See* proposed Rule 21.21(e)(2).

Customer order (including a Priority Customer AON order) resting on the opposite side of the Agency Order at the stop price on the EDGX Book, and the aggregate size of the Priority Customer order and any other contra-side interest is insufficient to satisfy the Agency Order.[34]

The system will cancel or reject any unexecuted SAM responses (or unexecuted portions) at the conclusion of the SAM auction.[35]

D. Notification Requirement and Order Exposure Rule

Proposed Rule 21.21, Interpretation and Policy .01 provides that prior to entering Agency Orders into a SAM auction on behalf of customers, Initiating Members must deliver to the customer a written notification informing the customer that his order may be executed using the SAM auction. The written notification must disclose the terms and conditions contained in proposed Rule 21.21 and be in a form approved by the Exchange.[36]

Exchange Rule 22.12 prevents an Options Member from executing agency orders to increase its economic gain from trading against the order without first giving other trading interests on the Exchange an opportunity to either trade with the agency order or to trade at the execution price when the Options Member was already bidding or offering on the book. However, the Exchange notes that it may be possible for an Options Member to establish a relationship with a Priority Customer or other person to deny agency orders the opportunity to interact on the Exchange and to realize similar economic benefits as it would achieve by executing agency order as principal.[37] Accordingly, proposed Rule 21.21, Interpretation and Policy .02 provides that Options Members may not use the SAM auction to circumvent Exchange Rule 21.19 or 22.12 limiting principal transactions. This may include, but is not limited to, Options Members entering contra-side orders that are solicited from (a) affiliated broker-dealers or (b) broker-dealers with which the Options Member has an arrangement that allows the Options Member to realize similar economic benefits from the solicited transaction as it would achieve by executing the customer order in whole or in part as principal.[38]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b) of the Act.[39] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[40] 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, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that allowing Options Members to enter orders into the SAM could provide additional opportunities for such large-sized orders to receive price improvement over the NBBO. The Commission further believes that the proposal to establish the SAM may allow for greater flexibility in executing large-sized orders, is not novel, and does not otherwise raise any issues of first impression.[41] The Commission believes that the proposal includes appropriate terms and conditions to assure that the Agency Order is exposed to Options Members for the possibility of price improvement over the NBBO and that Priority Customer orders on the Exchange are protected. At the conclusion of a SAM, the Agency Order would either be executed in full (at a price at or between the Initial NBBO and at or between the EDGX BBO at the conclusion of the SAM auction) or cancelled. The Agency Order will be executed against the Solicited Order at the proposed stop price if (i) there is insufficient size among contra-side trading interest at a price better than the stop price to execute the Agency Order; and (ii) there are no Priority Customer orders (including Priority Customer AON orders) resting on the opposite side of the Agency Order at the stop price.[42] If there are Priority Customer orders (including Priority Customer AON orders) and there is sufficient size to execute the Agency Order (considering all eligible interest), then the Agency Order will be executed against these interests and the Solicited Order will be cancelled.[43] If, however, there are resting Priority Customer orders (including Priority Customer AON orders) at the stop price, but there is not sufficient size to execute the Agency Order in full, then both the Agency Order and the Solicited Order will be cancelled.[44] Finally, if there is sufficient size to execute the Agency Order in full at an improved price equal to or better than the Initial NBBO and the EDGX BBO at the conclusion of the SAM auction, the Agency Order will execute at the improved price and the Solicited Order will be cancelled. The Commission believes that the priority and allocation rules for the SAM, which are consistent with similar mechanisms on other exchanges, are reasonable and consistent with the Act.

IV. Section 11(a) of the Act

Section 11(a)(1) of the Act[45] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, ''covered accounts'') unless an exception applies. Rule 11a2–2(T) under the Act,[46] known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the

[34] *See* proposed Rule 21.21(e)(3). The Exchange notes that the proposed provisions regarding the execution of the Agency Order at the conclusion of a SAM auction are similar to the corresponding provisions for a Cboe Options SAM, as well as current Exchange Rules regarding priority and allocation of resting orders and quotes. *See* Cboe Options Rule 6.74B(b)(2)(A); Exchange Rule 21.8.

[35] *See* proposed Rule 21.21(e)(4).

[36] *See* proposed Rule 21.21, Interpretation and Policy .01.

[37] *See* Notice, *supra* note 3, at 41783.

[38] *See* proposed Rule 21.21, Interpretation and Policy .02.

[39] 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[40] 15 U.S.C. 78f(b)(5).

[41] The Commission also notes that the proposal is similar to requirements set forth in the Cboe Options Solicitation Auction Mechanism, Nasdaq ISE, LLC (''ISE'') Solicited Order Mechanism, and Miami International Securities Exchange LLC (''MIAX'') PRIME Solicitation Mechanism. *See* Cboe Options Rule 6.74B; ISE Rule 716(d); MIAX Rule 515A(b).

[42] *See* proposed Rule 21.21(e)(1).

[43] *See* proposed Rule 21.21(e)(2).

[44] *See* proposed Rule 21.21(e)(3).

[45] 15 U.S.C. 78k(a)(1).

[46] 17 CFR 240.11a2–2(T).

execution of the transaction once it has been transmitted to the member performing the execution;[47] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule. For the reasons set forth below, the Commission believes that Exchange Options Members entering orders into the SAM would satisfy the requirements of Rule 11a2–2(T).

The Rule's first condition is that orders for covered accounts be transmitted from off the exchange floor. In the context of automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[48] The Exchange represents that its trading system and the proposed SAM receive all orders electronically through remote terminals or computer-to-computer interfaces.[49] The Exchange also represents that orders for covered accounts from Options Members will be transmitted from a remote location directly to the proposed SAM by electronic means. Because no Exchange Options Member may submit orders into the SAM from on the floor of the Exchange, the Commission believes that the SAM satisfies the off-floor transmission requirement.

Second, the Rule requires that the member and any associated person not participate in the execution of its order after the order has been transmitted. The Exchange represents that at no time following the submission to the SAM of an order or SAM response is an Options Member able to acquire control or influence over the result or timing of the order's or response's execution.[50] According to the Exchange, the execution of an order (including the Agency and the Solicited Order) or a SAM response sent to the SAM is determined by what other orders and responses are present and the priority of those orders and responses.[51] Accordingly, the Commission believes that an Options Member does not participate in the execution of an order or response submitted to the SAM.

Third, Rule 11a2–2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities, such as the SAM, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.[52] The Exchange represents that the SAM is designed so that no Options Member has any special or unique trading advantage in the handling of its orders after transmitting its orders to the mechanism.[53] Based on the Exchange's representation, the Commission believes that the SAM satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T) thereunder.[54] The Exchange represents that Options Members relying on Rule 11a2–2(T) for transactions effected through the SAM must comply with this condition of the Rule and that the Exchange will enforce this requirement pursuant to its obligations under Section 6(b)(1) of the Act to enforce compliance with federal securities laws.[55]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[56] that the proposed rule change (SR–CboeEDGX–2019–047), as modified by Amendment No. 1, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[57]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–20974 Filed 9–26–19; 8:45 am]

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[47] This prohibition also applies to associated persons. The member may, however, participate in clearing and settling the transaction.

[48] *See, e.g.,* Securities Exchange Act Release Nos. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR–BATS–2009–031) (approving BATS options trading); 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (approving equity securities listing and trading on BSE); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) (approving NOM options trading); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131) (approving The Nasdaq Stock Market LLC); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR–PCX–00–25) (approving Archipelago Exchange); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR–NYSE–90–52 and SR–NYSE–90–53) (approving NYSE's Off-Hours Trading Facility); and 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (''1979 Release'').

[49] *See* Notice, *supra* note 3, at 41787.

[50] *See id.* (also representing, among other things, that no Options Member, including the Initiating Member, will see a SAM response submitted into SAM and therefore will not be able to influence or guide the execution of their Agency Orders, Solicited Orders, or SAM responses, as applicable).

[51] *See id.* The Exchange notes that an Initiating Member may not cancel or modify an Agency Order or Solicited Order after it has been submitted into SAM, but that Options Members may modify or cancel their responses after being submitted to a SAM. *See id.* at 41787 n.68. As the Exchange notes, the Commission has stated that the non-participation requirement does not preclude members from cancelling or modifying orders, or from modifying instructions for executing orders, after they have been transmitted so long as such modifications or cancellations are also transmitted from off the floor. *See* Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542, 11547 (the ''1978 Release''). *See also* Amendment No. 1, *supra* note 4.

[52] In considering the operation of automated execution systems operated by an exchange, the Commission noted that, while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release, *supra* note 44.

[53] *See* Notice, *supra* note 3, at 41787.

[54] In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member or any associated person thereof in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 47, at 11548 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[55] *See* Notice, *supra* note 3, at 41787.

[56] 15 U.S.C. 78s(b)(2).

[57] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87059; File No. SR–CboeBZX–2019–057]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the American Century Focused Dynamic Growth ETF and American Century Focused Large Cap Value ETF Under Currently Proposed Rule 14.11(k)

September 23, 2019.

On June 6, 2019, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the American Century Focused Dynamic Growth ETF and American Century Focused Large Cap Value ETF (each a ''Fund'' and, collectively, the ''Funds'') under proposed BZX Rule 14.11(k).[3] The proposed rule change was published for comment in the **Federal Register** on June 25, 2019.[4] On August 2, 2019, pursuant to Section 19(b)(2) of the Exchange Act,[5] 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.[6] The Commission has received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act [7] to determine whether to approve or disapprove the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86157 (June 19, 2019), 84 FR 29892 (June 25, 2019) (''Managed Portfolio Shares Proposal''). Pursuant to the Managed Portfolio Shares Proposal, the Exchange proposes to adopt new BZX Rule 14.11(k) to permit the listing and trading of Managed Portfolio Shares. The Managed Portfolio Shares Proposal has not yet been acted upon by the Commission.

[4] *See* Securities Exchange Act Release No. 86155 (June 19, 2019), 84 FR 29912 (''Notice'').

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 86557, 84 FR 39024 (August 8, 2019). The Commission designated September 23, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[7] 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Exchange's Description of the Proposed Rule Change [8]

The Exchange proposes to list and trade shares of the Funds under proposed BZX Rule 14.11(k).[9] The shares of each Fund will be issued by American Century ETF Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[10] The investment adviser to the Trust will be American Century Investment Management, Inc. (''Adviser'').[11] Foreside Fund Services, LLC will serve as the distributor of each Fund's shares.

A. American Century Focused Dynamic Growth ETF

The Exchange states that the American Century Focused Dynamic Growth ETF seeks long-term capital growth. Under Normal Market Conditions,[12] the Fund intends to invest primarily in U.S. exchange-listed equity securities. In addition, the Fund may invest in exchange-traded funds (''ETFs''),[13] exchange-listed American Depositary Receipts (''ADRs''), U.S. exchange-listed equity futures contracts, and U.S. exchange-listed equity index futures contracts. The Fund may also hold cash and Cash Equivalents [14] without limitation.

B. American Century Focused Large Cap Value ETF

The Exchange states that the American Century Focused Large Cap Value ETF will seek long-term capital growth. Under Normal Market Conditions, the Fund intends to invest primarily in U.S. exchange-listed equity securities. In addition, the Fund may invest in ETFs, exchange-listed ADRs, U.S. exchange-listed equity futures contracts, and U.S. exchange-listed equity index futures contracts. The Fund may also hold cash and Cash Equivalents without limitation.

C. Investment Restrictions

All exchange-listed equity securities in which the Funds will invest will be listed and traded on U.S. national securities exchanges. The Funds will not invest in forwards or swaps.

Each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage.

Each Fund may hold up to an aggregate amount of 15% of its total assets in illiquid assets,[15] consistent with Commission guidance. Each Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an

[8] For a complete description of the Exchange's proposal, *see* the Notice, *supra* note 4.

[9] For a complete description of proposed BZX Rule 14.11(k), *see* the Managed Portfolio Shares Proposal, *supra* note 3.

[10] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). On June 18, 2018, the Trust filed a registration statement on Form N–1A relating to the Funds (File No. 811–23305). The Exchange states that the Trust filed an application for exemptive relief under the 1940 Act (File No. 812–15035), and shares of the Funds will not be issued until the Commission has issued an order granting exemptive relief.

[11] The Exchange states that the Adviser is not registered as a broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition of and/or changes to a Fund's portfolio. The Exchange further states that in the event (a) the Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

[12] The term ''Normal Market Conditions'' includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues causing dissemination of inaccurate market information or system failures; or force majeure type events such as natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[13] For purposes of describing the holdings of the Funds, ETFs include Portfolio Depository Receipts (as described in BZX Rule 14.11(b)); Index Fund Shares (as described in BZX Rule 14.11(c)); and Managed Fund Shares (as described in BZX Rule 14.11(i)). The ETFs in which a Fund will invest all will be listed and traded on U.S. national securities exchanges. While the Funds may invest in inverse ETFs, the Funds will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs.

[14] For purposes of this filing, ''Cash Equivalents'' are short-term instruments with maturities of less than three months, which include only the following: (i) U.S. Government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. Government agencies or instrumentalities; (ii) certificates of deposit issued against funds deposited in a bank or savings and loan association; (iii) bankers acceptances, which are short-term credit instruments used to finance commercial transactions; (iv) repurchase agreements and reverse repurchase agreements; (v) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (vi) commercial paper, which are short-term unsecured promissory notes; and (vii) money market funds.

[15] In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance. In any event, the Funds will not purchase any securities that are illiquid investments at the time of purchase.

The shares of each Fund will conform to the initial and continued listing criteria under proposed BZX Rule 14.11(k). The Exchange states that each Fund's holdings will also meet the generic listing standards applicable to series of Managed Fund Shares under BZX Rule 14.11(i)(4)(C). While such standards do not apply directly to series of Managed Portfolio Shares, the Exchange believes that the overarching policy issues related to liquidity, market capitalization, diversity, and concentration of portfolio holdings that BZX Rule 14.11(i)(4)(C) is intended to address are equally applicable to series of Managed Portfolio Shares.

II. Proceedings To Determine Whether To Approve or Disapprove SR–CboeBZX–2019–057 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act [16] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[17] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Exchange 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, . . . 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.'' [18]

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[19]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by October 18, 2019. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 1, 2019.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[20] and any other issues raised by the proposed rule change under the Exchange Act. In particular, the Commission seeks commenters' views regarding whether the Exchange's proposal to list and trade the Funds under proposed Rule 14.11(k) (Managed Portfolio Shares), which would be actively managed exchange-traded products for which the portfolio holdings would be disclosed on a quarterly, rather than daily, basis, is adequately 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, and is consistent with the maintenance of a fair and orderly market under the Exchange 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-CboeBZX–2019–057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2019–057. 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–CboeBZX–2019–057 and should be submitted on or before October 18, 2019. Rebuttal comments should be submitted by November 1, 2019.

[16] 15 U.S.C. 78s(b)(2)(B).

[17] *Id.*

[18] 15 U.S.C. 78f(b)(5).

[19] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[20] *See supra* note 4.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–20971 Filed 9–26–19; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33631; 812–15034]

Core Alternative Capital, LLC, Listed Funds Trust, and Quasar Distributors, LLC

September 24, 2019.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) actively-managed series of certain open-end management investment companies (''Funds'') to issue shares redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds (''Funds of Funds'') to acquire shares of the Funds; (f) certain Funds (''Feeder Funds'') to create and redeem Creation Units in-kind in a master-feeder structure; and (g) the Funds to issue shares in less than Creation Unit size to investors participating in a distribution reinvestment program.

Applicants: Core Alternative Capital, LLC (''Initial Adviser''), a Georgia limited liability company registered as an investment adviser under the Investment Advisers Act of 1940, Listed Funds Trust (''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and Quasar Distributors, LLC (''Initial Distributor''), a Delaware limited liability company registered as a broker-dealer under the Securities Exchange Act of 1934 (''Exchange Act'').

Filing Dates: The application was filed on May 17, 2019 and amended on September 23, 2019.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 21, 2019, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090; Applicants, c/o Laura Flores, Morgan, Lewis & Bockius LLP, 1111 Pennsylvania Avenue NW, Washington, DC 20004; or Kent P. Barnes, U.S. Bank Global Fund Services, 615 E Michigan Street, Milwaukee, WI 53202.

FOR FURTHER INFORMATION CONTACT: Zeena Abdul-Rahman, Senior Counsel, at (202) 551–4099, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as actively-managed exchange traded funds (''ETFs'').[1] Fund shares will be purchased and redeemed at their NAV in Creation Units only (other than pursuant to a distribution reinvestment program described in the application). All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant'' which will have signed a participant agreement with the Distributor. Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Certain Funds may operate as Feeder Funds in a master-feeder structure. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will consist of a portfolio of securities and other assets and investment positions (''Portfolio Instruments''). Each Fund will disclose on its website the identities and quantities of the Portfolio Instruments that will form the basis for the Fund's calculation of NAV at the end of the day.

3. Shares will be purchased and redeemed in Creation Units only and generally on an in-kind basis, or issued in less than Creation Unit size to investors participating in a distribution reinvestment program. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment

[21] 17 CFR 200.30–3(a)(57).

[1] Applicants request that the order apply to the new series of the Trust described in the application, as well as to additional series of the Trust and any other open-end management investment companies or series thereof that currently exist or that may be created in the future (each, included in the term ''Fund''), each of which will operate as an actively-managed ETF. Any Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each such entity and any successor thereto is included in the term ''Adviser'') and (b) comply with the terms and conditions of the application. For purposes of the requested Order, the term ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

companies and issue shares that are redeemable in Creation Units only.

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that hold non-U.S. Portfolio Instruments and that effect creations and redemptions of Creation Units in kind, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and (a)(2) of the Act to permit persons that are affiliated persons, or second-tier affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Instruments currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[2] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Applicants also request relief to permit a Feeder Fund to acquire shares of another registered investment company managed by the Adviser having substantially the same investment objectives as the Feeder Fund (''Master Fund'') beyond the limitations in section 12(d)(1)(A) and permit the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in section 12(d)(1)(B).

10. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21030 Filed 9–26–19; 8:45 am]

BILLING CODE 8011–01–P

[2] The requested relief would apply to direct sales of shares in Creation Units by a Fund to a Fund of Funds and redemptions of those shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2019–0017]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a New Matching Program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Railroad Retirement Board (RRB).

This matching agreement sets forth the terms, conditions, and safeguards under which RRB will disclose to SSA information necessary to verify an individual's self-certification of eligibility for the Extra Help with Medicare Prescription Drug Plan Costs program (Extra Help). It will also enable SSA to identify individuals who may qualify for Extra Help as part of the agency's Medicare outreach efforts.

DATES: The deadline to submit comments on the proposed matching program is 30 days from the date of publication of this notice in the **Federal Register**. The matching program will be applicable on March 31, 2020, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 966–0869, writing to Matthew D. Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov*. All comments received will be available for public inspection by contacting Mr. Ramsey at this street address.

FOR FURTHER INFORMATION CONTACT: Norma Followell, Supervisory Team Lead, Office of Privacy and Disclosure, Office of the General Counsel, Social

Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, Telephone: (410) 966–5855, or send an email to *Norma.Followell@ssa.gov*.

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies

SSA and RRB.

Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity is sections 1144 and 1860D–14 of the Social Security Act (Act) (42 U.S.C. 1320b–14 and 1395w–114).

Purpose(s)

This matching program establishes the conditions under which RRB will disclose to SSA information necessary to verify an individual's self-certification of eligibility for the Extra Help with Medicare Prescription Drug Plan Costs program (Extra Help). It will also enable SSA to identify individuals who may qualify for Extra Help as part of the agency's Medicare outreach efforts.

Categories of Individuals

The individuals whose information is involved in this matching program are individuals who self-certify for Extra Help or may qualify for Extra Help. SSA matches RRB's information with its Medicare Database File (MDB), which includes claimants, applicants, beneficiaries, ineligible spouses and potential claimants for Medicare Part A, Medicare Part B, Medicare Advantage Part C, Medicare Part D, and Medicare Part D prescription drug coverage subsidies.

Categories of Records

RRB will transmit its annuity payment data monthly from its RRB–22 system of records (SOR). The file will consist of approximately 600,000 electronic records. RRB will transmit its Post Entitlement System file daily. The number of records will differ each day, but consist of approximately 3,000 to 4,000 records each month. RRB will transmit files on all Medicare eligible Qualified Railroad Retirement Beneficiaries from its RRB–20 and RRB–22 SORs to report address changes and subsidy changing event information monthly. The file will consist of approximately 520,000 electronic records. The number of people who apply for Extra Help determines in part the number of records matched.

SSA's comparison file will consist of approximately 90 million records obtained from its MDB. SSA will conduct the match using each individual's Social Security number, name, date of birth, RRB claim number, and RRB annuity payment amount in both RRB and MDB files.

System(s) of Records

RRB will provide SSA with data from its RRB–20 SOR, last published on September 30, 2014 (79 FR 58886), and RRB–22 SOR, last published on May 15, 2015 (80 FR 28018).

SSA will match RRB's data with its MDB File, 60–0321, published on July 25, 2006 (71 FR 42159), as amended on December 10, 2007 (72 FR 69723) and November 1, 2018 (83 FR 54969).

[FR Doc. 2019–20962 Filed 9–26–19; 8:45 am]

BILLING CODE P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36345]

First State Infrastructure Managers (International) Limited, Global Diversified Infrastructure Fund (North America) LP, and Mitsubishi UFJ Financial Group, Inc.—Acquisition of Control Exemption—SteelRiver Transport Ventures LLC and Patriot Rail Company LLC

First State Infrastructure Managers (International) Limited (FSIM), Global Diversified Infrastructure Fund (North America) LP (GDIF–US), and Mitsubishi UFJ Financial Group, Inc. (MUFG),[1] all noncarriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to acquire control of SteelRiver Transport Ventures LLC (SRTV) [2] and its indirect subsidiary, Patriot Rail Company LLC (Patriot), both noncarriers, and 14 Class III rail carriers indirectly controlled by Patriot.[3] The verified notice states that a Purchase and Sale Agreement dated August 24, 2019, was executed by SRATH and DPH Holdco LLC as the sellers and FSIM on behalf of the buyer.[4]

The earliest the transaction may be consummated is October 13, 2019, the effective date of the exemption (30 days after the verified notice was filed).[5]

The verified notice states that: (i) The 14 SRTV/Patriot railroads do not connect with a railroad controlled by First State; (ii) the subject acquisition of control is not intended to connect the SRTV/Patriot railroads with any other railroad; and (iii) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than October 4, 2019 (at least seven days before the exemption becomes effective).

A copy of any petition filed with the Board should be sent to First State's representative: Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606.

Board decisions and notices are available at *www.stb.gov.*

Decided: September 24, 2019.

[1] The verified notice states that subsidiaries of MUFG acquired FSIM and MUFG is therefore the ultimate parent of FSIM. GDIF–US is a pooled investment fund which is in the process of being formed as a Delaware limited partnership. Pursuant to an agreement with GDIF–US's general partner, FSIM will be delegated the authority to manage and control GDIF–US. MUFG, FSIM, and GDIF–US are collectively referred to as ''First State.''

[2] The verified notice states that SRTV's ownership currently consists of Class A and Class B interests. The Class A interests are held by PRC Holdings LLC, which is a subsidiary of PRC Funding LLC, which is a subsidiary of SteelRiver Arch Transport Holdings LLC (SRATH). The Class B interests are held by DPH Holdco LLC. GDIF–US will complete the proposed acquisition of SRTV by acquiring PRC Funding LLC from SRATH and purchasing the Class B interests from DPH Holdco LLC.

[3] The 14 Class III rail carriers are: Columbia & Cowlitz Railway, LLC; DeQueen and Eastern Railroad, LLC; Georgia Northeastern Railroad Company LLC; Golden Triangle Railroad, LLC; Kingman Terminal Railroad, LLC; Louisiana and North West Railroad Company, LLC; Patriot Woods Railroad, LLC; Rarus Railway, LLC, d/b/a Butte, Anaconda & Pacific Railway Co.; Sacramento Valley Railroad, LLC; Temple & Central Texas Railway, LLC; Tennessee Southern Railroad Company, LLC; Texas, Oklahoma & Eastern Railroad, LLC; Utah Central Railway Company, LLC; and West Belt Railway LLC.

[4] Concurrently with its verified notice, First State filed a motion for protective order under 49 CFR 1104.14(b), which will be addressed in a separate decision.

[5] First State states that it intends to consummate the proposed transaction on or shortly after October 15, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2019–21025 Filed 9–26–19; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36348]

Motive Rail, Inc. d/b/a Illinois Terminal Belt—Lease and Operation Exemption—Illinois Central Railroad Company

Motive Rail, Inc. d/b/a Illinois Terminal Belt (ITB), a Class III railroad, has filed a verified notice of exemption under 49 CFR 1150.41 to lease from Illinois Central Railroad Company (IC) and operate approximately 10.7 miles of rail line from milepost 784.2 in Heyworth, Ill. to milepost 773.5 in Clinton, Ill. (the Line).

ITB states that it has entered into a track lease with IC to provide common carrier service on the Line. According to ITB, the track lease between ITB and IC does not contain an interchange commitment.

ITB certifies that its projected annual revenues as a result of the proposed transaction will not exceed $5 million and that the transaction will not result in the creation of a Class II or Class I rail carrier.

This transaction may be consummated on or after October 11, 2019 (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than October 4, 2019 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36348, must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on ITB's representative: Eric M. Hocky, Clark Hill PLC, Two Commerce Square, 2001 Market Street, Suite 2620, Philadelphia, PA 19103.

According to ITB, this action is excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: September 23, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Aretha Laws-Byrum,

Clearance Clerk.

[FR Doc. 2019–20984 Filed 9–26–19; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 795X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Harlan County, Ky

CSX Transportation, Inc. (CSXT), has filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 16.22-mile rail line on its Louisville Division, CV Subdivision, known as the Clover Fork Branch between milepost OWH 242.28 and milepost OWH 258.5, in Harlan County, Ky. (the Line). The Line traverses U.S. Postal Service Zip Codes 40831, 40801, 40806, and 40828. CSXT states that there are 13 stations on the Line,[1] and that they can all be closed.

CSXT has certified that: (1) No freight traffic has moved over the Line for two years; (2) no overhead traffic has been operated and therefore none needs to be rerouted; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) [2] to subsidize continued rail service has been received, this exemption will be effective on October 27, 2019,[3] unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2) [4] must be filed by October 7, 2019.[5] Petitions for reconsideration must be filed by October 17, 2019, with the Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative, Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available at *www.stb.gov*.

Decided: September 23, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2019–21108 Filed 9–26–19; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

National Express Transit Corporation—Acquisition of Control—Fox Bus Lines, Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving and Authorizing Finance Transaction.

SUMMARY: On August 30, 2019, National Express Transit Corporation (National Express), an intrastate passenger motor carrier, filed an application for National Express to acquire control of Fox Bus

[1] The stations are listed as Dartmont (OWH 243), Kitts (OWH 244), Coxton (OWH 245), Brookside (OWH 246), Ages (OWH 247), Parkdale (OWH 248), Verda (OWH 249), Harcow (OWH 250), Evarts (OWH 251), Black Mountain (OWH 252), Dartmont (OWH 253), Pillsbury (OWH 254), and Highsplint (OWH 257).

[2] Persons interested in submitting an OFA to subsidize continued rail service must first file a formal expression of intent to file an offer, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(2)(i).

[3] CSXT initially submitted its verified notice on September 3, 2019. CSXT subsequently filed an updated affidavit certifying newspaper publication on September 9, 2019, which will be considered the filing date in the proceeding.

[4] The filing fee for OFAs can be found at 49 CFR 1002.2(f)(25).

[5] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require environmental review.

Lines, Inc. (Fox), an interstate passenger motor carrier, from Fox's shareholders, Brian A. Fox, Stephen J. Fox, Catherine Fox, and William L. Fox, Jr. (collectively, Sellers). The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow the rules.

DATES: Comments may be filed by November 12, 2019. If any comments are filed, National Express may file a reply by November 26, 2019. If no opposing comments are filed by November 12, 2019, this notice shall be effective on November 13, 2019.

ADDRESSES: Comments may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. In addition, send one copy of comments to: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 245–0368. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: According to the application, National Express is a motor carrier incorporated under the laws of Delaware, and it primarily provides intrastate passenger transportation services and utilizes approximately 1,158 passenger-carrying vehicles and 1,609 drivers. (Appl. 1–2.) National Express represents that it does not have interstate carrier authority, but it owns and controls two passenger motor carrier subsidiaries that hold interstate carrier authority: Aristocrat Limousine and Bus, Inc. (Aristocrat), and Trans Express, Inc. (Trans Express). (*Id.* at 2.)

National Express states that it is indirectly wholly owned and controlled by a publicly-held British corporation, National Express Group, PLC (Express Group). (*Id.*) National Express further states that Express Group also indirectly wholly owns and controls the following passenger motor carriers that hold interstate carrier authority in the United States (collectively, National Express Affiliated Carriers). (*Id.* at 2–8.) [1]

- Aristocrat (the National Express subsidiary), which provides public passenger charter services in New Jersey, New York, and Pennsylvania, and intrastate passenger charter services in New Jersey;
- Beck Bus Transportation Corp., which primarily provides student school bus transportation services in Illinois, and charter passenger services to the public;
- Chicagoland Coach Lines LLC, which provides charter passenger services in the Chicago, Ill. area;
- Durham School Services, L.P., which primarily provides student school bus transportation services in several states, and charter passenger services to the public;
- New Dawn Transit LLC, which primarily provides non-regulated school bus transportation services in New York, and charter passenger services to the public;
- Petermann Ltd., which primarily provides non-regulated school bus transportation services in Ohio, and charter passenger services to the public;
- Petermann Northeast LLC, which primarily provides non-regulated school bus transportation services primarily in Ohio and Pennsylvania, and charter passenger services to the public;
- Petermann STSA, LLC, which primarily provides non-regulated school bus transportation services in Kansas, and charter passenger services to the public;
- Quality Bus Service LLC, which primarily provides non-regulated school bus transportation services in New York, and charter passenger services to the public;
- Queen City Transportation, LLC, which primarily provides non-regulated school bus transportation services in Ohio, and charter passenger services to the public;
- Free Enterprise System/Royal LLC, which provides interstate and intrastate passenger transportation services in Illinois and Indiana, and surrounding states, and corporate and university shuttle services for employees and students in the Chicago area;
- Trans Express (the National Express subsidiary), which provides interstate and intrastate passenger transportation services in New York;
- Trinity, Inc., which provides non-regulated school bus transportation services in southeastern Michigan, and charter service to the public;
- Trinity Student Delivery LLC, which provides non-regulated school bus transportation services in northern Ohio, and passenger charter services to the public;
- White Plains Bus Company, Inc., d/b/a Suburban Paratransit Service, which primarily provides non-regulated school bus transportation services in New York, paratransit services, and charter service to the public; and
- Wise Coaches, Inc., which provides interstate passenger charter services in Tennessee and its surrounding states, and intrastate passenger charter and shuttle services in Tennessee.[2]

National Express states that Fox is a Massachusetts corporation, doing business as Silver Fox Coaches, that holds interstate carrier operating authority. (*Id.* at 8–9.) According to National Express, Fox operates as a motor carrier providing charter and tour motor coach services in the areas of Boston, Springfield, and Worcester, Mass; Providence, R.I.; and Manchester/Nashua, N.H., and the surrounding New England area (the Service Area); tour services in and to New York City; and shuttle services on behalf of Massport Shuttle, at Framington, Mass., to and from Boston Logan International Airport. (*Id.* at 8, 12.) National Express further states that Fox utilizes approximately 30 passenger vehicles and 51 drivers. (*Id.* at 9.)

According to the application, Sellers collectively own all the outstanding equity shares of Fox. (*Id.* at 8.) National Express states that none of the Sellers have any direct or indirect ownership interest in any interstate passenger motor carrier other than Fox. (*Id.*)

National Express represents that, through this transaction, it will acquire all the outstanding equity shares of Fox, which will place Fox under its control. (*Id.* at 9.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees. National Express has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of National Express, the National

[1] Additional information about these motor carriers, along with Fox, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety ratings can be found in the application. (*See* Appl. 2–9 & sched. A.)

[2] In prior applications filed with the Board, National Express included two additional affiliated carriers: MV Student Transportation, Inc. (MV Student), and Petermann Southwest LLC (Petermann Southwest). By letter filed September 23, 2019, National Express explained that MV Student and Petermann Southwest were no longer listed as affiliated carriers because, prior to filing the current application, both entities had ceased operating and voluntarily revoked their USDOT numbers and interstate passenger operating authorities.

Express Affiliated Carriers, and Fox exceeded $2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5).

National Express asserts that the proposed transaction is not expected to have a material, detrimental impact on the adequacy of transportation services available to the public in the Service Area. (Appl. 10.) National Express states that it anticipates that services available to the public will be improved as operating efficiencies are realized and additional services and capacity are made available. (*Id.*) National Express further states that, for the foreseeable future, Fox will continue to provide the services it currently provides under the same name but will operate within the National Express corporate family, which is experienced in passenger transportation operations. (*Id.*) According to National Express, Fox is experienced in some of the same market segments already served by some of the National Express Affiliated Carriers, and the transaction is expected to result in improved operating efficiencies, increased equipment utilization rates, and cost savings derived from economies of scale, which will help ensure the provision of adequate service to the public. (*Id.* at 10–11.) National Express also asserts that adding Fox to National Express' corporate family will enhance the viability of the overall National Express organization and the operations of the National Express Affiliated Carriers. (*Id.* at 11.)

National Express claims that neither competition nor the public interest will be adversely affected by the proposed transaction. (*Id.* at 13.) National Express states that the population and demand for charter and tour services in the Service Area are expected to continue to increase in the foreseeable future, and that Fox competes directly with other passenger charter and tour service providers in Massachusetts, Rhode Island, and New Hampshire. (*Id.* at 12–13.) According to National Express, a number of passenger transportation arrangers or brokers for charter and tour services operate within the Service Area, and passenger motor coach charter providers also compete with scheduled rail transportation and a number of scheduled airlines within the Service Area. (*Id.* at 13.) With regard to interstate charter and tour service offerings, National Express also states that the Service Area is geographically dispersed from the service areas of the National Express Affiliated Carriers, and there is very limited overlap in the service areas and customer bases among the National Express Affiliated Carriers and Fox. (*Id.*)

National Express states that fixed charges are not contemplated to have a material impact on the proposed transaction. (*Id.* at 11.) Regarding the interests of employees, National Express claims that the transaction is not expected to have substantial impacts on employees or labor conditions, nor does National Express anticipate a measurable reduction in force or changes in compensation levels and/or benefits. (*Id.*) National Express submits, however, that staffing redundancies could result in limited downsizing of back-office or managerial-level personnel. (*Id.*)

The Board finds that the acquisition as proposed in the application is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at *www.stb.gov.*

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective November 13, 2019, unless opposing comments are filed by November 12, 2019.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: September 23, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2019–21007 Filed 9–26–19; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Submission Deadline for Schedule Information for Chicago O'Hare International Airport, John F. Kennedy International Airport, Los Angeles International Airport, and San Francisco International Airport for the Summer 2020 Scheduling Season

AGENCY: Federal Aviation Administration (FAA), Department of Transportation.

ACTION: Notice of submission deadline.

SUMMARY: Under this notice, the FAA announces the submission deadline of October 3, 2019, for Summer 2020 flight schedules at Chicago O'Hare International Airport (ORD), John F. Kennedy International Airport (JFK), Los Angeles International Airport (LAX), and San Francisco International Airport (SFO). The deadline coincides with the schedule submission deadline for the International Air Transport Association (IATA) Slot Conference for the Summer 2020 scheduling season.

DATES: Schedules must be submitted no later than October 3, 2019.

ADDRESSES: Schedules may be submitted by mail to the Slot Administration Office, AGC–200, Office of the Chief Counsel, 800 Independence Avenue SW, Washington, DC 20591; facsimile: 202–267–7277; or by email to: *7-AWA-slotadmin@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Al Meilus, Manager (Acting), Slot Administration, AJR–G, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–2822; email *Al.Meilus@faa.gov.*

SUPPLEMENTARY INFORMATION: This document provides routine notice to carriers serving capacity-constrained airports in the United States.

General Information for All Airports

The FAA has designated LAX, ORD, and SFO as IATA Level 2 airports [1] and JFK as an IATA Level 3 airport consistent with the Worldwide Slot Guidelines (WSG).[2] The FAA currently limits scheduled operations at JFK by

[1] These designations remain effective until the FAA announces a change in the **Federal Register**. The FAA suspended Level 2 schedule review at ORD on a trial basis for the Winter 2019/2020 scheduling season only. 84 FR 18630 (May 1, 2019).

[2] The FAA applies the WSG to the extent there is no conflict with U.S. law or regulation. The FAA is reviewing recent substantive amendments to the WSG adopted in version 10 and considering whether to implement certain changes in the U.S.

order that expires on October 24, 2020.[3] The FAA has also designated Newark Liberty International Airport (EWR) as a Level 2 airport and intends to issue a separate schedule submission notice for EWR for the Summer 2020 season.

The FAA is primarily concerned about scheduled and other regularly conducted commercial operations during peak hours, but carriers may submit schedule plans for the entire day. The peak hours for the Summer 2020 scheduling season are: At LAX and SFO from 0600 to 2300 Pacific Time (1300 to 0600 UTC), at ORD from 0600 to 2100 Central Time (1100 to 0200 UTC), and at JFK from 0600 to 2300 Eastern Time (1000 to 0300 UTC). These hours are unchanged from previous scheduling seasons. Carriers should submit schedule information in sufficient detail including, at minimum, the marketing or operating carrier, flight number, scheduled time of operation, frequency, aircraft equipment, and effective dates. IATA standard schedule information format and data elements for communications at Level 2 and Level 3 airports in the IATA Standard Schedules Information Manual (SSIM) Chapter 6 may be used. The WSG provides additional information on schedule submissions at Level 2 and Level 3 airports.

The U.S. summer scheduling season is from March 29, 2020, through October 24, 2020, in recognition of the IATA northern Summer scheduling period.

As stated in the WSG, schedule facilitation at a Level 2 airport is based on the following: (1) Schedule adjustments are mutually agreed upon between the airlines and the facilitator; (2) the intent is to avoid exceeding the airport's coordination parameters; (3) the concepts of historic precedence and series of slots do not apply at Level 2 airports; although WSG recommends giving priority to approved services that plan to operate unchanged from the previous equivalent season at Level 2 airports, and (4) the facilitator should adjust the smallest number of flights by the least amount of time necessary to avoid exceeding the airport's coordination parameters. Consistent with the WSG, the success of Level 2 in the U.S. depends on the voluntary cooperation of all carriers.

The FAA considers several factors and priorities as it reviews schedule and slot requests at Level 2 and Level 3 airports, which are consistent with the WSG, including—historic slots or services from the previous equivalent season over new demand for the same timings, services that are unchanged over services that plan to change time or other capacity relevant parameters, introduction of year-round services, effective period of operation, regularly planned operations over *ad hoc* operations, and other operational factors that may limit a carrier's timing flexibility. In addition to applying these priorities from the WSG, the U.S. Government has adopted a number of measures and procedures to promote competition and new entry at U.S. slot controlled and schedule facilitated airports.

At Level 2 airports, the FAA seeks to improve communications with carriers and terminal schedule facilitators on potential runway schedule issues or terminal and gate issues that may affect the runway times. The FAA also seeks to reduce the time that carriers consider proposed offers on schedules. Retaining open offers for extended periods of time may delay the facilitation process for the airport. Reducing this delay is particularly important to allow the FAA to make informed decisions at airports where operations in some hours are at or near the scheduling limits. The agency recognizes that there are circumstances that may require some schedules to remain open. However, the FAA expects to substantially complete the review process on initial submissions each scheduling season within 30 days of the end of the Slot Conference. After this time, the agency would confirm the acceptance of proposed offers, as applicable, or issue a denial of schedule requests.

Slot management in the U.S. differs in some respect from procedures in other countries. In the United States, the FAA is responsible for facilitation and coordination of runway access for takeoffs and landings at Level 2 and Level 3 airports; however, the airport authority or its designee is responsible for facilitation and coordination of terminal/gate/airport facility access. The process with the individual airports for terminal access and other airport services is separate from, and in addition to, the FAA schedule review based on runway capacity. Approval from the FAA for runway availability and the airport authority for airport facility availability is necessary before implementing schedule plans. Carriers seeking terminal approval should contact the schedule facilitator for that airport.

Generally, the FAA uses average hourly runway capacity throughput for airports and performance metrics in its schedule review at Level 2 airports and determining the scheduling limits at Level 3 airports included in FAA rules or orders.[4] The FAA also considers other factors that can affect operations, such as capacity changes due to runway, taxiway, or other airport construction, air traffic control procedural changes, airport surface operations, and historical or projected flight delays and congestion.

Finally, the FAA notes that the schedule information submitted by carriers to the FAA may be subject to disclosure under the Freedom of Information Act (FOIA). The WSG also provides for release of information at certain stages of slot coordination and schedule facilitation. In general, once it acts on a schedule submission or slot request, the FAA may release information on slot allocation or similar slot transactions or schedule information reviewed as part of the schedule facilitation process. The FAA does not expect that practice to change and most slot and schedule information would not be exempt from release under FOIA. The FAA recognizes that some carriers may submit information on schedule plans that is both customarily and actually treated as private. Carriers that submit such confidential schedule information should clearly mark the information as ''PROPIN''. The FAA will take the necessary steps to protect properly designated information to the extent allowable by law.

Level 2, FAA Designation Review

In the previous Notice of Submission Deadline published for the Winter 2019/2020 scheduling season, the FAA advised it was reviewing the Level 2 runway designations at LAX, ORD, and SFO to determine if the designations at these airports continue to be necessary for future scheduling seasons and announced a suspension on a trial basis of the Level 2 runway designation at ORD for Winter 2019/2020 schedules.[5]

[3] Operating Limitations at John F. Kennedy International Airport, 73 FR 3510 (Jan. 18, 2008), as amended 83 FR 46865 (Sep. 17, 2018). The slot coordination parameters for JFK are set forth in this Order.

[4] The FAA typically determines an airport's average adjusted runway capacity or typical throughput for Level 2 airports by reviewing hourly data on the arrival and departure rates that air traffic control indicates could be accepted for that hour, commonly known as ''called'' rates. The FAA also reviews the actual number of arrivals and departures that operated in the same hour. Generally, the FAA uses the higher of the two numbers, called or actual, for identifying trends and schedule review purposes. Some dates are excluded from analysis, such as during periods when extended airport closures or construction could affect capacity.

[5] Notice of Submission Deadline for Schedule Information for John F. Kennedy International Airport, Los Angeles International Airport, Newark Liberty International Airport, and San Francisco International Airport for the Winter 2019/2020 Scheduling Season; Suspension of Level 2 at

Continued

The FAA also indicated it would engage with the airport operators, carriers, and other stakeholders to determine whether the FAA designation provides substantive benefits to the traveling public by reducing potential runway congestion and delay. The FAA reiterates that its review at LAX, ORD, and SFO was for runway purposes only as the separate airport facility designations are made by the local airport operator.

The FAA held discussions with the airport operators of LAX, ORD, and SFO as well as various airlines serving the airports to obtain their views on whether Level 2 remains appropriate and whether the FAA's advance review of scheduled demand can yield improved performance. The FAA discussed the Level 2 review with airlines and airport operators in meetings at the 144th IATA Slot Conference, the domestic slot conference hosted by Airlines for America, as well as other individual meetings. No formal written comments were received. The FAA reviewed air traffic operations and constraints, performance metrics, and airport/airfield construction plans at the individual airports that might impact airport operations or capacity. The Air Traffic Organization and other FAA offices also regularly meet with stakeholders on national and local levels to address operational issues and ways to improve efficiency.

The FAA has determined that a Level 2 designation for LAX, ORD, and SFO remains appropriate at this time and these designations will remain in effect until the FAA announces a change in the **Federal Register**. The results of the FAA review for the individual airports are discussed below. The FAA will continue to monitor operations and demand at the airports and regularly consult with the airport operators and stakeholders to determine if a level change is warranted in the future.

LAX

LAX was designated Level 2 in 2015 based on multiple runway construction projects that were planned through 2018.[6] Since that time, other runway and taxiway have been planned by the Los Angeles World Airports (LAWA), including a closure of Runway 7R/25L during parts of the Winter 2020/2021 and Summer 2021 scheduling seasons, and construction of taxiway exits on Runways 6L/24R and 6R/24L in the planning stages for 2022.

The FAA reviewed the recent scheduled demand at LAX, the typical airport arrival and departure rates with four available runways, how runway capacity was impacted with the series of runway construction projects since 2015, and the anticipated impacts when Runway 7R/25L closes for construction. Surface operations at LAX present a challenging air traffic operational environment with limited movement and holding areas, multiple taxiway and runway restrictions based on aircraft types and operating characteristics, and limitations due to the distance between the north runways. The airfield construction over the last few years and continuing with current and upcoming taxiway and terminal construction increases the operational complexity for runway configuration and surface movements.

Stakeholders did not have strong views on whether the FAA's schedule review is needed in the long term as LAWA is also actively managing gates and terminal access for international passenger flights, has relocated terminals and gates for multiple airlines to improve efficiency and better match airport facilities with airline operations, and recently deployed surface management tools. Stakeholders acknowledged LAWA efforts and some international operators viewed LAWA's schedule facilitation for terminal access as sufficient. Some airlines expressed concern that the airport has been under construction for significant portions of the past several years with ongoing taxiway and terminal construction and this has increased delays and operational challenges. Some expressed concern that it may not be appropriate to change the airport level and that it should be considered after the next runway closure and major construction projects are done. Some airlines indicated that they wanted to grow their operations at LAX in the future and the airport could benefit from Level 2 to help prevent delays through facilitation of voluntary schedule adjustments while others were concerned that under Level 2 they might not be able to operate at their preferred times. The airlines generally indicated there is minimal burden associated with providing schedules noting that they were already providing information to the airport for terminal planning purposes or that providing information to the FAA was largely an automated process. Airlines noted that providing schedule information to the FAA before it is final and, in many cases, before it is publicly available, allows the FAA to identify periods of potential congestion. Several airlines stated that if changes were needed to avoid or reduce delays, they would rather know as early as possible in the planning process when it is easier to adjust schedules.

The FAA has determined that Level 2 at LAX remains appropriate given the airport demand and the potential capacity impacts and anticipated operational impacts from the upcoming airport construction. The aircraft fleet mix includes a significant percentage of heavy aircraft that require additional spacing in the air and specific routings or other limitations on the surface. Multiple airlines operate at LAX as a hub airport or focus city and plan schedules independently. There are periods when scheduled demand is relatively high such as the morning and evening hours and excessive demand has the potential to increase air traffic delays. The schedule facilitation and cooperation by airlines to voluntarily make necessary schedule changes would continue to provide an opportunity to manage scheduled demand during upcoming construction.

ORD

The FAA designated ORD as Level 2 in 2008 to allow for a smoother transition as slot control under Level 3 was phased out with the opening of a new runway in November 2008.[7] The FAA concluded that Level 2 was necessary to facilitate the scheduling of operations so that the airport would not suffer from periods of overscheduling as it adjusts to new capacity and as modernization plans continued.

While it conducted its review of the ORD Level 2 designation, the FAA suspended the runway schedule review on a trial basis for the Winter 2019/2020 scheduling season noting that demand is typically within the airport's runway capacity. This suspension was for Winter 2019/2020 only and does not change the designation for any other scheduling season unless a subsequent change is announced. The FAA also indicated it would publish the findings of its broad review of the ORD Level 2 designation in the notice for the Summer 2020 scheduling season. The FAA noted when it announced the trial suspension that it was not aware of any major schedule or hub structure changes planned for the Winter 2019/2020 season and none are apparent based on currently published schedules. The FAA will continue to monitor schedules

Chicago O'Hare International Airport, 84 FR 18630 (May 1, 2019).

[6] Notice of Submission Deadline for Schedule Information for Los Angeles International Airport for the Summer 2015 Scheduling Season, 80 FR 12253 (Mar. 6, 2015).

[7] Notice of Submission Deadline for Schedule Information for O'Hare International, John F. Kennedy International, and Newark Liberty International Airport for the Summer 2009 Scheduling Season, 73 FR 54659 (Sep. 22, 2008).

and operational data to assess if there are significant impacts or other issues related to the trial suspension that might inform future decisions.

The City of Chicago is continuing plans to improve the airport's throughput, efficiency, and terminal access. New construction of Runway 9C/27C is expected to continue through 2020. An extension of Runway 9R by about 3,000 feet and shortening of Runway 27L by about 300 feet and Terminal 5 expansion are in progress. Both projects are expected to continue into late 2021. Various taxiway construction projects are underway or planned for the next few years. Some of these projects, especially runway closures, impact capacity while others such as taxiway and terminal construction may limit surface movements and options for holding aircraft, or increase operational complexity in the short term. There is currently Level 2 schedule facilitation for Terminal 5 and the terminal is constrained at peak times.

Several airlines and the airport operator expressed support for continuation of Level 2 to address potential congestion issues over the next few years. Many of the statements made by airlines summarized in the LAX section of this Notice on submitting schedules for review, including a preference for early notice of adjustments, were also expressed with regard to ORD. No airlines expressed a preference for a change to Level 1 in the near term. Additionally, the FAA notes that ORD is uniquely situated as one of the few airports in the U.S. that is a major hub for two airlines, each of which has a substantial portion of the total operations at the airport. Currently, there is a degree of separation between the arrival and departure banks of the hub airlines that limits schedule peaking. There have been occasions when one or both airlines have changed schedule banks and overlapped schedules causing demand to exceed capacity. The resulting in delays and flight cancellations impacted ORD and other airports in the National Airspace System (NAS). The FAA worked with airlines to revise schedules. Until the changes were effective, there was significant impact to the operation and disruption to airline networks and passengers. The FAA finds that given ORD's demand and the importance of the airport to the NAS, the Level 2 process provides an opportunity to try to work with airlines to voluntarily adjust schedules before they take effect and reduce potential delays.

SFO

The FAA designated SFO as Level 2 effective in 2012 as a result of low on-time performance relative to other airports, expected growth in scheduled demand, and runway construction.[8] Separately, the airport also had planned runway construction after the Level 2 designation was effective, which contributed to congestion. Today, the airport continues to have high demand in certain hours even with Level 2 and is limited in some cases by gate availability during peak hours. SFO continues to be one of the more delay-prone airports in the U.S. Since 2012, operations at SFO have increased about 10%, and the proportion of flights delayed has increased about one percentage point.[9]

Stakeholders generally expressed support for retaining the Level 2 designation to help facilitate the movement of scheduled flights into less congested periods. Operationally, surface constraints limit holding and staging areas for aircraft and demand for gates remains high. Terminal 1 construction is underway and expected to be completed in 2022. SFO facilitates international passenger flights under the Level 2 process, which is complementary to the FAA runway review. As with LAX and ORD, airlines generally favored retaining the FAA's Level 2 designation. Some opined that SFO's runway layout limits the airport capacity, especially in adverse weather conditions, and the delays and performance strongly support continuing efforts under Level 2 to manage schedules and reduce delays. The FAA finds that the Level 2 process should be retained at SFO in order to facilitate voluntary schedule adjustments in an effort to reduce potential delay associated with growing scheduled demand.

Issued in Washington, DC, on September 24, 2019.

Michael C. Artist,

Vice President, System Operations Services.

[FR Doc. 2019–20986 Filed 9–26–19; 8:45 am]

BILLING CODE 4910–13–P

[8] Submission Deadline for Schedule Information for San Francisco International Airport for the Summer 2012 Scheduling Season, 76 FR 64163 (Oct. 17, 2011).

[9] *Source:* OPSNET data based on 12-month rolling averages.

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them. Additionally, OFAC is publishing the names of one or more persons that have been removed from the SDN List. Their property and interests in property are no longer blocked, and U.S. persons are no longer generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

A. On September 24, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Entities

1. CAROIL TRANSPORT MARINE LTD (a.k.a. CAROIL TRANSPORT MARINE LIMITED), Arch Makariou III Avenue 284, Fortuna Court, Block B, 2nd Floor, Limassol, Cyprus; Identification Number IMO 1869514; Registration Number HE 47364 (Cyprus) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 (E.O. 13850) of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by Executive Order 13857, ''Taking Additional Steps to Address the National Emergency with Respect to Venezuela,'' of January 25, 2019, for operating in the oil sector of the Venezuelan economy.

2. TOVASE DEVELOPMENT CORP, Panama City, Panama; Identification Number IMO 5447549; Company Number 568507 (Panama) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy.

3. TROCANA WORLD INC., Panama City, Panama; Identification Number IMO 5411381; Company Number 582152 (Panama) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy.

4. BLUELANE OVERSEAS SA, Panama City, Panama; Identification Number IMO 6109861 [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy.

Vessels

1. CARLOTA C Chemical/Products Tanker Panama flag; Vessel Registration Identification IMO 9502453 (vessel) [VENEZUELA–EO13850] (Linked To: CAROIL TRANSPORT MARINE LTD).

Identified pursuant to E.O. 13850, as amended by E.O. 13857, as property in which CAROIL TRANSPORT MARINE LTD, a person whose property and interest in property are blocked pursuant to E.O. 13850, as amended by E.O. 13857, has an interest.

2. PETION Products Tanker Panama flag; Vessel Registration Identification IMO 9295098 (vessel) [VENEZUELA–EO13850] (Linked To: CAROIL TRANSPORT MARINE LTD; Linked To: TROCANA WORLD INC.).

Identified pursuant to E.O. 13850, as amended by E.O. 13857, as property in which CAROIL TRANSPORT MARINE LTD and TROCANA WORLD INC., persons whose property and interest in property are blocked pursuant to E.O. 13850, as amended by E.O. 13857, have an interest.

3. SANDINO Chemical/Products Tanker Panama flag; Vessel Registration Identification IMO 9441178 (vessel) [VENEZUELA–EO13850] (Linked To: CAROIL TRANSPORT MARINE LTD; Linked To: TOVASE DEVELOPMENT CORP).

Identified pursuant to E.O. 13850, as amended by E.O. 13857, as property in which CAROIL TRANSPORT MARINE LTD and TOVASE DEVELOPMENT CORP, persons whose property and interest in property are blocked pursuant to E.O. 13850, as amended by E.O. 13857, have an interest.

4. GIRALT Crude Oil Tanker Panama flag; Vessel Registration Identification IMO 9259692 (vessel) [VENEZUELA–EO13850] (Linked To: BLUELANE OVERSEAS SA).

Identified pursuant to E.O. 13850, as amended by E.O. 13857, as property in which BLUELANE OVERSEAS SA, a person whose property and interested in property are blocked pursuant to E.O. 13850, as amended by E.O. 13857, has an interest.

B. OFAC previously determined on January 8, 2019; April 12, 2019; and on May 10, 2019 that the persons listed below met one or more of the criteria under E.O. 13850. On September 24, 2019, OFAC determined that circumstances no longer warrant the inclusion of the following persons on the SDN List under this authority. These persons are no longer subject to the blocking provisions of Section 1(a) of E.O. 13850.

Entity

1. LIMA SHIPPING CORPORATION (a.k.a. LIMA SHIPPING CORP), 80 Broad Street, Monrovia, Liberia; Identification Number IMO 4063640 [VENEZUELA–EO13850].

2. SERENITY MARITIME LIMITED (a.k.a. SERENITY MARITIME LTD.; a.k.a. SERENITY MARITIME LTD–LIB), Broad Street 80, Monrovia 1000, Liberia [VENEZUELA–EO13850].

Vessels and Aircraft

1. NEW HELLAS Crude Oil Tanker Greece flag; Vessel Registration Identification IMO 9221891 (vessel) [VENEZUELA–EO13850] (Linked To: LIMA SHIPPING CORPORATION).

2. LEON DIAS Chemical/Oil Tanker Panama flag; Vessel Registration Identification IMO 9396385 (vessel) [VENEZUELA–EO13850] (Linked To: SERENITY MARITIME LIMITED).

3. N133JA; Aircraft Model Mystere Falcon 50EX; Aircraft Manufacturer's Serial Number (MSN) 268; Aircraft Tail Number N133JA (aircraft) [VENEZUELA–EO13850] (Linked To: PERDOMO ROSALES, Gustavo Adolfo).

Dated: September 24, 2019.

Bradley T. Smith,

Deputy Director, Office of Foreign Assets Control.

[FR Doc. 2019–21026 Filed 9–26–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Appointment of Members of the Legal Division to the Performance Review Board, Internal Revenue Service

AGENCY: Office of the General Counsel, IRS, Treasury.

Under the authority granted to me as Chief Counsel of the Internal Revenue Service by the General Counsel of the Department of the Treasury by General Counsel Directive 15, pursuant to the Civil Service Reform Act, I have appointed the following persons to the Legal Division Performance Review Board, Internal Revenue Service Panel:

1. Brian Callanan, Treasury Deputy General Counsel
2. Donna Hansberry, IRS Independent Office of Appeals Director
3. Amalia Colbert, IRS Chief of Staff

Alternates:

Nikole Flax, Deputy Commissioner, Large Business & International.

Brian Sonfield, Assistant General Counsel (General Law, Ethics, and Regulation).

This publication is required by 5 U.S.C. 4314(c)(4).

Dated: September 19, 2019.

Michael Desmond,

Chief Counsel, Internal Revenue Service.

[FR Doc. 2019–21035 Filed 9–26–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning original issue discount.

DATES: Written comments should be received on or before November 26, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments to Laurie Brimmer, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at *Kerry.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Original Issue Discount.

OMB Number: 1545–0117.

Form Number: Form 1099–OID.

Abstract: Form 1099–OID is used for reporting original issue discount as required by section 6049 of the Internal Revenue Code. It is used to verify that income earned on discount obligations is properly reported by the recipient.

Current Actions: There are no changes being made to the form at this time.

However, the agency is updating the estimated number of respondents based on the most recent filing data.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 5,905,000.

Estimated Time per Respondent: 12 minutes.

Estimated Total Annual Burden Hours: 1,369,528 hours.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 23, 2019.

Laurie Brimmer,

Senior Tax Analyst.

[FR Doc. 2019–20960 Filed 9–26–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Prosthetics and Special-Disabilities Programs, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, that a meeting and site visit of the Federal Advisory Committee on Prosthetics and Special-Disabilities Programs will be held on Tuesday, October 22—Wednesday, October 23, 2019, at VA Central Office, 810 Vermont Avenue NW, Washington, DC 20420, in conference room 630. The meeting sessions will begin and end as follow:

Date	Time
October 22, 2019	8:30 a.m.–4:00 p.m.
October 23, 2019	8:30 a.m.–12:00 p.m.

The meeting sessions are open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on VA's prosthetics programs designed to provide state-of-the-art prosthetics and the associated rehabilitation research, development, and evaluation of such technology. The Committee also provides advice to the Secretary on special-disabilities programs, which are defined as any program administered by the Secretary to serve Veterans with spinal cord injuries, blindness or visual impairments, loss of extremities or loss of function, deafness or hearing impairment, and other serious incapacities in terms of daily life functions.

On October 22, 2019, the Committee will convene open sessions on Ethics; Establishment of New Subcommittees; MISSION Act Update; VHA Modernization Update; Chiropractic Care; and Clinical Orthotic and Prosthetic Services. On October 23, 2019, the Committee members convene open sessions on Physical Medicine and Rehabilitation, Polytrauma/Amputation System of Care; Blind Rehabilitation Service; and Spinal Cord Injury and Disorders System of Care.

No time will be allocated for receiving oral presentations from the public; however, members of the public may direct questions or submit written statements for review by the Committee in advance of the meeting to Judy Schafer, Ph.D., Designated Federal Officer, Rehabilitation and Prosthetic Services (10P4R), Patient Care Services, Veterans Health Administration, VA, 810 Vermont Avenue NW, Washington, DC 20420, or by email at *Judy.Schafer@va.gov*. Because the meeting is being held in a Government building, a photo I.D. must be presented at the Guard's Desk as a part of the clearance process. Therefore, you should allow an additional 30 minutes before the meeting begins. Any member of the public wishing to attend the meeting should contact Dr. Schafer at (202) 461–7315.

Dated: September 24, 2019.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2019–21016 Filed 9–26–19; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 84 Friday,
No. 188 September 27, 2019

Part II

Department of Labor

Wage and Hour Division

29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235–AA20

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor is updating and revising the regulations issued under the Fair Labor Standards Act implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees.

DATES: This final rule is effective on January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

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I. Executive Summary

The Fair Labor Standards Act (FLSA or Act) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the regular rate of pay. Section 13(a)(1) of the FLSA, commonly referred to as the ''white collar'' or ''EAP'' exemption, exempts from these minimum wage and overtime pay requirements ''any employee employed in a bona fide executive, administrative, or professional capacity.'' The statute delegates to the Secretary of Labor (Secretary) the authority to define and delimit the terms of the exemption. Since 1940, the regulations implementing the exemption have generally required each of the following three tests to be met: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the ''salary basis test''); (2) the amount of salary paid must meet a minimum specified amount (the ''salary level test''); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the ''duties test'').

The Department of Labor (Department) has long used the salary level test as a tool to help define the white collar exemption on the basis that employees paid less than the salary level are unlikely to be bona fide executive, administrative, or professional employees, and, conversely, that nearly all bona fide executive, administrative, and professional employees are paid at least that much. The salary level test provides certainty for employers and employees, as well as efficiency for government enforcement agencies. The salary level test's usefulness, however, diminishes as the wages of employees entitled to overtime increase and inflation reduces the real value of the salary threshold.

The Department increased the standard salary level from $455 per week ($23,660 per year) to $913 per week ($47,476 per year) in a final rule published May 23, 2016 (''2016 final rule''). That rulemaking was challenged in court, and on November 22, 2016, the U.S. District Court for the Eastern District of Texas enjoined the Department from implementing and enforcing the rule. On August 31, 2017, the court granted summary judgment against the Department, invalidating the 2016 final rule because it ''makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties.'' *Nevada* v. *U.S. Dep't of Labor,* 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017). An appeal of that decision to the U.S. Court of Appeals for the Fifth Circuit is being held in abeyance. Currently, the Department is enforcing the regulations in effect on November 30, 2016, including the $455 per week standard salary level, which is the level that was set in a final rule issued April 23, 2004 (''2004 final rule'').

Taking into account the *Nevada* district court's conclusion with respect to the salary level, public comments received in response to a July 26, 2017 Request for Information (RFI), and feedback received at public listening sessions, the Department has undertaken this rulemaking to revise the part 541 regulations so that they

effectively distinguish between the white collar employees whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions and bona fide executive, administrative, and professional employees whom Congress intended to exempt from those statutory requirements.

The Department published a Notice of Proposed Rulemaking (NPRM) on March 22, 2019. The NPRM stated that the standard salary level needed to exceed $455 per week to more effectively serve its purpose, but that the 2016 final rule's increase to $913 per week was inappropriate because it excluded from exemption 4.2 million employees whose duties would have otherwise qualified them for exemption, a result in significant tension with the text of section 13(a)(1). Noting the conclusions of the district court that invalidated the 2016 final rule, the Department explained that the 2016 final rule's inappropriately high salary level ''untethered the salary level test from its historical justification'' of ''[s]etting a dividing line between nonexempt and potentially exempt employees'' by screening out only those employees who, based on their compensation level, are unlikely to be bona fide executive, administrative, or professional employees. To address the district court's and the Department's concern with the 2016 final rule and set a more appropriate salary level, the NPRM proposed to rescind the 2016 final rule and update the salary level by applying the same methodology as the 2004 final rule to current earnings data.

In 2004, the Department set the standard salary level at $455 per week ($23,660 per year), which was approximately the 20th percentile of full-time salaried workers in the South and in the retail industry nationally.[1] Accordingly, in the NPRM, the Department proposed to update the standard salary level to the 20th percentile of full-time salaried workers in the lowest-wage Census Region (the South)[2] and/or in the retail industry nationally using current data.[3] This methodology resulted in a proposed standard salary level of $679 per week ($35,308 per year). Additionally, the Department proposed special salary levels for U.S. territories and an updated base rate for employees in the motion picture producing industry. The Department also proposed to allow employers to count nondiscretionary bonuses and incentive payments toward satisfying up to ten percent of the standard salary level or any of the special salary levels applicable to U.S. territories, so long as such bonuses are paid at least annually. Further, the Department proposed to update the highly compensated employee (HCE) total annual compensation level—a higher compensation level that is paired with a reduced duties requirement to provide an alternative basis for exemption under section 13(a)(1). The HCE level was set at $100,000 in the 2004 final rule and increased to $134,004 in the 2016 final rule, but the Department has continued to enforce the $100,000 level in light of the district court's invalidation of the 2016 final rule. In the NPRM, the Department proposed to update the HCE level by setting it equal to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers nationally, resulting in a level of $147,414 per year. The Department proposed to project both the standard salary level and HCE total annual compensation level to January 2020, the final rule's anticipated effective date. Finally, the Department explained its commitment to update the standard salary level and HCE total compensation levels more frequently in the future using notice-and-comment rulemaking every four years. The Department proposed no changes to the standard duties tests.

The 60-day comment period on the NPRM ended on May 21, 2019, and the Department received more than 116,000 comments. The vast majority of these comments, including tens of thousands of duplicate or similar submissions, were campaign comments using similar template language.[4] After considering the comments, the Department has decided in this final rule to maintain the proposed methodology for updating the part 541 standard salary level, but not to inflate the salary level to January 2020. The Department is also finalizing the special salary levels for certain U.S. territories as proposed, and updating the base rate for employees in the motion picture producing industry. Additionally, the Department is finalizing its proposal to permit employers to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the standard salary level or the special salary levels applicable to the U.S. territories, so long as employers pay those amounts at least annually. The Department has also decided to set the HCE total annual compensation threshold equal to the 80th percentile of earnings of full-time salaried workers nationally, without inflating the threshold to January 2020. When applied to updated data, these methodologies result in a standard salary level of $684 per week ($35,568 per year) and an HCE total annual compensation level of $107,432. Finally, the Department intends to update these thresholds more regularly in the future.

The Department estimates that in 2020, 1.2 million currently exempt employees who earn at least $455 per week but less than the standard salary level of $684 per week will, without some intervening action by their employers, gain overtime eligibility. The Department also estimates that an additional 2.2 million white collar workers who are currently nonexempt because they do not satisfy the EAP duties tests and currently earn at least $455 per week, but less than $684 per week, will have their overtime-eligible status strengthened in 2020 because these employees will now fail both the salary level and duties tests. Lastly, an estimated 101,800 employees who are currently exempt under the HCE test will be affected by the increase in the HCE total annual compensation level. The Department has not made any changes to the duties tests in this final rule.

This rule is considered an Executive Order 13771 deregulatory action. When the Department uses a perpetual time horizon to allow for cost comparisons under Executive Order 13771, and using the 2016 rule as the baseline, the annualized cost savings of this rule is $534.8 million with 7 percent discounting.

Because the Department is currently enforcing the 2004 salary level, much of the economic analysis uses the 2004 rule as the baseline for calculating costs and transfers. The economic analysis

[1] 69 FR 22171.

[2] The South Census Region comprises the following: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

[3] In 2004, the Department looked to the 20th percentile of full-time salaried workers in the South and in the retail industry nationally to validate the standard salary level set in the final rule. In this final rule, the Department set the standard salary level at the 20th percentile of the combined subpopulations of full-time salaried employees in the South and full-time salaried employees in the retail industry nationwide. Accordingly, the use of ''and/or'' when describing the salary level methodology in this final rule reflects that this data set includes full-time salaried workers who work: (1) In the South but not in the retail industry; (2) in the retail industry but not in the South; and (3) in the South in the retail industry.

[4] Specifically, one organization submitted spreadsheets containing over 56,000 comments from individuals. Of the comments contained in this submission, more than 34,000 were duplicates of comments that were submitted separately by these individuals. Additionally, numerous individual comments associated with this campaign were submitted multiple times. Together, these comments make up the vast majority of the comments received.

quantifies the direct costs resulting from the rule: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The Department estimates that annualized direct employer costs in the first 10 years following the rule's effective date will be $173.3 million with 7 percent discounting, including $543.0 million in Year 1 and $99.1 million in Year 10. This rulemaking will also give employees higher earnings in the form of transfers of income from employers to employees. Annualized transfers are estimated to be $298.8 million over the first ten years, with 7 percent discounting, including $396.4 million in Year 1.

II. Background

A. The FLSA

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime premium pay of at least 1.5 times the regular rate of pay for all hours worked over 40 in a workweek.[5] However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection ''any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .).'' The FLSA does not define the terms ''executive,'' ''administrative,'' ''professional,'' or ''outside salesman.'' Pursuant to Congress's grant of rulemaking authority, since 1938 the Department has issued regulations at 29 CFR part 541 defining the scope of the section 13(a)(1) exemptions. Because Congress explicitly delegated to the Secretary the power to define and delimit the specific terms of the exemptions through notice and comment rulemaking, the regulations so issued have the binding effect of law. *See Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977).

Employees who meet the requirements of part 541 are not subject to the FLSA's minimum wage and overtime pay requirements. Some state laws have stricter exemption standards than federal law. The FLSA does not preempt any such stricter state standards. If a State establishes a higher standard than the provisions of the FLSA, the higher standard applies in that State. *See* 29 U.S.C. 218(a); 29 CFR 541.4.

B. Regulatory History

The Department has consistently used its rulemaking authority to define and clarify the section 13(a)(1) exemptions. The implementing regulations have generally required each of three tests to be met for the exemptions to apply: (1) The salary basis test; (2) the salary level test; and (3) the duties test.

The first version of part 541, establishing the criteria for exempt status under section 13(a)(1), was promulgated in October 1938.[6] The Department revised its regulations in 1940,[7] 1949,[8] 1954, 1958,[9] 1961, 1963, 1967, 1970, 1973, and 1975.[10] A final rule increasing the salary levels was published on January 13, 1981, but was stayed indefinitely on February 12, 1981.[11] In 1985, the Department published an Advance Notice of Proposed Rulemaking that was never finalized.[12] In 1992, the Department twice revised the part 541 regulations. First, the Department created a limited exception from the salary basis test for public employees.[13] The Department then implemented the 1990 law exempting employees in certain computer-related occupations.[14]

From 1949 until 2004, the part 541 regulations contained two different tests for exemption—a ''long'' test that paired a more rigorous duties test with a lower salary level, and a ''short'' test that paired a more flexible duties test with a higher salary level. On April 23, 2004, the Department issued a final rule, which replaced the ''long'' and ''short'' test system for determining exemption status with a single ''standard'' salary level paired with a ''standard'' duties test.[15] The Department set the standard salary level at $455 per week, and made other changes, some of which are discussed below. In the 2004 final rule, the Department also created the HCE test for exemption, which paired a reduced duties requirement with a higher compensation level ($100,000 per year).

On May 23, 2016, the Department issued another final rule, which raised the standard salary level to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, resulting in a salary level of $913 per week. Additionally, the Department set the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually). The Department also included in the final rule a mechanism to automatically update (every three years) the salary and compensation thresholds, and for the first time permitted nondiscretionary bonuses, incentives, and commissions paid at least quarterly to count toward up to 10 percent of the required salary level.

On November 22, 2016, the United States District Court for the Eastern District of Texas issued a preliminary injunction, enjoining the Department from implementing and enforcing the 2016 final rule, pending further review.[16] On August 31, 2017, the district court granted summary judgment against the Department.[17] The court held that the 2016 final rule's salary level exceeded the Department's authority and that the entire final rule was therefore invalid. The court determined that a salary level that ''supplant[s] an analysis of an employee's job duties'' conflicts with Congress's command to exempt bona fide executive, administrative, and professional employees.[18] As a result of these rulings, the Department has continued to enforce the salary level set in 2004.

On July 26, 2017, the Department published an RFI asking for public input

[5] 29 U.S.C. 201, *et seq.*

[6] 3 FR 2518 (Oct. 20, 1938).

[7] 5 FR 4077 (Oct. 15, 1940). The 1940 regulations were informed by what has come to be known as the Stein Report. *See* ''Executive, Administrative, Professional . . . Outside Salesman'' Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer [Harold Stein] at Hearings Preliminary to Redefinition (Oct. 10, 1940) (''Stein Report'').

[8] 14 FR 7705 (Dec. 24, 1949); 14 FR 7730 (Dec. 28, 1949). The 1949 regulations were informed by what has come to be known as the Weiss Report. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (''Weiss Report'').

[9] 23 FR 8962 (Nov. 18, 1958). The 1958 regulations were informed by what has come to be known at the Kantor Report. *See* Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Assistant Administrator, Office of Regulations and Research, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (''Kantor Report'').

[10] *See* 19 FR 4405 (July 17, 1954); 26 FR 8635 (Sept. 15, 1961); 28 FR 9505 (Aug. 30, 1963); 32 FR 7823 (May 30, 1967); 35 FR 883 (Jan. 22, 1970); 38 FR 11390 (May 7, 1973); 40 FR 7091 (Feb. 19, 1975).

[11] 46 FR 3010 (Jan. 13, 1981); 46 FR 11972 (Feb. 12, 1981).

[12] 50 FR 47696 (Nov. 19, 1985).

[13] 57 FR 37677 (Aug. 19, 1992).

[14] 57 FR 46742 (Oct. 9, 1992); *see* Sec. 2, Pub. L. 101–583, 104 Stat. 2871 (Nov. 15, 1990), *codified at* 29 U.S.C. 213 Note.

[15] 69 FR 22122 (Apr. 23, 2004).

[16] *See Nevada* v. *U.S. Dep't of Labor,* 218 F. Supp. 3d 520 (E.D. Tex. 2016).

[17] *See* 275 F. Supp. 3d 795.

[18] *Id.* at 806.

on what changes the Department should propose in a new NPRM on the EAP exemption.[19] The Department received over 200,000 comments on the RFI. Between September 7 and October 17, 2018, the Department held listening sessions in all five Wage and Hour regions throughout the country, and in Washington, DC, to supplement feedback received as part of the RFI.[20]

On October 30, 2017, the Government appealed the *Nevada* district court's summary judgment decision to the United States Court of Appeals for the Fifth Circuit. On November 6, 2017, the Fifth Circuit granted the Government's motion to hold that appeal in abeyance while the Department undertook further rulemaking to set a new salary level.

On March 22, 2019, the Department issued its NPRM, proposing to update and revise the EAP regulations.

C. Overview of Existing Regulatory Requirements

The regulations in 29 CFR part 541 contain specific criteria that define each category of exemption provided by section 13(a)(1) for bona fide executive, administrative, professional, and outside sales employees, as well as teachers and academic administrative personnel. The regulations also define those computer employees who are exempt under section 13(a)(1) and section 13(a)(17). The employer bears the burden of establishing the applicability of any exemption from the FLSA's pay requirements.[21] Job titles, job descriptions, or the payment of a salary instead of an hourly rate are insufficient, standing alone, to confer exempt status on an employee.

To qualify for the EAP exemption, employees must meet certain tests regarding their job duties [22] and generally must be paid on a salary basis at least the amount specified in the regulations.[23] Some employees, such as business owners, doctors, lawyers, teachers, and outside sales employees, are not subject to salary tests.[24] Others, such as academic administrative personnel and computer employees, are subject to special, contingent earnings thresholds.[25] In 2004, the standard salary level for EAP employees was set at $455 per week (equivalent to $23,660 per year for a full-year worker), and the total annual compensation level for highly compensated employees was set at $100,000.[26] Due to the district court's decision invalidating the 2016 final rule, these are the salary levels the Department is currently enforcing.[27]

The 2004 final rule created the HCE test for exemption. Under the HCE test, employees who receive at least a specified total annual compensation (which must include at least the standard salary amount per week paid on a salary or fee basis) are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption.[28] The HCE test applies only to employees whose primary duty includes performing office or non-manual work.[29] Non-management production line workers and employees who perform work involving repetitive operations with their hands, physical skill, and energy cannot be exempt under this section.[30]

D. The Department's Proposal

On March 22, 2019, the Department issued its proposal to update and revise the regulations issued under section 13(a)(1) of the FLSA.[31] The Department proposed to update the standard salary level by applying to current data the same method as in the 2004 final rule—*i.e.,* by looking at the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (then and now the South) and/or in the retail industry nationwide. The Department also proposed to update the HCE total annual compensation level using the same method used in the 2016 final rule, setting it equivalent to the 90th percentile earnings of full-time salaried workers nationally. The Department proposed to project both levels to January 2020, the anticipated effective date of a final rule. Additionally, the Department proposed a special salary level of $380 per week for American Samoa, a special salary level of $455 per week for Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands, and a special ''base rate'' threshold of $1,036 for employees in the motion picture producing industry. The Department also proposed to permit employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard or special salary levels as long as such payments are made at least annually. As to future updates, the Department reaffirmed its commitment to evaluating the part 541 earnings thresholds more frequently, and stated its intent to propose updates to these levels quadrennially. The Department did not propose any changes to the duties tests.

The Department received more than 116,000 timely comments on the NPRM during the 60-day comment period that ended on May 21, 2019. The Department received comments from a broad array of constituencies, including small business owners, employer and industry associations, individual workers, worker advocacy groups, unions, non-profit organizations, law firms (representing both employers and employees), educational organizations and representatives, religious organizations, economists, Members of Congress, state and local governments, professional associations, and other interested members of the public. All timely received comments may be viewed on the *http://www.regulations.gov* website, docket ID WHD–2019–0001.

Some of the comments the Department received were general statements of support or opposition, and the Department also received many identical or nearly identical ''campaign'' comments sent in response to organized comment initiatives. Nearly all commenters favored some change to the currently enforced regulations, and commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal. Some commenters, including tens of thousands who submitted similar comments as part of a comment

[19] 82 FR 34616 (July 26, 2017).

[20] Listening Session transcripts may be viewed at *www.regulations.gov,* docket ID WHD–2017–0002.

[21] *See, e.g., Idaho Sheet Metal Works, Inc.* v. *Wirtz,* 383 U.S. 190, 209 (1966); *Walling* v. *Gen. Indus. Co.,* 330 U.S. 545, 547–48 (1947).

[22] *See* §§ 541.100 (executive employees); 541.200 (administrative employees); 541.300–.303 (teachers and professional employees); 541.400 (computer employees); 541.500 (outside sales employees).

[23] Alternatively, administrative and professional employees may be paid on a ''fee basis'' for a single job regardless of the time required for its completion as long as the hourly rate for work performed (*i.e.,* the fee payment divided by the number of hours worked) would total at least the weekly amount specified in the regulation if the employee worked 40 hours. *See* § 541.605.

[24] *See* §§ 541.101; 541.303(d); 541.304(d); 541.500(c); 541.600(e). Such employees are also not subject to a fee-basis test.

[25] *See* § 541.600(c)–(d).

[26] 69 FR 22123.

[27] The current text of the Code of Federal Regulations (CFR) reflects the updates made in the 2016 final rule. Therefore, unless otherwise indicated, citations to part 541 refer to the current CFR, and the amendments to the regulatory text reflect the current CFR's inclusion of the 2016 updates. However, because the Department is currently enforcing the 2004 standard salary and total annual compensation levels, the final rule references the 2004 standard salary and total annual compensation levels.

[28] § 541.601.

[29] § 541.601(d).

[30] *Id.*

[31] 84 FR 10900.

campaign (''Campaign Comments''),[32] requested that the Department reject the proposal and defend the 2016 final rule. The Department has carefully considered the timely submitted comments addressing the proposed changes.

Significant issues raised in the comments are discussed below, along with the Department's responses to those comments. Some commenters appear to have mistakenly filed comments intended for this rulemaking into the dockets for the Department's rulemakings concerning the regular rate (docket ID WHD–2019–0002) or joint employer status (docket ID WHD–2019–0003) under the FLSA. The Department did not consider these misfiled comments in this rulemaking.

The Department received a number of comments that are beyond the scope of this rulemaking. These include, for example, a request that the Department reconsider the scope of the exemption at 29 U.S.C. 207(i) for certain employees of retail and service establishments, and a request for tax write-offs for businesses that pass an annual audit by the Department. In addition, some non-profit organizations asked the Department to work with other federal agencies to create a mechanism that non-profits with government grants and contracts could use to adjust reimbursement rates to cover unanticipated increased costs, such as labor costs due to this rule. For example, in a joint comment, the National Council of Nonprofits and others recommended addressing this issue through changes to the relevant Federal Acquisition Regulations. The Department does not address such issues in this final rule.

Some commenters raised miscellaneous issues that more directly relate to other parts of the Department's regulations. For example, one commenter urged the Department to amend its regular rate regulations to allow the exclusion of any payments that do not count toward the salary level test; one commenter requested that private colleges and universities be permitted to use compensatory time off instead of cash payments for overtime hours; two commenters requested a safe harbor from joint-employment liability for franchisors who help their franchisees implement this rule; and one commenter asked the Department to permit hourly paid employees (beyond just computer employees) to qualify for the exemption. Some commenters requested that the Department make changes to the duties test, either as an alternative to raising the salary level more significantly or regardless of what salary level applies. The Department did not propose any of these changes in the NPRM, and declines to make such changes in this final rule.

A number of commenters asked the Department to provide guidance on how the FLSA applies to non-profit organizations. *See, e.g.,* Colorado Nonprofit Association; Independent Sector; National Council of Nonprofits. The Department notes that the FLSA does not provide special rules for non-profit organizations or their employees, nor does this final rule.[33]

E. Final Rule Effective Date

In the NPRM, the Department referenced an anticipated effective date of January 2020 for purposes of projecting forward the proposed standard salary level and proposed HCE total annual compensation level. Many commenters, while not expressly referencing the effective date, conveyed their view that updates to these regulations are ''long overdue.'' *See, e.g.,* Legal Aid at Work; Public Housing Authorities Directors Association; Washington State Budget and Policy Center. Similarly, a few commenters encouraged the Department to increase the standard salary threshold, or to promulgate a final rule, ''as soon as possible.'' *See, e.g.,* International Foodservice Distributors Association; Sergeants Benevolent Association.

Other commenters did specifically address the final rule's effective date. Nearly all of these commenters conveyed the need for employers to have sufficient time to adjust to and implement the rule, but they disagreed on how much time the Department should provide. The National Association of Landscape Professionals favored a period of 90 to 120 days between the rule's publication and its effective date, while several other commenters favored a minimum of 120 days, which was the applicable period of time in the 2004 final rule. *See, e.g.,* Seyfarth Shaw LLP (Seyfarth Shaw); Society for Human Resource Management (SHRM). SHRM thought the effective date should be at least 120 days from the date of publication of the final rule, but acknowledged that the proposed regulations are far more familiar to employers than the changes made in 2004. Other commenters favored a longer period, ranging from six to eighteen months from publication. The U.S. Public Interest Research Group suggested a two-year delay for public interest advocacy groups. Several employer representatives who opposed the proposed HCE level stated that adjusting to the new level would be particularly burdensome. For example, the National Association of Manufacturers stated that the proposed increase would require employers to spend significant time determining whether employees who previously met the HCE test satisfy the standard duties test (and thus remain exempt), and requested that if the Department were to finalize that increase as proposed, it should set a future compliance date that provides sufficient time for employers to adjust to the new HCE level.

Relatedly, multiple commenters requested that the Department ''phase in'' any new salary/compensation levels over a period of time. Suggested phase-in periods varied widely. Independent Sector and the National Council of Young Men's Christian Associations of the United States of America (YMCA) favored a two-year phase-in period. An individual employee commenter proposed a 3- to 5-year phase-in period for non-profit organizations. Some commenters who requested a phase-in period did not specify a particular timeframe. Many commenters who supported a phase-in cited the importance of providing sufficient time for employers to adapt to and implement the new levels. *See, e.g.,* Lutheran Services in America; National Grocers Association (NGA).

The Department has set an effective date of January 1, 2020, for the final rule. The Department agrees with the commenters who expressed the view that this update to the regulations is ''long overdue,'' and with those who encouraged the Department to increase the salary level as soon as possible. The time between this rule's publication and effective date exceeds the 30-day minimum required under the Administrative Procedure Act (APA), 5 U.S.C. 553(d), and the 60 days mandated for a ''major rule'' under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A). While the 2004 rule provided for 120 days between the rule's publication and effective date,[34] the Department agrees with commenters who acknowledged that this final rule will be far more familiar to employers than the substantial changes provided in the 2004 final rule.[35]

[32] *See supra* note 4.

[33] The Department has issued specific guidance on the application of the FLSA to non-profit entities. *See* Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA), available at: *https://www.dol.gov/whd/regs/compliance/whdfs14a.pdf.*

[34] *See* 79 FR 22126.

[35] The 2004 final rule included several significant changes, including: (1) A significant percentage increase in the salary threshold; (2) a significant

Additionally, while the 2016 rule provided 192 days from the rule's publication until its effective date, the salary level increase in this rule is more modest, and affects fewer workers—two factors that favor a shorter period. Moreover, given that the Department is currently enforcing the 2004 standard salary level, which an overwhelming majority of commenters agreed needs to be updated, the Department concludes that a lengthier delayed effective date would be imprudent. Additionally, a January 1 date may be convenient for those employers who use the calendar year as their fiscal year, or who use budgets, software systems, or other practices on a calendar-year basis. The Department is also declining to delay the effective date, or create a phase-in, specifically for non-profits. As discussed in more detail in the standard salary level discussion below, consistent with past practice, the Department is declining to create special rules for the application of the part 541 exemptions to non-profits.

While some employer representatives expressed concern that the proposed HCE level increase would pose unique challenges for employers compared to the change to the standard salary level, given the change in methodology for setting the HCE threshold in the final rule, discussed in further detail below, the Department does not believe a delayed effective date for this provision is necessary. The Department believes that the January 1, 2020 effective date will provide employers adequate time to make any changes that are necessary to comply with the final regulations, and for similar reasons concludes that a phase-in of the new thresholds is not warranted. The Department will also provide significant outreach and compliance assistance, and will issue a number of guidance documents in connection with the publication of this final rule.

III. Need for Rulemaking

The primary goal of this rulemaking is to update the standard salary level that helps define and delimit the EAP exemption. This will ensure that the level works effectively with the standard duties test to distinguish potentially exempt EAP employees from overtime-protected white collar workers. Due to the *Nevada* district court's decision invalidating the 2016 final rule, the Department has been enforcing the standard salary level of $455 a week. The Department recognizes that this level should be updated to reflect current earnings. In the NPRM, the Department proposed using the methodology from the 2004 final rule to calculate the salary threshold using current data. The Department explained that this method would keep the standard salary level aligned with the intervening years' growth in earnings. It further stated that the 2004 approach has withstood the test of time, would restore the salary level to its traditional purpose of serving as a dividing line between nonexempt and potentially exempt employees, would address concerns that led to the 2016 rule's invalidation, and would ensure that the FLSA's intended overtime protections are fully implemented.

The Department is also updating the total annual compensation requirement for the HCE test for exemption to ensure that this threshold remains a meaningful and appropriate standard when paired with the more-lenient HCE duties test. In an effort to modernize the part 541 regulations to account for changing methods of workplace compensation, the Department also proposed allowing nondiscretionary bonuses and incentive payments (including commissions) to count toward up to 10 percent of the standard or special salary levels. Finally, in its proposal the Department explained the importance of updating the salary thresholds more frequently. Regular updates promote greater stability, avoid the disruptive salary level increases that can result from lengthy gaps between updates, and provide appropriate wage protection for those under the threshold. With these goals in mind, in the NPRM, the Department affirmed its intention to issue a proposal to update the earnings thresholds every four years, unless the Secretary determines that economic or other factors warrant forestalling such an update.

IV. Final Regulatory Revisions

The Department is formally rescinding the 2016 final rule and is replacing it with a new rule that updates the part 541 earnings thresholds. The Department is setting the standard salary level by applying the methodology from the 2004 final rule to current data, resulting in a new standard salary level of $684 per week. In addition, the Department is setting a special salary level of $455 per week for Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands; a special salary level of $380 per week for American Samoa; and an updated weekly ''base rate'' of $1,043 per week for the motion picture producing industry. Nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10 percent of the standard salary level or the special salary levels applicable to the U.S. territories. The Department is also setting the HCE annual compensation amount at the 80th percentile of full-time salaried workers nationally, resulting in a new HCE level of $107,432. These revisions are discussed in further detail below.

A. Standard Salary Level

i. History of the Standard Salary Level

Congress enacted the FLSA on June 25, 1938, and the first version of part 541, which the Department issued in October 1938, set a salary level of $30 per week for executive and administrative employees.[36] The Department updated the salary levels in 1940, maintaining the salary level for executive employees, increasing the salary level for administrative employees, and establishing a salary level for professional employees. In setting those rates, the Department considered surveys of private industry by federal and state government agencies, experience gained under the National Industrial Recovery Act, and Federal Government salaries to identify a salary level that reflected a reasonable ''dividing line'' between employees performing exempt and nonexempt work.[37] Taking into account salaries paid in numerous industries and the percentage of employees earning below these amounts, the Department set the salary level for each exemption slightly below the average salary dividing exempt and nonexempt employees.

In 1949, the Department evaluated salary data from state and federal agencies, including the Bureau of Labor Statistics (BLS). The Department considered wages in small towns and low-wage industries, wages of federal employees, average weekly earnings for exempt employees, starting salaries for college graduates, and salary ranges for different occupations such as bookkeepers, accountants, chemists, and mining engineers.[38] The Department also looked at data showing increases in exempt employee salaries since 1940,

reorganization of the part 541 regulations; (3) the elimination of the short and long test structure that had been in place for more than 50 years and the creation of a single standard test; and (4) the creation of a new test for highly compensated employees. In contrast, here the Department is not changing the standard duties test or reorganizing the regulations, and so this rule will be much less complicated for employers to implement.

[36] 3 FR 2518.

[37] Stein Report at 9, 20–21, 30–31.

[38] Weiss Report at 10, 14–17, 19–20.

and supplemented it with nonexempt employee earnings data to approximate the ''prevailing minimum salaries of exempt employees.'' [39] Recognizing that the ''increase in wage rates and salary levels'' since 1940 had ''gradually weakened the effectiveness of the present salary tests as a dividing line between exempt and nonexempt employees,'' the Department considered the increase in weekly earnings from 1940 to 1949 for various industries, and then adopted new salary levels at a ''figure slightly lower than might be indicated by the data'' to protect small businesses.[40] Also in 1949, the Department established a second, less-stringent duties test for each exemption, which applied to employees paid at or above a higher ''short test'' salary level. The original, more-rigorous duties test became known as the ''long test.'' Apart from the differing salary requirements, the most significant difference between the short test and the long test was that the long test limited the amount of time an exempt employee could spend on nonexempt duties, while the short duties test did not include a specific limit on nonexempt work.[41]

In 1958, the Department set the long test salary levels using data collected by WHD on salaries paid to employees who met the applicable salary and duties tests, grouped by geographic region, broad industry groups, number of employees, and city size, and supplemented with BLS and Census data to reflect income increases for white collar and manufacturing employees during the period not covered by the Department's investigations.[42] The Department then set the long test salary levels for exempt employees ''at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests.'' [43] Thus, the Department set the long test salary levels so that about 10 percent of workers performing EAP duties in the lowest-wage regions and industries would not meet the salary level test and would therefore be nonexempt based on their salary level alone.

The Department followed a similar methodology when determining the salary level increase in 1963. The Department examined data on salaries paid to exempt workers collected in a 1961 WHD survey.[44] The salary level for executive and administrative employees was increased to $100 per week, for example, when the 1961 survey data showed that 13 percent of establishments paid one or more exempt executives less than $100 per week, and 4 percent of establishments paid one or more exempt administrative employees less than $100 per week.[45] The professional salary level was increased to $115 per week when the 1961 survey data showed that 12 percent of establishments surveyed paid one or more professional employees less than $115 per week.[46] The Department noted that these salary levels approximated the same percentages used to update the salary level in 1958.[47]

The Department applied a similar methodology when adopting salary level increases in 1970. After examining data from WHD investigations, BLS wage data, and information provided in a report issued by the Department in 1969 that included salary data for executive, administrative, and professional employees, the Department increased the long test salary level for executive employees to $125 per week when the salary level data showed that 20 percent of executive employees from all regions and 12 percent of executive employees in the West earned less than $130 a week.[48] The Department also increased the long test salary levels for administrative and professional employees to $125 and $140 per week, respectively.

In 1975, rather than follow the prior approaches, the Department updated the 1970 salary levels based on increases in the Consumer Price Index, but adjusted downward ''to eliminate any inflationary impact.'' [49] This resulted in a long test salary level for the executive and administrative exemptions of $155 per week, and $170 per week for the professional exemption. The short test salary level increased to $250 per week in 1975.[50] The salary levels adopted were intended as interim levels ''pending the completion and analysis of a study by [BLS] covering a six-month period in 1975.'' [51] Although the Department intended to increase the salary levels based on that study of actual salaries paid to employees, the process was never completed, and the ''interim'' salary levels remained in effect for the next 29 years.

In 2004, the Department replaced the separate long and short tests with a single ''standard'' salary level test of $455 per week, which was paired with a ''standard'' duties test for executive, administrative, and professional employees, respectively. The Department noted, in accord with numerous comments received during that rulemaking, that as a result of the outdated salary level, ''the 'long' duties tests [had], as a practical matter, become effectively dormant'' because relatively few salaried employees earned below the short test salary level.[52] The Department estimated that 1.3 million workers earning between $155 and $455 per week would become nonexempt under the new standard salary level.[53]

In setting the new standard salary level in 2004, the Department used Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) data collected by BLS that encompassed most salaried employees, including nonexempt salaried employees. The Department selected a standard salary level of $455 per week, which at the time was roughly equivalent to earnings at the 20th percentile of two subpopulations: (1) Salaried employees in the South and (2) salaried employees in the retail industry nationwide. Although prior salary levels had been based on salaries of approximately the lowest 10 percent of exempt salaried employees in low-wage regions and industries, the Department explained that the change in methodology was warranted in part to account for the elimination of the short and long tests, and because the data sample included nonexempt salaried employees, as opposed to only exempt salaried employees.[54] As in the past, the Department used lower-salary data sets to accommodate businesses for which salaries were generally lower due to geographic- or industry-specific reasons.

[39] *Id.* at 12.

[40] *Id.* at 8, 14–20. The Department also justified its modest increases by noting evidence of slow wage growth for executive employees ''in some areas and some industries.'' *Id.* at 14.

[41] The Department instituted a 20 percent cap on nonexempt work as part of the long duties test for executive and professional employees in 1940, and for administrative employees in 1949. By statute, beginning in 1961, retail employees could spend up to 40 percent of their hours worked performing nonexempt work and still be found to meet the duties tests for the EAP exemption. *See* 29 U.S.C. 213(a)(1).

[42] Kantor Report at 6.

[43] *Id.* at 6–7.

[44] 28 FR 7002 (July 9, 1963).

[45] *Id.* at 7004.

[46] *Id.*

[47] *See id.*

[48] 35 FR 884–85.

[49] 40 FR 7091.

[50] *Id.* at 7092. Each time the short test was increased between 1949 and 1975, it was set significantly higher than the long test salary levels.

[51] *Id.* at 7091.

[52] 69 FR 22126.

[53] *Id.* at 22123.

[54] *Id.* at 22167.

The Department published a final rule updating the salary level twelve years later, in 2016.[55] The Department set the standard salary level at an amount that would exclude from exemption the bottom 40 percent of full-time salaried workers (exempt and nonexempt) in the lowest-wage Census Region (the South).[56] The Department estimated that increasing the standard salary level from $455 per week to $913 per week would make 4.2 million workers earning between those levels newly nonexempt, absent other changes by their employers.[57] The Department made no changes to the standard duties test. As previously discussed, on August 31, 2017, the U.S. District Court for Eastern District of Texas declared the 2016 final rule invalid, and the Department's appeal of that decision is being held in abeyance. Until the Department issues a new final rule, it is enforcing the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level.

ii. Purpose of the Salary Level Requirement

The FLSA states that its minimum wage and overtime requirements ''shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary . . .).'' [58] The Department has long used a salary level test as part of its method for defining and delimiting that exemption.

In 1949, the Department summarized the role of the salary level tests over the preceding decade, explaining:

> In this long experience, the salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them.[59]

The Department again referenced these principles in the Kantor Report, reiterating, for example, that the salary level tests ''provide['] a ready method of screening out the obviously nonexempt employees[,]'' and that employees ''who do not meet the salary test are generally also found not to meet the other requirements of the regulations.'' [60] The 2003–2004 rulemaking also referenced these principles.[61] Likewise, this final rule updates the standard salary level in light of increased employee earnings, so that it maintains its usefulness in ''screening out the obviously nonexempt employees.''

For over 75 years the Department has used a salary level test as a criterion for identifying bona fide executive, administrative, and professional employees. Some statements in the Department's regulatory history have at times, however, suggested a greater role for the salary level test. These include, for instance, a statement from the 1940 Stein Report that salary is '' 'the best single test of the employer's good faith in characterizing the employment as of a professional nature.' '' [62] The Stein Report also stated that ''if an employer states that a particular employee is of sufficient importance . . . to be classified as an 'executive' employee and thereby exempt from the protection of the [A]ct, the best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them.'' [63]

As explained in the NPRM, the *Nevada* district court's invalidation of the 2016 final rule has prompted the Department to clarify these and similar statements in light of the salary level test's purposes and regulatory history. The concept of a ''dividing line'' should not be misconstrued to suggest that the Department views the salary level test as an effort to divide all exempt employees from all nonexempt employees. A salary level is helpful to determine who is not an exempt executive, administrative or professional employee—the employees who fall beneath it. But the salary level has significantly less probative value for the employees above it. They may be exempt or nonexempt. Above the threshold, the Department evaluates an employee's status as exempt or nonexempt based on an assessment of the duties that employee performs. An approach that emphasizes salary alone, irrespective of employee duties, would stand in significant tension with the Act. Section 13(a)(1) directs the Department to define and delimit employees based on the ''capacity'' in which they are employed. Salary is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees. But it is not ''capacity'' in and of itself.

The district court's summary judgment decision endorsed the Department's historical approach to setting the salary level and held the 2016 final rule unlawful because it departed from it. The district court approvingly cited the Weiss Report and explained that setting ''the minimum salary level as a floor to 'screen[ ] out the obviously nonexempt employees' '' is ''consistent with Congress's intent.'' [64] Further endorsing the Department's earlier rulemakings, the district court stated that prior to the 2016 final rule, ''the Department ha[d] used a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt.'' [65] The court then explained that in contrast to these acceptable past practices, the 2016 standard salary level of $913 per week was unlawful because it would exclude from exemption ''so many employees who perform exempt duties.'' [66] In support, the court cited the Department's estimate that, without some intervening action by their employers, the new salary level would result in 4.2 million workers who meet the duties test becoming nonexempt.[67] The court also emphasized the magnitude of the salary level increase, stating that the 2016 final rule ''more than double[d] the previous minimum salary level'' and that ''[b]y raising the salary level in this manner, the Department effectively eliminate[d] a

[55] 81 FR 32391 (May 23, 2016).

[56] *Id.* at 32408.

[57] *Id.* at 32393.

[58] 29 U.S.C. 213(a)–(a)(1).

[59] Weiss Report at 8.

[60] Kantor Report at 2–3; *see also* U.S. Dep't of Labor, *28th Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1940* (1940), at 236 (''[T]he power to define is the power to exclude.'').

[61] *See* 69 FR 22165; 68 FR 15560, 15570 (Mar. 31, 2003).

[62] 81 FR 32413 (quoting Stein Report at 42); *see also* 69 FR 22165 (quoting Stein Report at 42).

[63] Stein Report at 19; *see also id.* at 5 (''[T] he good faith specifically required by the [A]ct is best shown by the salary paid.''); *id.* at 19 (salary provides ''a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed''); *cf.* Weiss Report at 9 (''[S]alary is the best single indicator of the degree of importance involved in a particular employee's job.''); Kantor Report at 2 (''[Salary] is an index of the status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or subprofessional from one who is performing administrative or professional work.''). The Department ''is not bound by the [Stein, Weiss, and Kantor] reports,'' though they have been carefully considered. 69 FR 22124.

[64] 275 F. Supp. 3d at 806 (quoting Weiss Report at 7–8); *see also id.* at 807 at n.6 (supporting salary level that operates ''as more of a floor'') (internal quotation marks and citation omitted).

[65] *Id.* at 806 (emphasis in original).

[66] *Id.* at 807.

[67] *Id.* at 806.

consideration of whether an employee performs 'bona fide executive, administrative, or professional capacity' duties.'' [68] The district court declared the final rule invalid because the Department had unlawfully excluded from exemption ''entire categories of previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties.'' [69]

By excluding from exemption, without regard to their duties, 4.2 million workers who would have otherwise been exempt because they passed the salary basis and duties tests established under the 2004 final rule, the 2016 final rule was in tension with the Act and with the Department's longstanding policy of setting a salary level that does not ''disqualify[ ] any substantial number of'' bona fide executive, administrative, and professional employees from exemption.[70] A salary level set that high does not further the purpose of the Act, and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption.

The Department has therefore reexamined the 2016 final rule in light of the district court's decision and the salary level's historical purpose. The district court's decision underscores that except at the relatively low levels of compensation where EAP employees are unlikely to be found, the salary level is not a substitute for an analysis of an employee's duties. It is, at most, an indicator of those duties. For most white collar, salaried employees, the exemption should turn on an analysis of their actual functions, not their salaries, as Congress instructed. The salary level test's primary and modest purpose is to identify potentially exempt employees by screening out obviously nonexempt employees.

In light of these considerations, as noted in the NPRM, the Department has concluded that, while an increase in the standard salary level from $455 per week is warranted, the increase to $913 per week in the 2016 final rule was inappropriate. The Department has therefore engaged in this rulemaking to realign the salary level with its appropriate limited purpose, to address the concerns about the 2016 final rule identified by the district court, and to update the salary level in light of increased employee earnings.

iii. Standard Salary Level Proposal

In its NPRM, the Department proposed to rescind formally the 2016 final rule and to update the salary level by setting the salary level equal to the 20th percentile of earnings of full-time salaried workers in the lowest-wage region (the South) and/or in the retail industry nationally. The Department applied this method to pooled CPS MORG data for 2015 to 2017, adjusted to 2017, producing a level of $641 per week. To reflect employees' anticipated compensation at the time the rule would become effective, the Department then inflated this level to January 2020 using the compound annual growth rate in earnings since the 2004 rule. This methodology resulted in a proposed salary level of $679 per week ($35,308 per year). The Department estimated that at this level, 1.1 million employees who earn at least $455 per week but less than $679 per week would, without some intervening action by their employers, gain overtime eligibility.

The Department also stated that applying the 2004 final rule's methodology to set the salary level would ensure that overtime-eligible workers continue to receive the protections Congress intended, while avoiding the concerns that led to the invalidation of the 2016 rule. 84 FR 10903. The Department explained that adhering to the 2004 final rule's methodology was reasonable and appropriate, noting that it has enforced the 2004 final rule's salary level for nearly 15 years—the second-longest period (after the salary levels set in 1975) for any part 541 salary test. *Id.* at 10909. The Department stated that applying this well-established method would also promote familiarity and stability in the workplace, without causing significant hardship or disruption to the economy. *Id.* The Department also noted that the 2004 final rule has never been challenged, and so applying the 2004 salary level methodology would minimize the uncertainty and potential legal vulnerabilities that could accompany a novel and untested approach. *Id.*

iv. Standard Salary Level Final Rule

In the final rule, the Department adopts its proposed methodology for setting the standard salary level, with one minor modification. The Department will set the salary level equal to the 20th percentile of earnings of full-time salaried workers in the lowest-wage region (the South) and/or in the retail industry nationally. To calculate the salary level, the Department used updated CPS earnings data that BLS has compiled since the Department drafted its proposal. Specifically, the Department applied the adopted methodology to pooled CPS MORG data for July 2016 to June 2019, adjusted to reflect 2018/2019. As discussed below, rather than projecting the salary level to January 2020, as proposed in the NPRM, the Department has instead used the most recent data available at the time the Department drafted this final rule. This results in a salary level of $684 per week.

The Department believes that this method will set an appropriate dividing line between nonexempt and potentially exempt employees by screening out from exemption employees who, based on their compensation, are unlikely to be bona fide executive, administrative, or professional employees. In addition, the use of earnings data from the South and the retail industry will ensure that the salary level is suitable for employees in low-wage regions and industries. This approach will also maintain the prominence of the duties test by ensuring that the salary level alone does not disqualify from exemption a substantial number of employees who meet the duties test. This is consistent with the duties test's historical function, and will alleviate a major concern—overemphasis on the salary level test—that led to the 2016 rule's invalidation.

Once this rule is effective, white collar employees who are subject to the salary level test and earn less than $684 per week will not qualify for the EAP exemption, and therefore will be entitled to overtime pay. Employees earning this amount or more on a salary or fee basis will be exempt if they meet the standard duties test. As a result of this updated salary level, 1.2 million currently exempt employees who earn at least $455 but less than the updated standard salary level of $684 per week will, without some intervening action by their employers, gain overtime eligibility. In addition, 2.2 million white collar workers earning within this salary range who are currently nonexempt because they do not meet the standard duties test will have their overtime-eligible status strengthened because their exemption status will be clear based on their salary alone.

v. Discussion of Comments

1. Threshold Issues

As was the case in the responses to the July 26, 2017 RFI and in feedback received at the public listening sessions, commenters to the NPRM overwhelmingly agreed that the salary

[68] *Id.* at 807 (quoting 29 U.S.C. 213(a)(1)).

[69] *Id.* at 806 (quoting 29 U.S.C. 213(a)(1)).

[70] Kantor Report at 5. In contrast, had the Department simply applied the 2004 methodology to set the standard salary level, the 2016 final rule would have resulted in approximately 683,000 workers who satisfied the duties test becoming nonexempt. *See* 81 FR 32504 (Table 32).

level should be increased from the currently enforced level of $455 per week, which was set in 2004. Only a few commenters asserted that the salary level should not be updated; these commenters generally expressed concern that it would be difficult for employers to absorb any increase to the salary level. *See* Home Care Association of America; South Butler Community Library. Fisher & Phillips LLP and the National Federation of Independent Business (NFIB), however, questioned whether the Department has authority to set a salary level at all.

The vast majority of commenters also agreed that the Department should continue to set the salary level on a nationwide basis rather than having different salary levels that vary by region, industry, or some other factor. *See, e.g.,* Associated General Contractors of America (AGC); National Council of Nonprofits; National Employment Law Project (NELP); National Propane Gas Association; Partnership to Protect Workplace Opportunity (PPWO). A few commenters suggested that the Department set multiple salary levels, such as by region or state or for urban and rural areas. *See* Council for Christian Colleges and Universities; Idaho Division of Human Resources; Lutheran Services in America. A few other commenters advocated for industry-specific salary levels, *see* National Newspaper Association, or exemptions from the salary level test for specific industries, *see* Family Focused Treatment Association, or for ''seasonal'' employers, *see* Corps Network. Special Olympics sought a special salary level for non-profits, while the National Council of Nonprofits opposed such a carve-out.

The Department maintains that the FLSA's delegation of authority to the Secretary to ''define[ ] and delimit[ ]'' the terms of the section 13(a)(1) exemption includes the authority to set a salary level. While the language of section 13(a)(1) precludes the Department from adopting a salary-only test because salary ''is not 'capacity' in and of itself,'' 84 FR 10907; *see also* 81 FR 32429; 69 FR 22173, the Department's broad authority to ''define and delimit'' the terms of the EAP exemption permits it to use a salary level test as one criterion for identifying bona fide executive, administrative, and professional employees. The Department has used such a test for over 75 years, and its authority to establish a salary level is well-established. *See, e.g., Wirtz* v. *Miss. Publishers Corp.,* 364 F.2d 603, 608 (5th Cir. 1966); *Fanelli* v. *U.S. Gypsum Co.,* 141 F.2d 216, 218 (2d Cir. 1944); *Walling* v. *Yeakley,* 140 F.2d 830, 832–33 (10th Cir. 1944). As noted in the NPRM, ''[a] salary level is helpful to determine who is not an executive, administrative or professional employee'' because it ''is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees.'' 84 FR 10907.

The Department agrees with the vast majority of commenters who supported increasing the salary level. The currently enforced level of $455 was set a decade and a half ago in 2004. Like all previous salary levels, its effectiveness as a dividing line between nonexempt and potentially exempt employees has diminished over time, and the level should therefore be updated to align with growth in earnings in the intervening years. While the Department is sensitive to the views of commenters who contended that any increase would be challenging for businesses, historical experience has shown that incremental, reasonable salary level increases such as the one in this final rule are feasible and do not have significant adverse economic consequences. Additionally, as discussed below, the salary level set in this final rule takes these commenters' concerns into account by using wages in the South and the retail industry.

As in the past, the Department chooses to set a nationwide salary level and declines to establish multiple salary levels based on region, industry, employer size, or any other factor. Having multiple salary levels would make the regulations more complicated; for example, regional variations would introduce unnecessary complexity, particularly for employers and employees who operate or work across state lines. As the Department has explained when previously rejecting regional salary thresholds, adopting multiple different salary levels would, at minimum, create significant administrative difficulties ''because of the large number of different salary levels this would require.'' 69 FR 22171; 81 FR 32411. Likewise, the Department declines to set any additional industry-specific salary levels. The Department has rarely created such levels.[71] Instead, as the Department has previously noted, the 2004 methodology ''addresses the concerns'' of commenters advocating for multiple salary levels ''by looking toward the lower end of the salary levels and considering salaries in the South and in the retail industry.'' 69 FR 22171. This approach avoids the new compliance burdens that multiple salary levels would entail, while ensuring that the salary level is low enough that it exempts bona fide EAP employees in those regions and industries.[72]

2. The New Salary Level

Commenters diverged regarding the appropriate level at which to set the new salary level. As a general matter, with some exceptions, employer representatives supported the Department's proposal, while employee representatives opposed it and favored a level at least as high as the one set in the 2016 final rule.

The vast majority of employer representatives supported the Department's proposal to use the 2004 methodology to update the salary level. *See, e.g.,* HR Policy Association; National Association of Home Builders (NAHB); Small Business Legislative Council; PPWO; Wage and Hour Defense Institute. Employer representatives who supported the proposed level generally agreed with the Department's assessment that the 2004 methodology was faithful to the salary level's purpose of screening out only those employees who are obviously nonexempt, while avoiding a de facto salary-only test that would impermissibly replace the role of the duties test. *See, e.g.,* Bloomin' Brands; Job Creators Network; National Retail Federation (NRF); PPWO; Seyfarth Shaw.

Commenters who supported the proposal also stated that unlike the 2016 final rule, the proposal was suitable and manageable for low-wage regions and

[71] A special level for the motion picture producing industry has been in place for over six decades due to the ''peculiar employment conditions existing in the industry.'' 18 FR 2881. Academic administrative employees meet the compensation requirement if they are paid on a salary basis ''at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed.'' 29 CFR 541.600(c). The Department has otherwise refrained from setting industry-specific salary levels.

[72] Some commenters asked the Department to permit employers to prorate the salary level for part-time employees. *See, e.g.,* College and University Professional Association for Human Resources (CUPA–HR); Council for Christian Colleges and Universities; Idaho Division of Human Resources. The Department has never prorated the salary level for part-time positions, and it specifically considered and rejected similar requests in its 2004 and 2016 final rules. *See* 81 FR 23422; 69 FR 22171. As the Department has previously explained, employees hired to work part time, by most definitions, do not work in excess of 40 hours in a workweek, and overtime pay is not at issue for these employees. An employer may pay a nonexempt employee a salary to work part time without violating the FLSA, so long as the salary equals at least the minimum wage when divided by the actual number of hours (40 or fewer) the employee worked. *See* FLSA2008–1NA (Feb. 14, 2008). To the extent that commenters are concerned about the exemption status of seasonal employees, the Department notes that ''[e]xempt employees need not be paid for any workweek in which they perform no work.'' 29 CFR 541.602(a)(1).

industries, and for small businesses. *See, e.g.,* American Hotel and Lodging Association (AHLA); American Society of Travel Advisors (ASTA); CUPA–HR; LeadingAge; Society of Independent Gasoline Marketers of America (SIGMA); YMCA. Many also conveyed that the proposed level would not produce the same negative effects—*e.g.,* increased employer burdens and diminished workplace flexibility—as the 2016 final rule. *See, e.g.,* National Association of Landscape Professionals; Seyfarth Shaw. Some also noted that the 2004 rule has withstood the test of time for the past 15 years and has never been challenged in court. *See, e.g.,* Job Creators Network; SIGMA. Additionally, many of these commenters agreed with the Department that the proposed rule was responsive to the district court's concerns that led to the invalidation of the 2016 final rule. *See, e.g.,* Ogletree, Deakins, Nash, Smoak & Stewart, P.C.; SHRM.

Many employer representatives maintained that the proposed rule's salary level resulted in a more appropriate number of employees who would become newly nonexempt—1.1 million in the first year—compared to the 2016 final rule, which would have resulted in 4.2 million such workers in the first year. They noted that the smaller number of newly nonexempt employees would make it easier for employers to absorb the costs of compliance, *see* U.S. Small Business Administration Office of Advocacy (SBA Advocacy), would lessen the legal risk associated with the rule, *see* National Restaurant Association (NRA); Wage and Hour Defense Institute, and would ensure that the salary level maintains its historic screening function, *see* AGC; Chamber of Commerce of the United States of America (Chamber); NRF.

A few commenters, while generally supportive of the Department's approach in the NRPM, advocated for a salary level lower than the one proposed. These stakeholders maintained that to ensure that the salary level could accommodate low-wage regions and industries, the Department should exclude higher-wage states from the earnings data used to set the salary level. For example, some commenters urged the Department to include only the East South Central and West South Central Census Divisions, which include the lower-wage states of Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas, *see* Chamber; Food Marketing Institute (FMI); International Franchise Association (IFA); NRA, while AHLA recommended excluding Maryland, Virginia, and the District of Columbia from the data set. Others suggested generally that the Department use a narrower geographic area than the entire South, using the East South Central Census Division (Alabama, Kentucky, Mississippi, and Tennessee) as an example. *See* Kentucky Retail Federation; SBA Advocacy.

Employee representatives, conversely, generally stated that the salary level should be raised significantly above the level proposed in the NPRM or that the duties test should be significantly strengthened. *See, e.g.,* National Women's Law Center (NWLC); Public Justice Center; UnidosUS. Many commenters supported the level in the 2016 final rule or something similar to it. *See, e.g.,* American Association of Retired Persons (AARP); American Federation of State, County, and Municipal Employees (AFSCME); Campaign Comments; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). A few advocated that the salary level be set even higher, at $1,176 per week ($61,152 per year), using median earnings data. *See* National Employment Lawyers Association (NELA); Nichols Kaster, PLLP (Nichols Kaster); Rudy, Exelrod, Zieff & Lowe, LLP (Rudy Exelrod); Texas Employment Lawyers Association (TELA).

Many employee representatives maintained that the salary level proposed in the NPRM is inconsistent with the purpose of the FLSA and the EAP exemption. In general, these commenters contended that the proposed salary level was too low to adequately distinguish between bona fide EAP employees and those who were intended to be eligible for overtime, and that the rule would result in the exemption of lower-wage workers with limited bargaining power, whom the statute was designed to protect. *See, e.g.,* NELP; NELA; Texas RioGrande Legal Aid; Washington State Budget and Policy Center. Several commenters stated that the proposal would inappropriately exempt employees who perform significant amounts of nonexempt work. *See, e.g.,* National Council of Jewish Women; Women Employed. The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) disagreed that the salary level test's primary purpose is to screen out obviously nonexempt employees, contending that statements to that effect in the Weiss and Stein reports were ''not proposals for setting the long duties salary threshold'' but ''defending the salary tests against criticism,'' and that the salary levels described in those reports as having ''screening'' functions were accompanied by the more rigorous long duties test.

Commenters also noted that according to the Department's own estimates, 84 FR 10951, the proposed rule would result in 2.8 million fewer workers newly entitled to overtime pay in the first year than the 2016 final rule. *See* Joint Comment from 77 Members of Congress; National Partnership for Women and Families; Nichols Kaster. Many of these commenters also cited estimates by EPI, which projected that the proposed rule, compared to the 2016 final rule, would result in $1.2 billion fewer dollars in earnings transfers to employees and would affect 8.2 million fewer workers, including 3.1 million workers who would have gained the right to overtime pay and 5.1 million workers who are already overtime-eligible but would have had their overtime protections strengthened by the 2016 final rule's higher salary level because of a reduced risk of misclassification. These commenters stated that the narrowed scope of the proposed rule would be detrimental to these employees, who include millions of women, people of color, and parents of children under 18. *See* EPI; National Partnership for Women and Families. Some maintained, for example, that a higher salary level that would affect more workers would provide such workers with more income, improve upward mobility, and/or provide workers with more time to spend with their families. *See* AARP; Campaign Comments. Several commenters highlighted the lower number of affected employees (compared to the 2016 final rule) in their particular states. *See, e.g.,* Maryland Center on Economic Policy; Washington State Budget and Policy Center.

Some commenters also asserted that the proposed salary level would result in a higher risk of misclassification relative to the 2016 final rule, as well as more litigation, because more employees' exempt status would turn on the duties test rather than the salary level test. *See* NELA; Winebrake & Santillo LLC. A group of 14 state attorneys general and the Attorney General for the District of Columbia (State AGs) stated that these misclassification consequences would extend to state wage-and-hour laws that contain EAP exemptions that track the federal standard.

Commenters who opposed the proposed rule also criticized the Department's reliance on the reasoning of the *Nevada* district court's decision.

See AFL–CIO; EPI; NELP; NWLC; State AGs. These commenters took issue with the district court's conclusion that the 2016 final rule's salary level was too high because it classified as nonexempt over 4 million previously exempt workers based on their salaries alone, and as a result impermissibly displaced the role of the duties test. AFL–CIO and EPI asserted that the raw number of newly nonexempt workers under a new salary test should not determine the test's appropriateness since that number depends on several factors, such as the amount of time since the previous update and whether the methodology used in the last update was sound. Relatedly, the AFL–CIO stated that it is unclear why the 2016 final rule's salary level, which would have resulted in 4.2 million newly nonexempt employees, was impermissibly high, but the proposed rule's salary level, which would result in 1.1 million (the Department's estimate) to 1.4 million (EPI's estimate) newly nonexempt employees, is not. The AFL–CIO also asserted that the Department preemptively responded to the district court's views in the 2016 final rule, while it and other employee representatives contended that the rationale that the Department put forth in support of the 2016 final rule was more persuasive than the district court decision that invalidated it. *See* AFL–CIO; EPI; NELP; NWLC.

Many employee commenters asserted that if the Department did not substantially raise the salary level above the proposed level, it should establish a more rigorous duties test such as the former long test, which set specific limits on the performance of nonexempt work. *See, e.g.,* AARP; House and Senate Democratic Caucuses of the Michigan Legislature; National Council of Jewish Women; Women Employed. Some commenters recommended instituting a more rigorous duties test regardless of the salary level the Department adopts. *See* AFL–CIO; State of Wisconsin Department of Workforce Development.

Finally, several employee representatives also asserted that by adopting the 2004 methodology in the NPRM, the Department perpetuated a methodological error that the 2016 final rule characterized as a ''mismatch.'' *See* AFL–CIO; Economic Policy Institute (EPI); NELP; NWLC; 81 FR 34400. According to this view, while the Department had historically used two tests for exemption—a long test that paired a more rigorous duties test with a lower salary level, and a short test that paired a less rigorous duties test with a higher salary level—in 2004, the Department instead paired a less rigorous duties test with a lower salary level, resulting in historically nonexempt workers being instead classified as exempt. These commenters stated that the 2004 methodology failed to adjust for changes from the long/short test structure, and that a significantly higher salary level is necessary to account for the absence of the long duties test, which restricted the amount of nonexempt work lower-wage white collar employees could perform while still being classified as exempt. Some of these commenters contended that, as a result, the 2004 methodology results in a salary level that exempts certain historically nonexempt employees because employees who traditionally passed the long salary test and failed the long duties test became exempt under the 2004 final rule's standard salary level and duties tests. *See, e.g.,* NELA; Nichols Kaster; Senator Patty Murray. Some commented that the Department unreasonably relied on the functional dormancy of the long test to justify its adoption of the standard test in 2004, given that the Department did not update the short and long test thresholds between 1975 and 2004. One commenter, EPI, noted that the Department did not include the methodology for the Kantor long test, which used the lowest 10 percent of exempt salaried employees in low-wage regions and industries, as an alternative in the NPRM or elsewhere in the proposal.

Conversely, employer representatives disagreed with the ''mismatch'' rationale. They stated, for example, that the standard duties test is not identical to the short duties test, and that in 2004, the Department accounted for its change in the structure and data set used for the EAP exemption by adjusting the percentile used for determining the salary level. *See* Chamber; NRA. More generally, nearly all employer representatives opposed any changes to the standard duties test. *See, e.g.,* Bowling Proprietors Association of America; NGA; PPWO.

The Department appreciates the thoughtful comments it received regarding the salary level. After considering these comments, the Department has decided to retain the approach from the proposed rule with one small change. As proposed, the Department is using CPS earnings data to set the salary level equal to the 20th percentile of full-time salaried workers in the lowest-wage Census Region (the South) and/or the retail industry nationwide. To set the salary level, the Department applied this methodology to pooled CPS MORG data for July 2016 to June 2019, adjusted to reflect 2018/2019. This results in a final rule salary level of $684 per week ($35,568 for a full-year worker). For the reasons discussed below, the Department is not inflating the salary level forward to January 2020 as was proposed in the NPRM, but instead has used the most recent available actual wage data.

As an initial matter, the Department believes that the proposed salary level is consistent with, and faithful to, the FLSA's purpose. As noted in the NPRM, the FLSA explicitly directs that bona fide executive, administrative, and professional employees ''shall not'' be subject to the statute's minimum wage and overtime requirements. 29 U.S.C. 213(a)(1); 84 FR 10903. As such, when defining the contours of the EAP exemption, while the Department must, of course, ensure that employees who are subject to the Act's coverage receive its benefits, it must also ensure that employees whom Congress has directed ''shall'' be exempt from coverage are, in fact, exempt. The 2016 final rule was in tension with this purpose, as it would have newly disqualified 4.2 million workers from exemption simply because of their salaries, regardless of their duties.

The Department believes that this final rule strikes the appropriate balance by using the salary level, in line with its historical purpose, to screen out obviously nonexempt employees. As explained above, the Department articulated this purpose in the Weiss Report in 1949, when it explained that the salary level tests ''prevent[ed] the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation'' and ''simplified enforcement by providing a ready method of screening out the obviously nonexempt employees'' who, ''[i]n an overwhelming majority of cases . . . would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them.'' Weiss Report at 8. Likewise, in the Kantor Report, the Department stated the salary level tests ''provide[ ] a ready method of screening out the obviously nonexempt employees,'' and that employees ''who do not meet the salary test are generally also found not to meet the other requirements of the regulations.'' Kantor Report at 2–3. The Department referenced the screening function again in the 2004 final rule. *See* 69 FR 22165. This principle has been at the heart of the Department's interpretation of the EAP exemption for over 75 years.

The Department disagrees with the proposition advanced by some employee representatives that this

articulation of the salary level's modest purpose misreads the Weiss and Kantor reports, or that it applies only when paired with the long duties test. Both reports explicitly characterize the minimum salary level as ''simplif[ying] enforcement by providing a ready method of screening out the obviously exempt employees.'' Kantor Report at 3; Weiss Report at 8. And both confirm that under an appropriate salary level test, employees earning below the salary level generally would not meet the requirements of the duties test.[73] While these reports were written while a more rigorous duties test was in effect, they nonetheless affirm that a minimum salary level's purpose is to serve as a ''screening'' mechanism.

Conversely, as explained in the NPRM, the 2016 final rule went beyond this purpose, and instead suggested that the salary level had a much greater role to play in determining exempt status. For example, in the 2016 final rule the Department took the position that, in light of the single standard duties test that is less rigorous than the long duties test, ''the salary threshold must play a greater role in protecting overtime-eligible employees,'' and that ''it [was] necessary to set the salary level higher . . . because the salary level must perform more of the screening function previously performed by the long duties test.'' 81 FR 32412, 32465–66.[74]

As a result, the $913 per week salary level newly excluded 4.2 million salaried workers from exemption regardless of the duties they performed. The district court concluded that this would exclude from exemption ''so many employees who perform exempt duties,'' and in fact excluded ''entire categories of previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties[.]'' 275 F. Supp. 3d at 806–7. Accordingly, it invalidated the rule.

In sum, as explained in the NPRM, the Department believes that the 2016 final rule ''untethered the salary level test from its historical justification[,]'' 84 FR 10901, and that this resulted in its invalidation by the district court. For this reason, the Department declines to return to the 2016 methodology or to set an even higher salary level. In contrast, as noted in the NPRM, the methodology in the 2004 final rule, which the Department is applying in this rule, ''has withstood the test of time, is familiar to employees and employers, and can be used without causing significant hardship or disruption to employers or the economy, while ensuring overtime-eligible workers continue to receive the protections intended by Congress.'' *Id.* at 10903.

The Department also believes that the number of workers affected by the salary level set in this final rule confirms that the level is appropriate. The Department estimates that the final rule will result in 1.2 million workers who will be newly overtime-eligible in the first year as a result of the increased salary level. The number of affected workers is very similar to the 1.3 million workers affected by the 2004 rule's salary level increase. *Id.* at 10911 (citing 69 FR 22213, 22253). This similarity to the 2004 rule, which has never been challenged in court, is consistent with the Department's view that the salary level set in this final rule is reasonable and legally sound.

Moreover, as the Department explained in the NPRM, because the 2016 final rule set the salary level ''at the low end of the historical salary range of short test salary levels,'' 81 FR 32414, it failed to account for the absence of a long test that historically exempted white collar workers with lower salaries but whose duties confirmed they were bona fide EAP employees. Thus, the impact of the 2016 final rule would have been the inverse of the ''mismatch'' the Department sought to correct. It would have resulted in employees who, due to the nature of their duties, have historically been classified as exempt suddenly becoming nonexempt simply because of their salaries.

As a result, the 2016 final rule was in tension with the salary level's limited role in defining the EAP exemption, as it conflicted with the Department's longtime practice of setting a salary level that did not ''disqualify[ ] any substantial number of'' bona fide executive, administrative, and professional employees from exemption, Kantor Report at 5, leading directly to the district court's invalidation of the rule. While the Department has long recognized that it is inevitable that some employees will be incorrectly excluded from exemption since the salary level is ''a dividing line [that] cannot be drawn with great precision but can at best be only approximate[,]'' Weiss Report at 11, the Department may not disregard Congress's express directive to exempt bona fide EAP employees. Conversely, the 1.2 million lower-income workers who will become nonexempt as a result of this rule's increase to the standard salary level will not include a substantial number of workers whose duties have historically qualified them as bona fide EAP employees.

Thus, while employee representatives criticized the narrower scope of this rule compared to the 2016 final rule, the fact that this final rule affects considerably fewer employees than the 2016 final rule confirms, rather than undermines, its appropriateness. Given that the 2016 final rule was invalidated due to its overbreadth, that rule is not a reasonable benchmark for concluding that the number of affected employees under this rule is too low.

As noted above, employee commenters also objected to the Department's reliance on the *Nevada* district court's decision invalidating the 2016 final rule. The Department believes that its reliance on the reasoning of the district court is well-founded.

Such reliance is reasonable and prudent as it reduces the vulnerability of new rules to legal challenges or injunctions, and maximizes the likelihood that a new rule can be implemented immediately. Notably, it has been over three years since the 2016 rule was published, and nearly three years since its stated effective date. Because of the rule's invalidation, however, the currently enforced salary level remains at $455 per week, which the Department and nearly all commenters agree must be updated. Adoption of a salary level that reduces, to the extent possible, the likelihood that the rule will be enjoined is the best way to ensure that workers can reap the rule's benefits as soon as possible rather than waiting for the outcome of potentially lengthy litigation. The Department believes that the salary level in this final rule accomplishes that objective, particularly given the district court's implicit endorsement of the 2004 methodology. *See* 275 F. Supp. 3d at

[73] *See* Kantor Report at 3 (''Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.''); Weiss Report at 8 (''In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them.'').

[74] As noted in the NRPM, 84 FR 10908 n.76, the Department explained in the 2016 final rule that at the time of its analysis, 12.2 million salaried white collar workers earned more than $455 per week but were overtime eligible because they failed the duties test, while 838,000 salaried white collar workers were overtime eligible because even though they passed the standard duties test they earned below $455 per week. The Department then estimated that a $913-per-week salary level would result in 6.5 million salaried white collar workers who failed only the duties test, and increase to 5.0 million the number of salaried white collar workers who passed the duties test but would be overtime eligible because they failed the salary level test. *See* 81 FR 32464–65; *see also id.* at 32413. As the Department noted, however, it ''has never compared the number of employees who are nonexempt based exclusively on the salary or duties test, respectively, to determine the effectiveness of the salary level.'' 84 FR 10908.

807 n.6 (noting the court's earlier observation that an updated 2004 salary level likely would have not prompted the litigation that invalidated the 2016 final rule because it ''would still be operating . . . as more of a floor'') (internal quotation marks and citation omitted).

Additionally, the Department is mindful of the concerns the district court cited. As articulated in the NPRM and above, the 2016 final rule was, at minimum, in tension with the FLSA because it resulted in 4.2 million employees, including employees who were historically exempt under the long test, becoming nonexempt based on their salaries alone, even though the Act directs that the EAP exemption be based on ''capacity.'' This threatened to make ''salary rather than an employee's duties determinative'' of an employee's status under the EAP exemption.[75] While the 2016 final rule naturally contains language disagreeing with these propositions, for the reasons explained above, the Department has reexamined the 2016 final rule in light of the district court's decision and the public comments it has received in response to the RFI and the NPRM, and ultimately finds that the concerns voiced by the district court and by many public commenters warrant adopting a lower salary level.

The Department disagrees with the employee commenters who asserted that the 2004 methodology created a ''mismatch'' that must be corrected by a salary level comparable to the one from the 2016 final rule or a restoration of the long duties test. *See, e.g.,* EPI (''The methodology for setting the standard salary threshold in the 2004 rule was fundamentally flawed.''); NELP. The 2004 final rule explained that it was difficult to coherently apply the long duties test's requirement that an EAP employee perform no more than 20 percent nonexempt work.[76] Consequently, the Department switched from the long and short duties tests to a single duties test that, like the previous short duties test, did not include a quantitative limit on the percentage of time performing nonexempt work. And the Department set a standard salary level that was similar to that of the long test.

The commenters relying on the ''mismatch'' theory appear to assert that the 2004 final rule should have paired the single duties test with a higher salary threshold such as the short test because the Department was obligated to preserve the previous structure of pairing a more rigorous duties test with a lower salary level test, or a less rigorous duties test with a higher salary level. *See, e.g.,* AFL–CIO, EPI. But the previous structure had been created by the Department as one among many permissible policy choices. It was not required by the statutory text. Indeed, the statutory text does not require the Department to determine any salary level. As such, the Department was under no legal obligation to preserve the previous salary/duties structure in the 2004 final rule.

Moreover, the Department believes it would have been inappropriate to adopt the higher short test salary level after removing the long duties test in the 2004 final rule. *See* 84 FR 10908. The long duties test ensured that white collar employees would not become nonexempt simply because their salaries fell below the short test's higher threshold, if their duties clearly indicated bona fide EAP status. If the 2004 final rule had adopted the short test's higher salary threshold after eliminating the long duties test, such employees would have been reclassified as nonexempt solely because of their salary level. This approach would have departed from the historical role of using the salary level to screen out only obviously nonexempt employees, and would have risked violating the statutory requirement to base EAP status on the ''capacity'' in which the employee is employed. 29 U.S.C. 213(a)(1). Therefore, the Department believes that its' decision in 2004 not to pair the higher short test salary level with the standard duties test was a necessary measure to maintain policy consistency and follow statutory requirements.

Indeed, the 2016 final rule's attempt to correct the ''mismatch'' by setting the salary level ''at the low end of the historical range of short test salary levels,'' 81 FR 32409, created the precise legal risks that the 2004 final rule attempted to avoid. While the Department previously relied on the mismatch theory in defending the 2016 final rule in litigation, the district court, in declaring the 2016 final rule invalid for the reasons set forth above, implicitly rejected application of the mismatch theory in reaching its conclusion. As explained above, the district court found that the salary level set by the 2016 final rule improperly substituted employee salaries for an analysis of employees' duties.[77] 275 F. Supp. 3d at 806. In contrast, the 2004 methodology has never even been challenged in court—let alone invalidated—during the 15 years it has been enforced by the Department.

Additionally, as noted in the NPRM, the mismatch rationale failed to account for the substantial number of years during which the long duties test was effectively dormant. 84 FR 10908–09; *see also* 69 FR 22126 (explaining that ''the 'long' duties test [had], as a practical matter, become effectively dormant'' due to outdated salary levels, and quoting commenters who described the long duties test as ''inoperative,'' ''rarely, if ever, used,'' ''largely . . . dormant,'' and ''lack[ing] current relevance''). The long test salary levels set in 1975 were equaled or surpassed by the minimum wage in 1991.[78] Thus, since at least 1991, the short duties test and salary level determined whether workers qualified for the EAP exemption. Employers and employees alike have effectively operated for 28 years under a single-test system. Thus, although, as noted above, some employee commenters asserted that the 2004 methodology exempts certain historically nonexempt employees (*i.e.,* those who had passed the long salary test and failed the long duties test), any of these employees who were nonexempt in the years leading up to 2004 were nonexempt because their salaries fell below the short test's salary threshold. It therefore appears that these commenters are requesting that the Department set the salary threshold at the historical short test level. The Department attempted to do this in the 2016 final rule, but as explained above, this approach created legal risks, as evidenced by the district court's conclusion.

The Department continues to believe that the post-1991 landscape is ''highly relevant'' to its approach here, 84 FR 10909, and disagrees with the employee representatives contending otherwise. The one-test system effectively in place for the nearly three decades has created significant reliance interests and

[75] 275 F. Supp. 3d at 807.

[76] 69 FR 22127 (''When employers, employees, as well as Wage and Hour Division investigators applied the 'long' test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes.'').

[77] Some commenters contend that the district court's decision was flawed because it did not address the ''mismatch'' theory in its opinion, even though it was the central theory behind the 2016 final rule. *See* AFL–CIO; NELP. However, as noted above, the district court implicitly rejected the mismatch theory.

[78] In 1975, the Department set a long test salary level of $155 per week for executive and administrative employees, and of $170 per week for professional employees. *See* 40 FR 7092. On April 1, 1991, the federal minimum wage increased to $4.25 per hour, which equals $170 for a 40-hour workweek. *See* Sec. 2, Public Law 101–157, 103 Stat. 938 (Nov. 17, 1989).

understandings in the workplace under which employees and employers alike recognize certain positions as exempt. As the *Nevada* district court recognized, a salary level that deviates substantially from recent practice would result in ''entire categories of previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties'' becoming nonexempt. 275 F. Supp. 3d at 806 (quoting 29 U.S.C. 213(a)(1)). Numerous employers indicated that they anticipated significant adverse effects from the 2016 final rule as a result of this widespread reclassification, including not only increased compliance costs but decreased employee flexibility, reduced morale, and increased employee turnover. *See* Independent Electrical Contractors; National Association of Truck Stop Operators; National Multifamily Housing Council and the National Apartment Association; PPWO; SBA Advocacy; Seyfarth Shaw.

Regarding EPI's request that the Department ''include the value of the Kantor long test in the final rule,'' as explained below and as described in more detail in the economic analysis, the Department has considered the Kantor long test methodology as an alternative. But as the 2004 final rule explained, the Kantor method, which uses the lowest 10 percent of exempt salaried employees in low-wage regions and industries, requires ''uncertain assumptions regarding which employees are actually exempt[.]'' 69 FR 22167. It is also more complex to model and thus is less accessible and transparent. And it presents a circularity problem: The Kantor method would determine the population of exempt salaried employees, while being determined by the make-up of that population. The 2004 methodology of setting the minimum salary level based on the lowest 20 percent of *all* salaried employees in the South and retail industry avoids these problems. *See id.* Additionally, as discussed in the economic analysis below, upon consideration of the Kantor method, the Department found that it would result in a salary threshold that differs from the level set in this final rule by $40 per week. EPI similarly estimated that the Kantor method would result in a salary threshold that deviates from the level proposed in the NPRM by $33 per week. The Department does not believe this fairly small difference justifies reverting back to the Kantor method, particularly because the 2004 methodology is familiar to employers and employees, does not require uncertain and circular assumptions, and has never been challenged in court.

The Department also disagrees with commenters who stated that a significantly higher salary level is justified in order to reduce further the risk of employee misclassification. The Department recognizes that, in addition to conferring minimum wage and overtime protections on newly nonexempt employees, an updated salary level clarifies and strengthens the nonexempt status of employees who fail the duties test and earn between the previous salary level and the new one (*i.e.,* those who are and will remain nonexempt), and thereby reduces the risk that those employees will be misclassified as exempt. Indeed, this final rule clarifies and strengthens the nonexempt status of 2.2 million salaried white collar workers and 1.9 million salaried blue collar workers earning between $455 and $684 per week. *See infra* §§ VI.A.iii, VI.D.iii.3.

But the laudable goal of reducing misclassification cannot overtake the statutory text, which grounds an analysis of exemption status in the ''capacity'' in which someone is employed—*i.e.,* that employee's duties. Accordingly, the salary level test's limited purpose is to screen out only those employees who are not performing bona fide EAP duties. *See* Weiss Report at 8 (noting that the salary levels ''have amply proved their effectiveness in preventing the misclassification by employers of *obviously nonexempt* employees'') (emphasis added). As explained at length above, if the salary level is too high, as was the case in the 2016 final rule, it results in a substantial number of historically *exempt* bona fide EAP employees being classified as *nonexempt* without any examination of their duties. Such action is inconsistent with the section 13(a)(1) exemption. The Department believes that potential misclassification of nonexempt employees as exempt is most appropriately addressed through compliance assistance and, if necessary, enforcement by the Department or private parties, rather than through an artificial increase to the salary level.[79]

The Department also declines to adopt a lower salary level than the one proposed in the NPRM, as some employer representatives suggested. As explained above, by setting the salary level at the low end—the 20th percentile—of the earnings of full-time salaried employees in the South and/or retail industry, the Department, consistent with its historical practice, has tailored the salary level to the needs of the lowest-wage regions and industries. While some employer representatives stated that the Department could use an even narrower subset of data by eliminating from consideration higher-wage states, the Department believes that using the entire South—the lowest-wage Census Region—in addition to the retail industry nationwide strikes the appropriate balance by setting a salary level that is based on low-wage areas but can still serve as a meaningful dividing line in higher-wage areas as well.[80]

In sum, after considering the comments received, the Department has decided to update the salary level by applying the 2004 methodology to current data. As noted in the NPRM, using this methodology ''promotes familiarity and stability for the workplace, ensures workers the important wage protections contained in the Act, . . . minimizes the uncertainty and potential legal vulnerabilities that could accompany a novel and untested approach,'' ''avoids new regulatory burdens,'' and sets a salary level that ''accounts for nationwide differences in employee earnings and . . . work[s] appropriately with the standard duties test.'' 84 FR 10909.

The Department declines to make any changes to the duties test, such as adopting a duties test similar to the long duties test, which some employee representatives advocated as an alternative or complement to a higher salary level. As explained above, the standard duties test has been in effect for 15 years, and the short duties test, to which it is similar, was functionally the predominant test in use for the preceding 13 years. This approach has never been challenged. As a result, both employees and employers are accustomed to these tests. Moreover, a large body of jurisprudence interprets these duties tests, and so changing these tests could increase regulatory uncertainty and result in costly litigation. The Department also remains

[79] Regarding the view of the state attorneys general that the new salary level does not do enough to prevent misclassification under their states' wage-and-hour laws that track FLSA exemptions, nothing in this rule prevents any state from enacting a higher salary level, or a more restrictive duties test, than the FLSA if it believes it is necessary to prevent misclassification under state law.

[80] The Chamber stated that the 2004 rule and the Department's application of that rule (in the NPRM) used different groups of states, and that the 2004 rule used only a subset of states in the South Census Region. The Chamber's characterization of the data set used in the 2004 rule is incorrect, as both this rule and the 2004 final rule used the entire South Census Region in setting the salary level.

mindful of employer concerns that reinstating the long test's cap on nonexempt work could introduce new compliance burdens. *See, e.g.,* National Association of Truck Stop Operators; NRF; *see also* 81 FR 32446; 69 FR 22127. Finally, the Department did not propose any changes to the duties test in the NPRM and does not believe that it would be appropriate to institute such a significant change to the part 541 exemptions in this final rule.

Accordingly, the Department declines to return to the more complicated long duties test. The Department believes that the standard duties test, which focuses on whether an employee's ''primary duty'' consists of EAP tasks, can appropriately distinguish bona fide EAP employees from nonexempt workers.

The Department considered a number of alternatives to the salary level in this final rule.[81] First, the Department considered not changing the salary level from the currently enforced level of $455 per week. The Department rejected this option because, as discussed above, the Department concluded that the $455 salary level set fifteen years ago no longer reflects current earnings and must be updated to serve as a meaningful dividing line between nonexempt and potentially exempt employees. The Department also considered maintaining the average minimum wage protection in place since 2004 by using the weighted average of hours at minimum wage and overtime pay represented by the minimum salary level (*i.e.,* the $455 weekly threshold represented 72.2 hours at minimum wage and overtime pay at the minimum wage in 2004; currently, that salary level represents 55.2 hours at minimum wage and overtime pay; the weighted average is 59.5 hours, which yields a salary of $502 per week). The Department rejected this option because it would not adequately address wage growth since 2004.

In light of comments from some employer representatives, the Department also considered using the 2004 methodology but eliminating the District of Columbia, Maryland, and Virginia from the data set used to determine the salary level due to their higher levels of employee earnings. However, as discussed above, the Department believes that using the entire South and the retail industry nationwide results in an appropriate nationwide salary level that is based on low-wage regions but can still serve as a meaningful dividing line in higher-wage regions. Using the entire South is also consistent with the methodology used in the 2004 final rule.

In response to a comment from EPI, the Department also considered adopting the methodology that was used to derive the long test salary level prior to 2004 (the Kantor long test method), which used the lowest 10 percent of exempt salaried employees in low-wage regions and industries. However, as explained in greater detail above, the Department declined to do so because while the Kantor methodology produces a salary level that differs from the level set in this final rule by less than 6 percent, it depends on uncertain and circular assumptions, and is more complex to model and thus less accessible and transparent.

Finally, the Department considered using the methodology from the 2016 final rule to set the salary level, as suggested by many employee representatives. However, as explained at length above, the Department believes that methodology was inappropriate because it resulted in too many employees being newly classified as nonexempt based on their salaries alone, thus supplanting the role of the duties test. Moreover, the district court invalidated the 2016 final rule. Therefore, the Department has chosen to use the 2004 methodology, which, as noted above, screens out obviously nonexempt workers, works well with the standard duties test, and has never been challenged during the fifteen years in which it has been enforced by the Department.

3. Proposed Inflation to January 2020

The Department proposed to inflate the salary level to reflect anticipated wage growth to January 2020, the final rule's estimated effective date. Most commenters did not address this aspect of the proposal, but some employer representatives opposed it. A few stated that the proposed approach was inconsistent with the Department's past practice of setting the salary level using the most recent available data on actual salaries paid to employees, rather than inflationary metrics. *See, e.g.,* Center for Workplace Compliance; Chamber; FMI.

In the final rule, instead of projecting the salary level to January 2020, the Department has set the salary level using the most recent data available at the time the Department has drafted the final rule. The Department is using pooled CPS MORG data from July 2016 to June 2019, adjusted to reflect 2018/2019. As some commenters noted, using recent actual wage data is consistent with the approach the Department has taken in prior rulemakings. *See* 81 FR 32403 (noting regulatory history reveals that in most prior rulemakings ''the Department examined a broad set of data on actual wages paid to salaried employees'' to set the salary level), *id.* at 32051 (''In keeping with our practice, the Department relies on the most up-to-date data available to derive the final salary level[.]'').

It is also consistent with the Department's historical practice (with only one exception, in 1975) of declining to use inflation to adjust the salary level for the part 541 exemption. *See* 69 FR 12167 (noting the Department's ''long-standing tradition of avoiding the use of inflation indicators for automatic adjustments to these salary requirements''). Additionally, the gap between the latest month covered by the data set—June 2019—and the rule's effective date—January 2020—is only six months. This is a shorter gap than was the case in the 2016 rule, which had an effective date of December 1, 2016 and relied on salary data from the fourth quarter of 2015, and a significantly shorter gap than the 2004 rule, which had an effective date of August 23, 2004 and relied on 2002 CPS data. 81 FR 32391, 32405; 69 FR 22122, 22168. Using a data set that includes such recent earnings data enables the Department to avoid the uncertainty and speculation that would accompany projecting earnings data.

4. Rescission of the 2016 Final Rule

Many employer representatives who commented on the issue supported the NPRM's independent proposal to rescind the 2016 final rule. *See, e.g.,* ASTA; Center for Workplace Compliance; NAHB; NFIB; Wage and Hour Defense Institute; Worldwide Cleaning Industry Association. These employers generally maintained that the 2016 final rule, unlike the proposed rule, was inconsistent with how the Department has previously set the salary level, and some highlighted that the 2016 final rule excluded many workers performing EAP duties. As noted above, employer representatives also asserted that the 2016 final rule salary level would have a number of adverse effects, including reductions in staffing levels, hours, and employee benefits; less flexibility in scheduling; and decreased employee morale. In contrast, other commenters, including the tens of thousands who submitted comments as part of a campaign, maintained that the 2016 final rule was appropriate and would have benefited more employees than the salary level proposed in the NPRM, and urged the Department to defend the 2016 final rule in the

[81] The salary levels that would result from each of the alternatives are set forth in section VI.C.

currently stayed litigation. *See, e.g.,* AFL–CIO; Campaign Comments; Senator Patty Murray; The Leadership Conference on Civil and Human Rights.

The Department is finalizing the formal rescission of the 2016 final rule as proposed. Thus, in addition to replacing the 2016 final rule functionally by revising the part 541 regulatory text in the Code of Federal Regulations, this final rule also formally rescinds the 2016 final rule. This rescission operates independently of the new content in this final rule, as the Department intends it to be severable from the substantive rule for revising part 541. Thus, even if the substantive provisions of this final rule revising part 541 are invalidated, enjoined, or otherwise not put into effect, the Department intends the 2004 final rule to remain operative, not the enjoined 2016 final rule that it is rescinding.

Particularly given the recent history of litigation in this area, the rescission of the 2016 final rule is necessary to provide certainty and clarity to employees and employers about what salary level will be effective if this final rule were to be invalidated, enjoined, or otherwise not put into effect. As explained at length above, the Department believes that the salary level set in the 2016 final rule was inappropriate. Moreover, given the district court's invalidation of the 2016 final rule, the 2004 final rule, which has never been challenged in court, is the logical framework to take the place of this rule if this rule were to be struck down.

B. Special Salary Tests

i. Puerto Rico, Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands [82]

The Department has applied the standard salary level to Puerto Rico since 2004.[83] In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[84] Section 404 of PROMESA states that ''any final regulations issued related to'' the Department's 2015 overtime rule NPRM—*i.e.,* the 2016 final rule—''shall have no force or effect'' in Puerto Rico until the Comptroller General of the Unites States completes and transmits a report to Congress assessing the impact of applying the final regulations to Puerto Rico, and the Secretary of Labor, ''taking into account the assessment and report of the Comptroller General, provides a written determination to Congress that applying such rule to Puerto Rico would not have a negative impact on the economy of Puerto Rico.'' [85]

It is the Department's belief that PROMESA does not apply to this final rule as it is a new rulemaking, and thus not ''related to'' the 2015 overtime rule NPRM within the meaning of PROMESA. Section 404, however, reflected Congress's apprehension with increasing the salary level in Puerto Rico, and given the current economic climate there, the Department proposed to set a special salary level in Puerto Rico of $455 per week—the level that currently applies under PROMESA.

The Department also currently applies the standard salary level to the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI).[86] The Department understands that U.S. territories face their own economic challenges and that an increase in the salary level affects them differently than the States. In recognition of these challenges, and to promote special salary level consistency across U.S. territories, the Department proposed setting a special salary level of $455 per week for the Virgin Islands, Guam, and the CNMI.

Few commenters addressed this issue, but those who did all supported the Department's proposal. The Saipan Chamber of Commerce, for example, stated that ''U.S. territories face economic challenges not experienced by businesses and employers on the U.S. mainland,'' and the World Floor Covering Association (WFCA) similarly cited the ''unique economies'' in these territories. The Hotel Association of the Northern Mariana Islands referenced several CNMI-specific concerns, including that ''[w]ages across all industries in the CNMI, including the hospitality industry, have been historically lower than their stateside counterparts.'' The CNMI chapter of SHRM expressed similar concerns.

After reviewing the comments received, the Department is finalizing this aspect of the NPRM as proposed. As such, in this final rule the Department will set a special salary level of $455 per week for Puerto Rico, the Virgin Islands, Guam, and the CNMI.

ii. American Samoa

As discussed in the NPRM, the Department has historically applied a special salary level test to employees in American Samoa because minimum wage rates there have remained lower than the federal minimum wage.[87] The Fair Minimum Wage Act of 2007, as amended, provides that industry-specific minimum wage rates in American Samoa will increase every three years until each equals the federal minimum wage.[88] The disparity with the federal minimum wage is expected to remain for the foreseeable future.

The special salary level test for employees in American Samoa has historically equaled approximately 84 percent of the standard salary level.[89] The Department proposed to maintain this percentage and considered whether to set the special salary level in American Samoa equal to 84 percent of the proposed standard salary level ($679 per week)—resulting in a special salary level of $570 per week—or to set it equal to approximately 84 percent of the proposed special salary level applicable to the other U.S. territories ($455 per week)—resulting in a special salary level of $380 per week. The Department proposed a special salary level of $380 per week in American Samoa. It explained that this approach would not only maintain the special salary level that the Department is currently enforcing in American Samoa, but would also ensure that American Samoa, which has a lower minimum wage than the other U.S. territories, would not have a higher special salary level.[90]

The Department received no comments on this proposal and will adopt the methodology set forth in the NPRM. Accordingly, in this final rule the Department will set a special salary level of $380 per week for employees in American Samoa.

iii. Motion Picture Producing Industry

The Department has permitted employers to classify as exempt employees in the motion picture producing industry who are paid a specified base rate per week (or a proportionate amount based on the number of days worked), so long as they meet the duties tests for the EAP exemption.[91] This exception from the

[82] The special salary tests do not apply to employees of the Federal government employed in Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

[83] *See* 69 FR 22172.

[84] *See* Public Law 114–187, 130 Stat. 549 (June 30, 2016).

[85] *See* 48 U.S.C. 2193(a)–(b). The Comptroller General's report was published on June 29, 2018 and is available at: *https://www.gao.gov/products/GAO-18-483.*

[86] In Guam and the CNMI, the Department has applied the salary level test(s) applicable to the States. In the Virgin Islands, the Department applied a special salary level test prior to 2004, but applied the standard salary level beginning in 2004.

[87] *See* 69 FR 22172.

[88] *See* Sec. 1, Public Law 114–61, 129 Stat. 545 (Oct. 7, 2015).

[89] *See, e.g.,* 69 FR 22172.

[90] *See* 84 FR 10912.

[91] *See* § 541.709.

''salary basis'' requirement was created in 1953 to address the ''peculiar employment conditions existing in the [motion picture producing] industry,'' and applies, for example, when a motion picture producing industry employee works less than a full workweek and is paid a daily base rate that would yield the weekly base rate if 6 days were worked.[92] Consistent with its practice since the 2004 final rule, the Department proposed to increase the required base rate proportionally to the proposed increase in the standard salary level test, resulting in a proposed base rate of $1,036 per week.

The Department did not receive any comments on the proposed base rate for motion picture employees. The final rule adopts the methodology set forth in our proposal, which using the new standard salary level ($684 per week) results in a base rate of $1,043 per week (or a proportionate amount based on the number of days worked).[93]

C. Inclusion of Nondiscretionary Bonuses, Incentive Payments, and Commissions in the Salary Level Requirement

In the 2016 final rule, the Department for the first time allowed employers to count nondiscretionary bonuses and incentive payments toward the standard or special salary levels.[94] Under that rule, such bonuses must be paid quarterly or more frequently and may satisfy up to 10 percent of the standard or special salary level. In the NPRM, the Department again proposed to permit nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard or special salary level tests for the EAP exemption. However, unlike the 2016 final rule's requirement that such payments must be paid on a quarterly or more frequent basis, the Department proposed to allow the crediting of payments made on an annual or more frequent basis. Additionally, the Department proposed to permit employers to make a final ''catch-up'' payment within one pay period after the end of each 52-week period to bring an employee's compensation up to the required level. *See* 84 FR 10912–13.

Most commenters representing employers supported allowing nondiscretionary bonuses and incentive payments to count towards the standard salary level requirement. Employer representatives supporting the bonuses proposal (or an expanded version of it) asserted that nondiscretionary bonuses and incentive payments constitute a large and important part of the total compensation package for many exempt employees. Several commenters, including the Chamber, FMI, IFA, and NRA, noted that, in light of commenter feedback, the Department has previously acknowledged this point in the NPRM and in the 2016 final rule. *See* 81 FR 32423–24; 84 FR 10912. The Chamber additionally cited a survey from 2018 showing that 80 percent of non-profit and government employers surveyed use some type of ''short-term incentive plan.'' The National Association of Truck Stop Operators and PPWO asserted that the majority of employees who receive bonuses and incentive payments otherwise qualify for exempt status, while SIGMA and WFCA asserted that bonuses and incentive payments tied to an employer's success ''foster a sense of ownership'' among the managerial employees who receive them. Many employer representatives specifically approved of the Department's proposal to allow the crediting of nondiscretionary bonuses and incentive payments paid on an annual basis (rather than quarterly, as provided by the 2016 final rule), agreeing that annual bonuses are a common form of compensation for many EAP employees. *See* PPWO; SIGMA.

Although several employer representatives supported the proposal without reservation, a larger number objected to the proposal's restriction that nondiscretionary bonuses and incentive payments could only satisfy up to 10 percent of the standard salary level. Some of these commenters urged the Department to allow bonuses to satisfy more than 10 percent of the standard salary level, but declined to specify an exact amount. *See* Center for Workplace Compliance; National Association of Federally-Insured Credit Unions; NGA. Others specifically proposed a higher percentage limit, including: WFCA (suggesting 20 percent); Small Business Legislative Council and TechServe Alliance (25 percent); ASTA (30 percent); National Independent Automobile Dealers Association (30 or 40 percent); and HR Policy Association and the Kentucky Retail Federation (50 percent). Finally, many employer representatives urged the Department not to impose any limit. *See, e.g.,* American Network of Community Options and Resources; American Staffing Association; IFA; Mortgage Bankers Association; NRF; PPWO; Seyfarth Shaw.

Some commenters critical of the proposed 10 percent limit asserted that it is not reflective of the compensation practices in their industry, where bonuses and incentive payments often exceed 10 percent of an employee's fixed salary. *See, e.g.,* ASTA; NGA; WFCA. Others contended that to ''harmonize'' the respective regulations, any non-hourly payments that count toward an employee's ''regular rate of pay'' when calculating overtime pay, *see* 29 CFR 778.211(c), should count towards the salary threshold as well. *See, e.g.,* AGC; HR Policy Association; PPWO; Worldwide Cleaning Industry Association.[95] The Chamber, IFA, and the National Lumber and Building Material Dealers Association criticized the NPRM's rationale that the 10 percent limit was necessary to help maintain parity between sectors that use such pay methods and those that traditionally have not done so,[96] while ASTA and TechServe Alliance asserted that the 10 percent limit would have a negative impact on employers in industries that rely on incentive pay.

Although few organizations representing employees commented on the bonuses proposal, those who did were unanimous in voicing their opposition. NELA, Nichols Kaster, Rudy Exelrod, and Smith Summerset & Associates LLC (Smith Summerset) asserted that allowing annual bonuses and incentive payments to satisfy any portion of the salary level test would undermine the premise that only workers with a minimum level of dependable and predictable pay should be exempt from the FLSA's overtime protections. Relatedly, the AFL–CIO expressed concern that the proposal would ''provide a means for employers to manipulate employees' salaries to

[92] 18 FR 2881 (May 19, 1953).

[93] The Department calculated this figure by dividing the weekly salary level ($684) by $455, and then multiplying this result (rounded to the nearest hundredth) by the base rate set in the 2004 final rule ($695 per week). This produced a new base rate of $1,043 (per week), when rounded to the nearest whole dollar.

[94] Although a federal district court subsequently invalidated the 2016 final rule, the court's summary judgment decision did not address the bonuses provision. 275 F. Supp. 3d 795.

[95] For the same reason, some commenters specifically requested the Department allow employers to credit the value of board and lodging towards the standard salary level. See AHLA (''If an employer must include a non-hourly payment in the regular rate, that payment should likewise count towards the salary threshold.''); *see also* CUPA–HR; PPWO; Seyfarth Shaw. AHLA and CUPA–HR asserted that board and lodging benefits are especially common for exempt employees in hospitality and higher education, respectively.

[96] The Chamber stated that such a consideration is ''beyond the Department's proper purview.'' The Chamber and IFA additionally stated that government and non-profit employers do not typically compete with for-profit employers over the same employee, and that the proposal would not alter any existing competitive imbalance in any event.

avoid paying overtime[.]'' *See also* NELA. Given these concerns, some employee representatives asserted that the proposal would be particularly inappropriately paired with a salary level substantially lower than the figure adopted in the 2016 final rule. *See, e.g.,* NELA; Smith Summerset.

Several commenters disputed that nondiscretionary bonuses and incentive payments are indicative of exempt status. For example, NELA and TELA emphasized that such payments do not convey ownership interests in the business, and asserted that their members ''have represented many categories of employees who receive various nondiscretionary bonuses, including middle management and lower level employees[.]'' By contrast, Smith Summerset asserted that nondiscretionary bonuses and incentive payments ''are not an important pay component for the relatively lowly paid employees who would be affected by the [proposal],'' who the firm described as ''most in need of the certainty and regularity of a salary'' (emphasis in original).

Finally, employee representatives worried that the proposal would undermine the clarity and effectiveness of the salary level test. For example, AFL–CIO stated that ''[i]ncluding bonuses in the calculation could create confusion as to whether employees meet the salary threshold test and are overtime eligible.'' *See also* Nichols Kaster. Several commenters, including NELA, Rudy Exelrod, and TELA, asserted that the proposal would increase monitoring and compliance costs. Smith Summerset asserted that employers would have to keep new payroll and timekeeping records for their exempt staff, including for some individuals no longer employed by the company who might be awaiting a deferred compensation payment. Several employee representatives predicted that the proposal would result in increased litigation, particularly over the distinction between discretionary and nondiscretionary bonuses.[97] Smith Summerset emphasized that the back wage claims in such disputes would be substantial, and could pose ''a surprising and unexpected liability to those unsophisticated employers who might stumble into the violation simply by reason of administrative oversight.''

After carefully considering commenter feedback, the Department has decided to adopt the proposal without modification—*i.e.,* allowing employers to satisfy up to 10 percent of the standard or special salary levels [98] with nondiscretionary bonuses and incentive payments (including commissions), provided that such payments are paid no less frequently than on an annual basis.[99] This provision appropriately modernizes the regulations to account for EAP compensation practices in a growing number of workplaces, while at the same time preserving the important role of the salary basis and salary level tests in identifying EAP employees, simplifying compliance, and preventing abuse.

Feedback from employer representatives responding to the NPRM has reinforced the Department's view in the previous rulemaking that the provision of nondiscretionary bonus and incentive payments has become sufficiently correlated with EAP status. At the same time, the Department acknowledges that nonexempt employees may receive nondiscretionary bonuses and incentive payments, and that the part 541 regulations have historically looked only to payments made on a salary or fee basis to satisfy the minimum salary level. The Department believes that allowing employers to credit nondiscretionary bonuses towards up to 10 percent of the standard or special salary levels strikes an appropriate balance between accommodating legitimate pay practices for a growing number of bona fide EAP employees, while not undermining the salary basis requirement.

The Department has decided against raising or eliminating the proposal's 10 percent limitation. The Department continues to believe in the basic logic of the salary requirement. Capping the crediting of nondiscretionary bonuses and incentive payments at 10 percent of the standard salary level ensures that the salary level test remains predominantly a test of *salaried* earnings, requiring that EAP employees subject to the salary criteria must earn at least 90 percent of the standard salary level on a salaried basis. Additionally, while several employer commenters asserted that nondiscretionary bonuses and incentive pay often comprise more than 10 percent of the total compensation paid to EAP employees, few specifically asserted that any significant number of EAP employees earn salaries of less than 90 percent of the proposed salary threshold (*i.e.,* $614.70 per week, or $31,964.40 per year). Thus, the Department disagrees that the cumulative effect of raising the standard salary level while limiting the amount that can be satisfied through nondiscretionary bonuses and incentive pay will result in a significant reduction in such payments. The regulations do not limit the amount of bonuses EAP employees may earn; it only limits the amount that can count toward the standard salary level.

For similar reasons, the Department has decided against expanding the proposal to allow additional kinds of payments to count towards the standard salary level, such as discretionary bonuses, employer benefit contributions, or the value of board, lodging, and facilities. The Department has never allowed such payments to count towards any of the earning thresholds required for the EAP exemption, including under the HCE test created in 2004. *See* 541.601(b)(1). The Department did not propose to allow such payments to count towards the salary level test, and declines commenter suggestions to do so in this final rule.

NELA, Smith Summerset, and other commenters questioned how the proposed rule would treat employees affected by the proposal whose employment ends before the end of a 52-week period. Here, consistent with the treatment of employees under the existing HCE test, *see* § 541.601(b)(3), the Department has amended the proposed regulatory text at § 541.602(a)(3) to clarify that employers may pay employees a prorated amount for a designated 52-week period where an employee does not work for the entire period, because the employee either is newly hired after the period's start or ends employment before the period's end. Determining an employer's payment obligation to such employees to maintain their exempt status depends on the number of workweeks that the employee works within the 52-week period. Where employment ends before the end of the 52-week period, employers must ensure that the employee receives enough in pay to satisfy the standard salary level by the end of the next pay period

[97] NELA and other commenters asserted that ''[d]etermining whether bonuses are discretionary or nondiscretionary already generates considerable litigation in the context of whether certain kinds of bonuses must be included in the regular rate for purposes of calculating the overtime rate.'' *See also* Nichols Kaster; Rudy Exelrod; TELA.

[98] Specifically, this rule permits employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level or any of the special salary levels applicable to U.S. territories. As discussed in greater detail below, however, HCEs must receive at least the standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments.

[99] The employer may use any 52-week period, such as a calendar year, a fiscal year, or an anniversary of the hire year.

following the employee's end of employment.

The final rule permits employers to meet the salary level requirement by making a catch-up payment within one pay period of the end of the 52-week period.[100] In plain terms, each pay period an employer must pay the EAP employee on a salary basis at least 90 percent of the standard salary level and, if at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for the 52-week period, the employer has one pay period to make up for the shortfall (up to 10 percent of the required salary level). Any such catch-up payment will count only toward the previous 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid.

The Department is sensitive to concerns raised by employee representatives and some employer commenters that the bonuses provision may increase compliance costs and litigation. These effects, however, are mitigated by the fact that crediting nondiscretionary bonuses and incentive pay towards the standard salary level is purely optional. Employers, who would predominantly bear the cost of compliance and litigation expenses, are presumably best positioned to evaluate whether the potential costs of such crediting would outweigh the potential benefits. While the AFL–CIO contends that the bonuses proposal could theoretically ''lead to anomalous results, where employees working side by side performing the same job would be exempt and nonexempt, simply because inclusion of the bonus would raise one employee over the salary threshold[,]'' this has always been true of the salary level test, given that employees performing identical job duties may receive different salaries.

The Department emphasizes that this rulemaking does not change the requirement in § 541.601(b)(1) that highly compensated employees must receive at least the standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. While nondiscretionary bonuses and incentive payments (including commissions) may be counted toward the HCE total annual compensation requirement, the HCE test does not allow employers to credit these types of payments toward the standard salary requirement. The Department continues to believe that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary portion of the HCE test is not appropriate because employers are already permitted to fulfill more than three quarters of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation (paid at least annually). Thus, when conducting the HCE analysis, employers must remain mindful that HCEs must receive the full standard salary amount each pay period on a salary or fee basis.

Finally, nothing adopted in this final rule alters the Department's longstanding position that employers may pay their exempt EAP employees additional compensation of any form beyond the minimum amount needed to satisfy the salary basis and salary level tests. *See* § 541.604(a). Similarly, the Department emphasizes that nonexempt employees may continue to receive bonuses and incentive payments. Where nondiscretionary bonuses or incentive payments are made to nonexempt employees, the payments must be included in the regular rate when calculating overtime pay. The Department's regulations at §§ 778.208–.210 explain how to include nondiscretionary bonuses in the regular rate calculation.

D. Highly Compensated Employees

As noted in the NPRM, the Department's 2004 final rule created a new test under the EAP exemption, known as the highly compensated employee (HCE) test, based on the rationale that it is unnecessary to apply the standard duties test in its entirety to employees who earn at least a certain amount annually—an amount substantially higher than the annual equivalent of the weekly standard salary level—because such employees ''have almost invariably been found to meet all the other requirements of the regulations for exemption.'' [101] The HCE test combines a high compensation requirement with a less-stringent duties test.

To meet the HCE test, an employee must earn at least the amount specified in the regulation in total annual compensation and must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.[102] This test applies ''only to employees whose primary duty includes performing office or non-manual work.'' [103] Such an employee must receive at least the standard salary level each pay period on a salary or fee basis, while the remainder of the employee's total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.[104] An employee is permitted to make a final ''catch-up'' payment ''during the last pay period or within one month after the end of the 52-week period'' to bring an employee's compensation up to the required level.[105] If an employee works for less than a full year, either because the employee is newly hired after the beginning of the 52-week period or ends the employment before the end of this period, the employee may still qualify for exemption under the HCE test if the employee receives a pro rata portion of the required annual compensation, based upon the number of weeks of employment.[106]

The Department stated in the NPRM that it continues to believe that the HCE test is a useful alternative to the standard salary level and duties tests for highly compensated employees.[107] At the time this level was initially set in 2004 at $100,000, the Department concluded that ''white collar'' employees who earn above this threshold would nearly always satisfy any duties test.[108] The Department proposed updating the HCE threshold to ensure that it remains a meaningful and appropriate standard when paired with the more-lenient HCE duties test. Specifically, the Department proposed setting the HCE threshold at the 90th percentile of all full-time salaried workers nationally using 2017 CPS data, then inflated to January 2020, resulting

[100] FMI, IFA, and other employer representatives requested giving employers more than one pay period to make any necessary catch-up payments, pointing out that the HCE test permits employers to make catch-up payments within one month after the end of the 52-week period used for that test. *See* 29 CFR 541.601(b)(2). The Department declines this request because this new provision specifically affects the standard salary level requirement, not additional income received on top of that threshold by highly compensated employees.

[101] 69 FR 22174 (quoting Weiss Report at 22).

[102] § 541.601(a).

[103] § 541.601(d).

[104] § 541.601(b)(1). However, total annual compensation does not include board, lodging, and other facilities, or payments for medical insurance, life insurance, retirement plans, or other fringe benefits. *Id.*

[105] § 541.601(b)(2).

[106] § 541.601(b)(3).

[107] 84 FR 10913.

[108] *Id.* The Department concluded that ''in the rare instances when these employees do not meet all other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the Act.'' 69 FR 22174 (quoting Weiss Report at 22–23).

in a proposed HCE threshold of $147,414, of which $679 would have to be paid weekly on a salary or fee basis.[109]

The Department received fewer comments addressing the HCE proposal than on many other issues in the NPRM, and those who addressed the HCE proposal often did not provide detailed feedback. Nearly all the commenters on the HCE proposal were employer representatives, most of whom opposed the Department's proposal to increase the HCE compensation level to a level equal to the 90th percentile of all full-time salaried workers ($147,414). These commenters instead supported keeping the HCE level at $100,000, *see, e.g.,* HR Policy Association; National Association of Manufacturers; NRF, or increasing the HCE level but by a lower amount (resulting in a threshold between $100,000 and $147,414), *see, e.g.,* Chamber; National Lumber and Building Material Dealers Association; WFCA. For example, some commenters suggested lowering the percentile from 90 percent to 80 percent of full-time salaried employees nationwide. *See, e.g.,* Center for Workplace Compliance; WorldatWork. A few employer representatives noted that they did not object to the proposed HCE salary level. *See* ASTA; Credit Human Federal Credit Union. By and large, employee representatives did not specifically address the HCE proposal.[110]

Commenters who favored keeping the HCE threshold at $100,000 or increasing it by a lower amount expressed concern that the proposed level was so high as to put the HCE test for the EAP exemption out of reach for employers in lower-wage regions and industries. For example, the Chamber stated that such employers would not be able to access the HCE test ''on equal terms,'' because ''[w]hether an employee qualifies for exemption under the highly compensated test would depend more on where the employee works than how much the employer values the employee's duties.'' Some of these commenters suggested that the Department should calculate the HCE threshold using data from a lower-wage region of the country, such as the South Census Region or a subset thereof, which would result in a lower threshold than using a national data set. *See, e.g.,* Chamber; NRA. Others suggested that the Department should continue to use national data, but should lower the threshold by pegging the HCE threshold at the 80th percentile of full-time salaried workers, rather than the 90th percentile proposed in the NPRM. *See* Center for Workforce Opportunity; WorldatWork. WorldatWork asserted that this approach would ''result in a far more workable standard, given the fluctuation in weekly earnings in different parts of the country and in different industries'' and would still ''identify[ ] those individuals who should be eligible for a more relaxed duties test.''

Other commenters objected to the Department's proposed HCE threshold on the ground that it would require employers to reassess the exempt status of many employees using the standard duties test, rather than the simpler HCE test. The HR Policy Association and PPWO explained that ''[a] significant amount of administrative effort will be needed to determine that an employee who had been classified as exempt through application of the HCE test remains exempt under application of the standard duties test.'' The National Association of Manufacturers explained that this process ''is certain to be lengthy'' as ''employers will need to survey managers, conduct follow-up interviews, hold new budget discussions, and plan and implement changes to each individual employee's duties or status.''

The Department has considered the comments regarding the HCE test for exemption and decided to lower the percentile at which to set the HCE threshold from that proposed in the NPRM. The Department agrees with commenters that increasing the HCE threshold so dramatically would result in significant administrative burdens and compliance costs, including costs associated with reassessing the exempt status of many highly paid white collar workers under the standard duties test. Yet while employers would incur these burdens and costs, the vast majority of currently exempt HCE employees would remain exempt (under the standard test).[111] In short, the Department would be imposing significant administrative costs on employers for a limited effect. Additionally, the Department agrees with commenters that the proposed level was so high that it would have excluded employees who should be exempt under the provision, particularly those in lower-wage regions and industries. However, the Department disagrees with commenters who oppose any increase in the HCE threshold beyond the currently enforced level. The number of full-time salaried workers who earn above $100,000 per year has increased significantly.[112] The Department believes that some increase to the HCE threshold is necessary to ensure that the HCE threshold continues to provide a meaningful and appropriate complement to the more lenient HCE duties test.

Accordingly, the Department is setting the HCE total annual compensation level at the 80th percentile of full-time salaried workers nationally using pooled 2018/2019 CPS data.[113] This results in a level of $107,432, of which $684 must be paid weekly on a salary or fee basis.[114] The Department believes this threshold is sufficiently high to ensure that it provides a meaningful and appropriate complement to the more lenient HCE duties test, and that nearly all of the highly-paid white collar workers earning above this threshold ''would satisfy any duties test.'' Additionally, to be consistent with the methodology for setting the standard salary level, the Department now uses three-year pooled data to estimate the HCE compensation level. The Department further believes that this straightforward approach will lower administrative costs, as compared to the initial proposal, while still ensuring that nearly all of the highly paid white collar workers earning above this threshold ''would satisfy any duties test.'' [115]

E. Future Updates to the Earnings Thresholds

As the Department noted in the NPRM, even a well-calibrated salary

[109] 84 FR 10913–14. Consistent with the 2016 final rule, the Department's proposal did not permit employers to use nondiscretionary bonuses to satisfy the weekly standard salary level requirement for HCE workers. *Id.* at 10914 n.129. As previously stated, the Department believes that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary portion of the HCE test is not appropriate because employers are already permitted to fulfill the majority of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation (paid at least annually).

[110] At least one individual commenter supported the proposed increase in the HCE compensation level.

[111] In the economic analysis below in section VI.B.v, the Department estimated that, under the baseline scenario in which the HCE threshold remains at $100,000, approximately 9.3 million workers will pass both the standard and HCE tests and 343,000 will pass only the HCE test. Stated differently, of those workers who will earn at least $100,000, approximately 96.4 percent would pass the standard duties test.

[112] 84 FR 10913 n.123.

[113] In the NPRM, the Department used 2017 CPS data to set the HCE compensation level. *See id.* at 10913. To be consistent with the methodology for setting the standard salary level, in the final rule the Department is setting the HCE compensation level using pooled CPS data for July 2016 to June 2019, adjusted to reflect 2018/2019.

[114] The Department notes that no regional adjustment has been made to the HCE threshold in this final rule, just as this was not part of the determination of the HCE threshold in either the 2004 or 2016 final rules.

[115] 84 FR 10914 (internal citation omitted).

level that is fixed becomes obsolete as wages for nonexempt workers increase over time. Long lapses between rulemakings have resulted in EAP salary levels based on outdated salary data. Such levels are ill-equipped to help employers assess which employees are unlikely to meet the duties tests for the part 541 exemptions. As the Department noted in 2004, outdated regulations ''allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer;'' they can also lead increasing numbers of nonexempt employees to ''resort to lengthy court battles to receive their overtime pay.'' 69 FR 22212.

Throughout the years, various stakeholders have submitted comments asking the Department to establish a mechanism to update the thresholds automatically. The Department has twice declined such requests, once in 1970, when it concluded that ''such a proposal [would] require further study,'' 35 FR 884, and once in 2004, 69 FR 22171–72. However, in the 2016 final rule, the Department for the first time adopted a mechanism to automatically update the earnings thresholds every three years, applying the same methodology used to initially set each threshold in that rulemaking. 81 FR 32430. The district court's summary judgment decision invalidating the 2016 final rule stated that because the standard salary level established by the 2016 final rule was unlawful, the mechanism to automatically update that standard salary level was ''similarly . . . unlawful.'' [116]

In the NPRM, the Department expressed its intent to evaluate the part 541 earnings thresholds more frequently through rulemaking. 84 FR 10914–15. Specifically, the Department stated in the NPRM that it intended to propose updates to the standard salary level and HCE total compensation threshold on a quadrennial basis (*i.e.,* once every four years) through notice-and-comment rulemaking, and that each proposal would use the same methodology as the most recently published final rule. The Secretary, however, could forestall proposed updates if economic or other factors so indicated. The Department also described how it could revise the part 541 regulations if it were to codify this intention in a final rule. *Id.* at 10915 n.140.

Some commenters supported the Department's proposal to propose updates to the earnings thresholds every four years unless unwarranted due to economic or other factors. *See* National Association of Convenience Stores; National Association of Landscape Professionals; NGA; National Multifamily Housing Council and the National Apartment Association; SBA Advocacy. These commenters generally agreed that the Department's proposal would help the salary level keep pace with earnings growth, thus preventing dramatic increases after long gaps between updates. *See, e.g.,* Credit Union National Association; Joint Comment from Golf Industry Representatives. Many of these commenters specifically expressed support for the Department's proposal to use notice-and-comment rulemaking to set future salary thresholds; such as NAHB, which commented that ''[b]y continuing its current practice of engaging the regulated community . . . DOL will receive timely and important information as it moves forward with proposed updates in the future.'' Commenters who supported the Department's proposal generally characterized this reliance on notice-and-comment rulemaking as preferable to the 2016 final rule's automatic updating provision, *see, e.g.,* Job Creators Network; Joint Comment of 5 Senators, with some asserting that automatic updating, without notice-and-comment rulemaking, would be unlawful, *see, e.g.,* Joint Comment by International Public Management Association for Human Resources and others; SIGMA.

Other commenters did not support the Department's commitment to evaluate the thresholds regularly. Many commenters felt that there was no need to adhere to a fixed schedule, with some asserting that doing so could deprive the Department of flexibility to adapt to unanticipated circumstances. These commenters advocated for the Department to continue its practice of updating the salary whenever it deems such updates appropriate. *See, e.g.,* AGC; Argentum and American Seniors Housing Association; HR Policy Association; Independent Bakers Association. A few commenters questioned the Department's authority to bind itself to conducting regular evaluations of the salary level. *See* AHLA; PPWO. Others felt that the proposed updating framework could expose the Department to legal risk because parties might challenge a decision by the Department not to engage in the anticipated rulemaking. *See* Associated Builders and Contractors; FMI. Some commenters who opposed the updating proposal asserted that it was unnecessary since the Department can engage in rulemaking at any time. *See* Associated Builders and Contractors, FMI, NRA.

Other commenters, including employee representatives, took the opposite tack, requesting that the Department automatically update the salary thresholds. *See, e.g.,* Center for Popular Democracy; Demos; Oxfam America. Some of these commenters asserted that past experience, including the long gaps between the most recent updates, has demonstrated that in the absence of regular updates, the salary level becomes obsolete, and that an announced intent to propose updates does not sufficiently ensure that the levels will, in fact, be updated. *See, e.g.,* AARP; Joint Comment from 77 Members of Congress; Nichols Kaster. Many commenters who favored automatic updating specifically supported the updating provision that was included in the 2016 final rule. *See* AARP; NELA; NELP; NWLC; State AGs; The Leadership Conference on Civil and Human Rights. Some maintained that the lack of automatic updating would result in decreased earnings for workers, citing EPI's estimates that the gap in projected earnings transfers to workers between the 2016 final rule and the proposal would increase from $1.2 billion to $1.6 billion due to the lack of automatic updates. *See, e.g.,* EPI; NELP; UAW. NELP further stated that ''[i]ndexing would ensure predictability for workers and employers alike and eliminate the need for time-consuming federal regulations.''

A number of commenters generally supported regular updates to the earnings thresholds, but suggested a frequency other than every four years. For instance, ASTA suggested that a six-year gap ''would strike a better balance in recognizing [its] and [its] member employers' legitimate concerns . . . than the four-year interval included in the NPRM.'' The Pennsylvania Credit Union Association wrote in support of updating the thresholds no less frequently than every three years, while Representative Daniel Lipinski ''urge[d] the Department to review the [standard salary] threshold more frequently than once every four years.'' AFSCME supported annual updates.

In this final rule, the Department reaffirms its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking. The Department agrees with those commenters who stated that long periods without updates serve neither employee nor employer interests, since they diminish the usefulness of the salary level test and cause future increases to be larger and

[116] 275 F. Supp. 3d at 808.

more challenging for businesses to absorb. Regular updates, on the other hand, ensure that the salary level test is based on the best available data (and thus remains a meaningful, bright-line test), produce more predictable and incremental changes in the salary level, and therefore provide certainty to employers and promote government efficiency.

After reviewing the comments received on this issue, however, the Department declines to finalize its proposal to propose updates to the part 541 regulations quadrennially. The Department agrees with commenters who stated that this commitment could deprive the Department of flexibility to adapt to unanticipated circumstances, and believes that prevailing economic conditions, rather than fixed timelines, should drive future updates. While some commenters supported the Department's updating proposal, the reasons often underlying that support—*e.g.,* the benefits of notice-and-comment rulemaking and of salary levels that keep pace with earnings growth—are not necessarily tied to updates occurring on a predetermined schedule, and would be met by the Department updating the salary thresholds more regularly. In addition, that many commenters who supported regular updates nonetheless disagreed on the optimal updating frequency reaffirms the Department's approach, as does the fact that few, if any, commenters supported the Department codifying its intent to propose updates quadrennially.

The Department's intention to update the part 541 regulations more regularly using notice-and-comment rulemaking will also ensure ample opportunity for public input, and provide the Department with the flexibility to update the earnings thresholds in a manner that is tailored to wages and economic conditions at the time of the update. Because the Department believes that it is important to preserve the Department's flexibility to adapt to different types of circumstances, the Department declines the suggestions by employee representatives to adopt an automatic updating mechanism as in the 2016 final rule. Lastly, while the Department understands commenter concerns regarding the lengthy time periods between recent rulemakings, in this final rule the Department is reaffirming its commitment to better implement Congress's instruction to define and delimit the EAP exemptions ''from time to time'' [117] through regulations. Regular updates ensure that the salary level test continues to screen from exemption obviously nonexempt employees who are unlikely to be performing the duties of bona fide executive, administrative, or professional employees.

[117] 29 U.S.C. 213(a)(1).

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi). OMB has assigned control number 1235–0018 to the Fair Labor Standards Act (FLSA) information collections. OMB has assigned control number 1235–0021 to Employment Information Form collections, which the Department uses to obtain information from complainants regarding FLSA violations.

In accordance with the PRA, the Department solicited comments on the FLSA information collections and the Employment Information Form collections in the NPRM published March 22, 2019, *see* 84 FR 10900, as the NPRM was expected to impact these collections. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). On May 20, 2019, OMB issued a notice for each collection (1235–0018 and 1235–0021) that continued the previous approval of the FLSA information collections and the Employment Information Form collections under the existing terms of clearance. OMB asked the Department to resubmit the information collection request upon promulgation of the final rule and after considering public comments on the proposed rule.

Circumstances Necessitating Collection: The FLSA, 29 U.S.C. 201 *et seq.,* sets the federal minimum wage, overtime pay, recordkeeping, and youth employment standards of most general application. Section 11(c) of the FLSA requires all employers covered by the FLSA to make, keep, and preserve records of employees and of wages, hours, and other conditions and practices of employment. An FLSA covered employer must maintain the records for such period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. The Department has promulgated regulations at part 516 to establish the basic FLSA recordkeeping requirements, which are approved under OMB control number 1235–0018.

FLSA section 11(a) provides that the Secretary of Labor may investigate and gather data regarding the wages, hours, or other conditions and practices of employment in any industry subject to the FLSA, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters deemed necessary or appropriate to determine whether any person has violated any provision of the FLSA. 29 U.S.C. 211(a). The information collection approved under OMB control number 1235–0021 provides a method for the Wage and Hour Division of the U.S. Department of Labor to obtain information from complainants regarding alleged violations of the labor standards the agency administers and enforces. This final rule revises the existing information collections previously approved under OMB control number 1235–0018 (Records to be Kept by Employers—Fair Labor Standards Act) and OMB control number 1235–0021 (Employment Information Form).

This final rule does not impose new information collection requirements; rather, burdens under existing requirements are expected to increase as more employees receive minimum wage and overtime protections due to the proposed increase in the salary level requirement. More specifically, the changes adopted in this final rule may cause an increase in burden on the regulated community because employers will have additional employees to whom certain long-established recordkeeping requirements apply (*e.g.,* maintaining daily records of hours worked by employees who are not exempt from both the minimum wage and overtime provisions). Additionally, the changes adopted in this final rule may cause an initial increase in burden if more employees file complaints with WHD to collect back wages under the overtime pay requirements.

Public Comments: The Department sought public comments regarding the burdens imposed by information collections contained in the proposed rule. The Department received few comments relevant to the PRA. A few commenters stated that employers would need to maintain records of hours worked for more employees as a result of an increase to the salary level.

See, International Bancshares Corporation; Washington Nonprofits. A few individual commenters expressed concerns surrounding costs associated with additional recordkeeping. A CEO of a professional placement firm indicated that tracking of hours would produce increased human resources paperwork and technology costs. Smith Summerset commented that those employers who take advantage of the allowance for up to ten percent of nondiscretionary bonuses and incentive payments to meet the standard salary level will have to maintain records documenting the applicable annual periods and detailing earnings and all payments (including catch-up payments) for each affected worker, including records such employers were not previously required to maintain.

In response to these comments, the Department notes that most employers currently have both exempt and nonexempt workers and therefore have systems already in place for employers to track hours. The Department also notes that commenters did not offer alternatives for estimates or make suggestions regarding the methodology for calculating the PRA burdens. The actual recordkeeping requirements are not changing in the final rule. However, the pool of workers for whom employers will be required to make and maintain records has increased under the final rule, and as a result the burden hours have increased. Included in this PRA section are the regulatory familiarization costs for this final rule. We note, however, that this is a duplication of the regulatory familiarization costs contained in the economic impact analysis, *see* section VI.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted the identified information collection contained in the proposed rule to OMB for review under the PRA under the Control Numbers 1235–0018 and 1235–0021. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised FLSA information collections to OMB for approval, and intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.Reginfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Total annual burden estimates, which reflect both the existing and new responses for the recordkeeping and complaint process information collections, are summarized as follows:

Type of Review: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Records to be Kept by Employers—Fair Labor Standards Act.

OMB Control Number: 1235–0018.

Affected Public: Private sector businesses or other for-profits, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Estimated Number of Respondents: 5,621,961 (2,616,667 by this rulemaking).

Estimated Number of Responses: 46,959,856 (2,616,667 added by this rulemaking).

Estimated Burden Hours: 3,625,986 hours (2,616,667 added by this rulemaking).

Estimated Time per Response: Various (unaffected by this rulemaking).

Frequency: Various (unaffected by this rulemaking).

Other Burden Cost: 0.

Title: Employment Information Form.

OMB Control Number: 1235–0021.

Affected Public: Businesses or other for-profit, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Total Respondents: 36,278 (651 added by this rulemaking).

Estimated Number of Responses: 36,278 (651 added by this rulemaking).

Estimated Burden Hours: 12,155 (217 hours added by this rulemaking).

Estimated Time per Response: 20 minutes (unaffected by this rulemaking).

Frequency: Once.

Other Burden Cost: 0.

VI. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of a regulation and to adopt a regulation only upon a reasoned determination that the regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether a regulatory action is a ''significant regulatory action,'' which includes an economically significant action that has an annual effect of $100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this final rule is economically significant.

When the Department uses a perpetual time horizon to allow for cost comparisons under Executive Order 13771,[118] the annualized cost savings of the final rule is $534.8 million with 7 percent discounting. This final rule is accordingly expected to be an Executive Order 13771 deregulatory action.

A. Introduction

i. Background

The FLSA requires covered employers to: (1) Pay employees who are covered and not exempt from the Act's requirements not less than the federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of their employees and of the wages, hours, and other conditions and practices of employment.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity and to outside sales employees, as those terms are ''defined and delimited'' by the Department.[119] The Department's regulations implementing these ''white collar'' exemptions are codified at 29 CFR part 541.

In 2004, the Department determined that two earnings level tests should be used to help employers distinguish nonexempt employees from exempt employees: The standard salary test, which it set at $455 a week, and the highly compensated employee (HCE) total-compensation test, which it set at $100,000 per year (see section II.C for further discussion). In 2016, the Department published a final rule setting the standard salary level at $913 per week and the HCE annual compensation level at $134,004. As previously discussed, the U.S. District Court for Eastern District of Texas declared the 2016 final rule invalid.

ii. Need for Rulemaking

The Department has updated the salary level test many times since its implementation in 1938. Table 1 presents the weekly salary levels

[118] 82 FR 9339 (Feb. 3, 2017).

[119] 29 U.S.C. 213(a)(1).

associated with the EAP exemptions since 1938, organized by exemption and long/short/standard duties tests.[120] In the 37 years between 1938 and 1975, the Department increased salary test levels approximately every five to nine years. In subsequent years, the Department revised the levels less frequently, and it is currently enforcing the levels set in 2004.[121]

TABLE 1—HISTORICAL SALARY LEVELS FOR THE EAP EXEMPTIONS

Date enacted	Long test			Short test (all)
	Executive	Administrative	Professional	
1938	$30	$30	.....	.....
1940	30	50	$50	.....
1949	55	75	75	$100
1958	80	95	95	125
1963	100	100	115	150
1970	125	125	140	200
1975	155	155	170	250
Standard test				
2004	$455			

To restore the value of the standard salary level as a line of demarcation between those workers for whom Congress clearly intended to provide minimum wage and overtime protections and other workers who may be bona fide EAPs, and to maintain the salary level's continued validity, the Department is updating the standard salary level by applying the 2004 methodology to current Current Population Survey (CPS) data.[122] Using pooled CPS Merged Outgoing Rotation Group (MORG) [123] data to represent the July 2018 through June 2019 period (hereafter referred to as 2019), the salary level of $684 ($35,568 annually) set in this final rule corresponds to the 20th percentile of earnings for full-time salaried workers in the South Census Region and/or in the retail industry.[124] [125] Similarly, the Department used the pooled 2018/19 CPS MORG data to set the updated HCE total annual compensation requirement at $107,432, which is the earnings for the 80th percentile of all full-time salaried workers nationally.

iii. Summary of Affected Workers, Costs, Benefits, and Transfers

The Department estimated the number of affected workers and quantified costs and transfer payments associated with this final rule, using the currently-enforced 2004 salary level as the baseline. To produce these estimates, the Department used pooled CPS MORG data. *See* section VI.B.ii. Most critically, the Department estimates that 1.2 million workers who would otherwise be exempt under the currently-enforced standard salary level of $455 per week will either become eligible for overtime or have their salary increased to at least $684 per week, and that 4.1 million employees paid between $455 and $684 per week who fail the standard duties test (*i.e.,* that are and will remain nonexempt) will have their overtime eligibility made clearer because their salary will fall below the specified threshold (Table 2).[126] Additionally, an estimated 101,800 workers will be affected by the increase in the HCE compensation test from $100,000 per year to $107,432 per year using the pooled 2018/19 CPS MORG data. By Year 10, the Department estimates that 723,000 workers will be affected by the change in the standard salary level test and 154,000 workers will be affected by the change in the HCE total annual compensation test, compared to a baseline assuming the currently-enforced earnings thresholds (*i.e.,* $455 per week and $100,000 per year) remain unchanged.[127]

This analysis quantifies three direct costs to employers: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs (*see* section VI.D.iii for further discussion on costs). The costs presented here are the combined costs for both the change in the standard salary level test and the HCE total annual compensation level (these will be disaggregated in section VI.D.iii). Total annualized direct employer costs over the first 10 years

[120] From 1949 until 2004 the regulations contained two different tests for exemption—a long test for employees paid a lower salary that included a more rigorous examination of employees' duties, and a short test for employees paid at a higher salary level that included a more flexible duties test. The standard duties test is used in conjunction with the standard salary level test, as set in 2004 and applied to date, to determine eligibility for the EAP exemptions. It replaced the short and long tests in effect from 1949 to 2004.

[121] In 2016, the Department issued a final rule revising the EAP salary levels; however, on August 31, 2017, the U.S. District Court for Eastern District of Texas held that the 2016 final rule's standard salary level exceeded the Department's authority and was therefore invalid. *See Nevada* v. *U.S. Dep't of Labor,* 275 F. Supp. 3d 795 (E.D. Tex. 2017). Until the Department issues a new final rule, it is enforcing the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level set in the 2004 final rule.

[122] The Department also notes that the terms *employee* and *worker* are used interchangeably throughout this analysis.

[123] The Merged Outgoing Rotation Group is a supplement to the CPS and is conducted on approximately one-fourth of the CPS sample monthly to obtain information on weekly hours worked and earnings.

[124] Excluding workers who are not subject to the FLSA, not subject to the salary level test, or in agriculture or transportation.

[125] As previously explained, in the 2004 final rule, the Department looked to the 20th percentile of full-time salaried workers in the South and in the retail industry nationally to validate the standard salary level set in the final rule. In this final rule, the Department set the standard salary level at the 20th percentile of the combined subpopulations of full-time salaried employees in the South and full-time salaried employees in the retail industry nationwide. Accordingly, the use of ''and/or'' when describing the salary level methodology in this final rule reflects that this data set includes full-time salaried workers who work: (1) In the South but not in the retail industry; (2) in the retail industry but not in the South; and (3) in the south in the retail industry.

[126] Here and elsewhere in this analysis, numbers are reported at varying levels of aggregation, and are generally rounded to a single decimal point. However, calculations are performed using exact numbers. Therefore, some numbers may not match the reported totals or the calculations shown due to rounding of components.

[127] In later years, earnings growth will cause some workers to no longer be affected because their earnings will exceed the new salary threshold. Additionally, some workers will become newly affected because their earnings will exceed $455 per week, and in the absence of this final rule would have lost their overtime protections. To estimate the total number of affected workers over time, the Department accounts for both of these effects.

were estimated to be $173.3 million, assuming a 7 percent discount rate (Table 2).[128]

In addition to the costs described above, this rule will also transfer income from employers to employees in the form of wages. The Department estimated annualized transfers will be $298.8 million. The majority of these transfers will be attributable to the FLSA's overtime provision; a smaller share will be attributable to the FLSA's minimum wage requirement. Transfers also include salary increases for some affected EAP workers [129] to preserve their exempt status. Employers may incur additional costs, such as hiring new workers. These other potential costs are discussed in section VI.D.iii. Potential benefits of this rule could not be quantified due to data limitations, requiring the Department to discuss such benefits qualitatively. *See* § VI.D.v.

TABLE 2—SUMMARY OF REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

[Millions in 2019$]

Impact	Year 1	Future years [a]		Annualized value	
		Year 2	Year 10	3% real discount rate	7% real discount rate
Affected Workers (1,000s)					
Standard	1,156	1,069	723		
HCE	101.8	114	154		
Total	1,257	1,183	877		
Costs and Transfers (Millions in 2019$) [b]					
Direct employer costs	$543.0	$134.3	$99.1	$164.0	$173.3
Transfersthnsp;[c]	396.4	307.7	247.4	295.0	298.8

[a] These cost and transfer figures represent a range over the nine-year span.
[b] Costs and transfers for affected workers passing the standard and HCE tests are combined.
[c] This is the net transfer from employers to workers. There may also be transfers of hours and income from some workers to others.

B. Methodology To Determine the Number of Potentially Affected EAP Workers

i. Overview

This section explains the methodology used to estimate the number of workers who are subject to the part 541 regulations and the number of potentially affected EAP workers. In this final rule, as in the 2004 final rule, the Department estimated the number of EAP exempt workers because there is no data source that identifies workers as EAP exempt. Employers are not required to report EAP exempt workers to any central agency or as part of any employee or establishment survey.[130] The methodology described here is largely based on the approach the Department used in the 2004 and 2016 final rules.[131]

ii. Data

The estimates of EAP exempt workers were based on data drawn from the CPS MORG, which is sponsored jointly by the U.S. Census Bureau and BLS. The CPS is a large, nationally representative sample of the labor force. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey.[132] This supplement contains the detailed information on earnings necessary to estimate a worker's exemption status. Responses are based on the reference week, which is always the week that includes the 12th day of the month.

Although the CPS MORG is a large scale survey, administered to approximately 15,000 households monthly representing the entire nation, it is still possible to have relatively few observations when looking at subsets of employees, such as exempt workers in a specific occupation employed in a specific industry, or workers in a specific geographic location. To increase the sample size, the Department pooled together three years of CPS MORG data (July 2016 through June 2019) to represent the single year from July 2018 through June 2019. Earnings for each observation from the last six months of 2016, 2017, and the first six months of 2018 were inflated to 2018/19 dollars using the Consumer Price Index for All Urban Consumers (CPI–U). For ease of presentation and because inflation is low enough for this to be trivial, these will be referred to as 2019 dollars throughout this analysis. The weight of each observation was adjusted so that the total number of potentially affected EAP workers in the pooled sample remained the same as the number for the July 2018 through June 2019 CPS MORG. Thus, the pooled CPS MORG sample uses roughly three times as many observations to represent the same total number of workers in 2018/19. The additional observations allow the Department to better characterize certain attributes of the potentially affected labor force. This pooled dataset

[128] Hereafter, unless otherwise specified, annualized values will be presented using the 7 percent real discount rate.

[129] The term affected EAP workers refers to the population of potentially affected EAP workers who either pass the standard duties test and earn at least $455 but less than the new salary level of $684, or pass only the HCE duties test and earn at least $100,000 but less than the new HCE compensation level of $107,432. This was estimated to be 1.3 million workers.

[130] In 2015, RAND released results from a survey conducted to estimate EAP exempt workers. However, this survey does not have the variables or sample size necessary for the Department to base the RIA on this analysis. Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

[131] *See* 69 FR 22196–209; 81 FR 32453–60. Where the proposal follows the methodology used to determine affected workers in both the 2004 and 2016 final rules citations to both rules are not always included.

[132] This is the outgoing rotation group (ORG); however, this analysis uses the data merged over twelve months and thus will be referred to as MORG.

is used to estimate all impacts of the final rulemaking.[133]

Some assumptions were necessary to use these data as the basis for the analysis. For example, the Department eliminated workers who reported that their weekly hours vary and provided no additional information on hours worked. This was done because the Department cannot estimate effects for these workers since it is unknown whether they work overtime and therefore unknown whether there would be any need to pay for overtime if their status changed from exempt to nonexempt. The Department reweighted the rest of the sample to account for this change (*i.e.,* to keep the same total employment estimates).[134] This adjustment assumes that the distribution of hours worked by workers whose hours do not vary is representative of hours worked by workers whose hours do vary. The Department believes that without more information this is an appropriate assumption.[135]

[133] A few commenters commented on the Department's use of CPS data to calculate the salary level. EPI and NELP asked the Department to set the salary thresholds using a data series that BLS publishes on a regular basis, while the Chamber asked the Department to publish the data sets used to set the salary thresholds. The Department calculated the standard salary level and the HCE total annual compensation level using publicly-available CPS microdata (compiled by the U.S. Census Bureau). The Department has frequently set the salary level using its own enforcement data and/or data that is not publicly available, and believes that using publicly available CPS data to calculate the salary level in this final rule is appropriate.

[134] The Department also reweighted for workers reporting zero earnings. In addition, the Department eliminated, without reweighting, workers who both reported usually working zero hours and working zero hours in the past week.

[135] This is justifiable because demographic and employment characteristics are similar across these two populations (*e.g.,* age, gender, education, distribution across industries, share paid nonhourly). The share of all workers who stated that their hours vary (but provided no additional information) is 5.0 percent. To the extent these excluded workers are exempt, if they tend to work more overtime than other workers, then transfer payments and costs may be underestimated. Conversely, if they work fewer overtime hours, then transfer payments and costs may be overestimated.

iii. Number of Workers Covered by the Department's Part 541 Regulations

To estimate the number of workers covered by the FLSA and subject to the Department's part 541 regulations, the Department excluded workers who are not subject to its regulations or whom the FLSA does not cover. This may happen, for instance, if a worker is not an employee under the FLSA. Excluded workers include military personnel, unpaid volunteers, self-employed individuals, clergy and other religious workers, and federal employees (with a few exceptions described below).

Many of these workers are excluded from the CPS MORG, including members of the military on active duty and unpaid volunteers. Self-employed and unpaid workers are included in the CPS MORG, but have no earnings data reported and thus are excluded from the analysis. The analysis excluded religious workers identified by their occupation codes: 'clergy' (Census occupational code 2040), 'directors, religious activities and education' (2050), and 'religious workers, all other' (2060). Most employees of the federal government are covered by the FLSA but not the Department's part 541 regulations because the Office of Personnel Management (OPM) regulates their entitlement to minimum wage and overtime pay.[136] Exceptions exist for U.S. Postal Service employees, Tennessee Valley Authority employees, and Library of Congress employees.[137] The analysis identified and included these covered federal workers using occupation and/or industry codes.[138] The FLSA also does not cover employees of firms that have annual revenue of less than $500,000 and who are not engaged in interstate commerce. The Department does not exclude them from the analysis, however, because there is no data set that would adequately inform an estimate of the size of this worker population, although the Department believes it is a small percentage of workers. The 2004 final rule analysis similarly did not adjust for these workers.

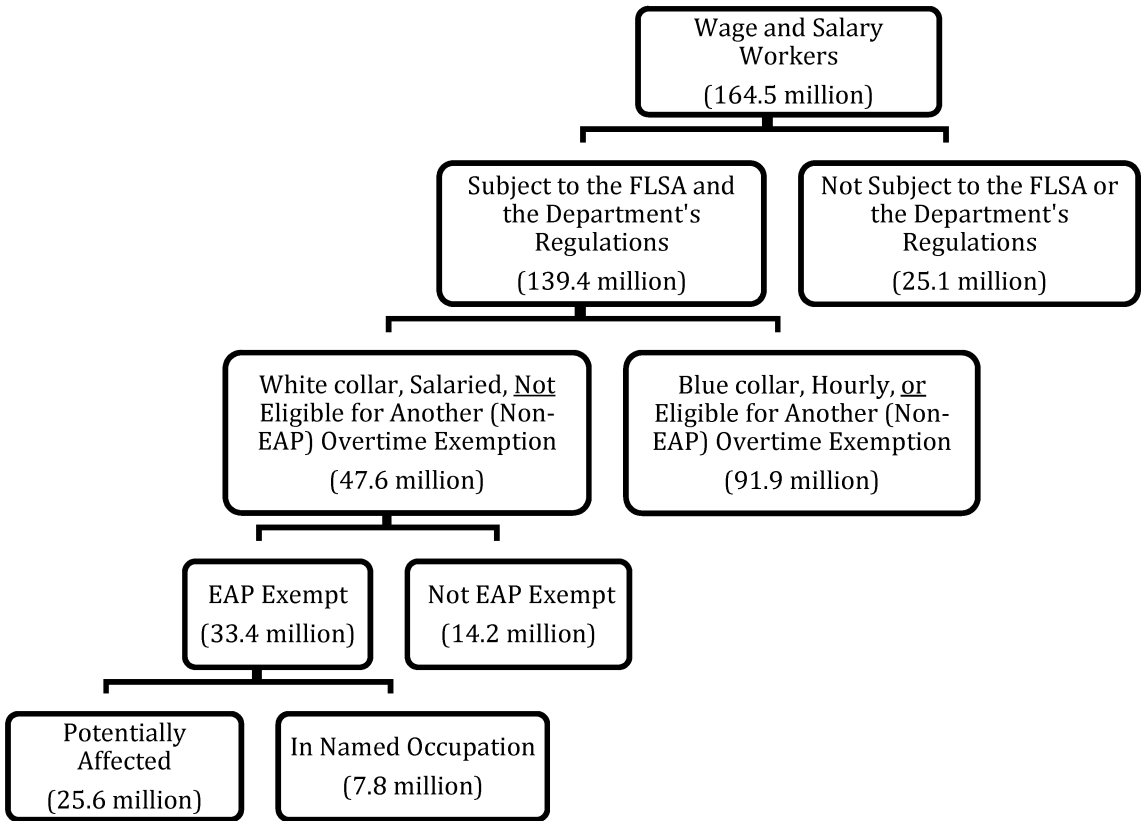
The Department estimated that in Year 1 there will be 164.5 million wage and salary workers in the United States (Figure 1). Of these, 139.4 million will be covered by the FLSA and subject to the Department's regulations (84.7 percent). The remaining 25.1 million workers will be excluded from FLSA coverage for the reasons described above. Figure 1 illustrates how the Department analyzed the U.S. civilian workforce through successive stages to estimate the number of potentially affected EAP workers.

[136] *See* 29 U.S.C. 204(f). Federal workers are identified in the CPS MORG with the class of worker variable PEIO1COW.

[137] *See id.*

[138] Postal Service employees were identified with the Census industry classification for postal service (6370). Tennessee Valley Authority employees were identified as federal workers employed in the electric power generation, transmission, and distribution industry (570) and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, or Virginia. Library of Congress employees were identified as federal workers under Census industry 'libraries and archives' (6770) and residing in Washington DC

Figure 1: Flow Chart of FLSA Exemptions and Estimated Number of Potentially Affected Workers



iv. Number of Workers in the Analysis

After limiting the analysis to workers covered by the FLSA and subject to the Department's part 541 regulations, several other groups of workers were identified and excluded from further analysis since this final rule is unlikely to affect them. These include blue collar workers, workers paid on an hourly basis, and workers who are exempt under certain other (non-EAP) exemptions.

The Department excluded a total of 91.9 million workers from the analysis for one or more of these reasons, which often overlapped (*e.g.,* many blue collar workers are also paid hourly). The Department estimated that in 2018/19 there were 50.0 million blue collar workers. These workers were identified in the CPS MORG data following the methodology from the U.S. Government Accountability Office's (GAO) 1999 white collar exemptions report [139] and the Department's 2004 regulatory impact analysis. *See* 69 FR 22240–44. Supervisors in traditionally blue collar industries were classified as white collar workers because their duties are generally managerial or administrative, and therefore they were not excluded as blue collar workers. Using the CPS variable indicating a respondent's hourly wage status, the Department determined that 81.9 million workers were paid on an hourly basis in 2018/19.[140]

Also excluded from further analysis were workers who were exempt under certain other (non-EAP) exemptions. Although some of these workers may also be exempt under the EAP exemptions, they would independently remain exempt from the minimum wage and/or overtime pay provisions based on the non-EAP exemptions. The Department excluded an estimated 5.0 million workers, including some agricultural and transportation workers, from further analysis because they would be subject to another (non-EAP) overtime exemption. *See* Appendix A: Methodology for Estimating Exemption Status, contained in the rulemaking docket, for details on how this population was identified.

Agricultural and transportation workers are two of the largest groups of workers excluded from the population of potentially affected EAP workers in the current analysis, and with some exceptions, they were similarly excluded in 2004. The 2004 final rule excluded all workers in agricultural industries from the analysis,[141] while the current analysis, similar to the 2016 analysis, only excludes agricultural workers from specified occupational-industry combinations since not all workers in agricultural industries qualify for the agricultural overtime pay exemptions. The exclusion of transportation workers matched the method for the 2004 final rule. Transportation workers were defined as those who are subject to the following FLSA exemptions: Section 13(b)(1), section 13(b)(2), section 13(b)(3), section 13(b)(6), or section 13(b)(10). The Department excluded 1.1 million agricultural workers and 2.1 million transportation workers from the analysis. In addition, the Department excluded another 1.9 million workers who fall within one or more other FLSA minimum wage and overtime

[139] GAO/HEHS. (1999). Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place. GAO/HEHS–99–164, 40–41, *https://www.gao.gov/assets/230/228036.pdf.*

[140] CPS MORG variable PEERNHRY.

[141] 69 FR 22197.

exemptions. The criteria for determining exempt status for agricultural and transportation workers are detailed in Appendix A. However, of these 1.9 million workers, all but 20,000 are either blue collar or hourly, and thus the effect of excluding these workers is negligible.

v. Number of Potentially Affected EAP Workers

After excluding workers not subject to the Department's FLSA regulations and workers who are unlikely to be affected by this final rule (*i.e.,* blue collar workers, workers paid hourly, workers who are subject to another (non-EAP) overtime exemption), the Department estimated there will be 47.6 million salaried white collar workers for whom employers might claim either the standard EAP exemption or the HCE exemption. To be exempt under the standard EAP test, the employee must:

- Be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); [142]
- earn at least a designated salary amount (the 2004 final rule set the salary level at $455 per week (the standard salary level test)); and
- primarily perform exempt work, as defined by the regulations (the standard duties test).

The 2004 final rule's HCE test allows certain highly-paid employees to qualify for exemption as long as they customarily and regularly perform one or more exempt job duties. The HCE annual compensation level set in the 2004 final rule was $100,000, including at least $455 per week paid on a salary or fee basis. The CPS annual earnings variable is topcoded at $150,000 (*i.e.,* workers earning above $2,884.61 ($150,000/52 weeks) per week are reported as earning $2,884.61 per week). The Department imputed earnings for topcoded workers in the CPS data to adequately estimate the cost savings of this rule in comparison to the 2016 final rule under E.O. 13771.[143] [144]

Salary Basis

The Department included only nonhourly workers in the analysis based on CPS data.[145] For this rulemaking, the Department considered data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department notes that it made the same assumption regarding nonhourly workers in the 2004 final rule.[146]

The CPS population of ''nonhourly'' workers includes workers who are paid on a piece-rate, a day-rate, or largely on bonuses or commissions. Data in the CPS are not available to distinguish between salaried workers and these other nonhourly workers. However, the Panel Study of Income Dynamics (PSID) provides additional information on how nonhourly workers are paid. In the PSID, respondents are asked how they are paid on their main job and are also asked for more detail if their response is other than salaried or hourly. Possible responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. The Department analyzed the PSID data and found that relatively few nonhourly workers were paid by methods other than salaried. The Department is not aware of any statistically robust source that more closely reflects salary as defined in its regulations.

Salary Level

Weekly earnings are available in the CPS MORG data, which allowed the Department to estimate how many nonhourly workers pass the salary level tests.[147] However, the CPS earnings variable does not perfectly reflect the Department's definition of earnings. First, the CPS includes all nondiscretionary bonuses and commissions, which may be used to satisfy up to 10 percent of the new standard salary level under this final rule. This discrepancy between the earnings variable used and the FLSA definition of salary may cause a slight overestimation of the number of workers estimated to meet the standard salary level test. Second, CPS earnings data includes overtime pay, commissions, and tips. The Department notes that employers may factor into an employee's salary a premium for expected overtime hours worked. To the extent they do so, that premium would be reflected in the data. Similarly, the Department believes tips will be an uncommon form of payment for these workers since tips are uncommon for white collar workers. The Department also believes that commissions make up a relatively small share of earnings among nonhourly employees.[148]

Duties

The CPS MORG data do not capture information about job duties; therefore, the Department used occupational titles, combined with probability estimates of passing the duties test by occupational title, to estimate the number of workers passing the duties test. This methodology is very similar to the methodology used in the 2004 rulemaking, and the Department believes it is the best available methodology. In 2004, to determine whether a worker met the duties test, the Department used an analysis performed by WHD in 1998 in response to a request from the GAO. Because WHD enforces the FLSA's overtime requirements and regularly assesses workers' exempt status, WHD was uniquely qualified to provide the analysis. The analysis was used in both the GAO's 1999 white collar exemptions report [149] and the Department's 2004 regulatory impact analysis.[150]

WHD examined 499 occupational codes, excluding nine that were not relevant to the analysis for various reasons (one code was assigned to unemployed persons whose last job was in the Armed Forces, some codes were assigned to workers who are not FLSA covered, others had no observations). Of the remaining occupational codes, WHD

[142] Some computer employees may be exempt even if they are not paid on a salary basis. Hourly computer employees who earn at least $27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA. These workers are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this final rule (these workers were similarly excluded in the 2004 analysis). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions, and are included in the analysis since they will be impacted by this final rule. Additionally, administrative and professional employees may be paid on a fee basis, as opposed to a salary basis. § 541.605(a). Although the CPS MORG does not identify workers paid on a fee basis, they are considered nonhourly workers in the CPS and consequently are correctly classified as ''salaried'' (as was done in the 2004 final rule).

[143] We used the standard Pareto distribution approach to impute earnings above the topcoded value as described in Armour, P. and Burkhauser, R (2013). Using the Pareto Distribution to Improve Estimates of Topcoded Earnings. Center for Economic Studies (CES).

[144] As a result of the 2016 final rule's automatic updating provision, the HCE compensation level in Year 7 following the 2016 final rule would exceed $150,000. Imputing earnings improves the impact estimates and consequently the estimates of cost savings of this final rule.

[145] The CPS variable PEERNHRY identifies workers as either hourly or nonhourly.

[146] *See* 69 FR 22197.

[147] The CPS MORG variable PRERNWA, which measures weekly earnings, is used to identify weekly salary.

[148] In the PSID, relatively few nonhourly workers were paid by commission. Additionally, according to the BLS ECI, about 5 percent of the private workforce is incentive-paid workers (incentive pay is defined as payment that relates earnings to actual individual or group production). *See* William J. Wiatrowski, Bureau of Labor Statistics, The Effect of Incentive Pay on Rates of Change in Wages and Salaries (November 24, 2009), *http://www.bls.gov/opub/mlr/cwc/the-effect-of-incentive-pay-on-rates-of-change-in-wages-and-salaries.pdf,* at 1.

[149] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, *supra note* 139, at 40–41.

[150] *See* 69 FR 22198.

determined that 251 occupational codes likely included EAP exempt workers and assigned one of four probability codes reflecting the estimated likelihood, expressed as ranges, that a worker in a specific occupation would perform duties required to meet the EAP duties tests. The Department supplemented this analysis in the 2004 final rule regulatory impact analysis when the HCE exemption was introduced. The Department modified the four probability codes for highly paid workers based upon its analysis of the provisions of the highly compensated test relative to the standard duties test (Table 3). To illustrate, WHD assigned exempt probability code 4 to the occupation ''first-line supervisors/managers of construction trades and extraction workers'' (Census code 6200), which indicates that a worker in this occupation has a 0 to 10 percent likelihood of meeting the standard EAP duties test. However, if that worker earned at least $100,000 annually, he or she was assigned a 15 percent probability of passing the more lenient HCE duties test.[151]

The occupations identified in GAO's 1999 report and used by the Department in the 2004 final rule map to an earlier occupational classification scheme (the 1990 Census occupational codes). For this final rule, the Department used occupational crosswalks to map the previous occupational codes to the 2002 Census occupational codes and then to the 2010 Census occupational codes, which are used in the CPS MORG 2016 through 2019 data.[152] If a new occupation comprises more than one previous occupation, then the new occupation's probability code is the weighted average of the previous occupations' probability codes, rounded to the closest probability code.

TABLE 3—PROBABILITY WORKER IN CATEGORY PASSES THE DUTIES TEST

Probability code	The standard EAP test		The HCE test	
	Lower bound %	Upper bound %	Lower bound %	Upper bound %
0	0	0	0	0
1	90	100	100	100
2	50	90	94	96
3	10	50	58.4	60
4	0	10	15	15

These codes provide information on the likelihood that an employee in a category met the duties test but they do not identify the workers in the CPS MORG who actually passed the test. Therefore, the Department designated workers as exempt or nonexempt based on the probabilities. For example, for every ten public relations managers, between five and nine were estimated to pass the standard duties test (based on probability category 2). However, it is unknown which of these ten workers are exempt; therefore, the Department must determine the status for these workers. Exemption status could be randomly assigned with equal probability, but this would ignore the earnings of the worker as a factor in determining the probability of exemption. The probability of qualifying for the exemption increases with earnings because higher paid workers are more likely to perform the required duties, an assumption to which both the Department in the 2004 final rule and the GAO in its 1999 Report adhered.[153]

The Department estimated the probability of exemption for each worker as a function of both earnings and the occupation's exempt probability category using a gamma distribution.[154] Based on these revised probabilities, each worker was assigned exempt or nonexempt status based on a random draw from a binomial distribution using the worker's revised probability as the probability of success. Thus, if this method is applied to ten workers who each have a 60 percent probability of being exempt, six workers would be expected to be designated as exempt.[155] However, which particular workers are designated as exempt may vary with each set of ten random draws. For details, see Appendix A (in the rulemaking docket).

The Department acknowledges that the probability codes used to determine the share of workers in an occupation who are EAP exempt are 21 years old. However, the Department believes the probability codes continue to estimate exemption status accurately given the fact that the standard duties test is not substantively different from the former short duties tests reflected in the codes. For the 2016 rulemaking, the Department looked at O*NET[156] to determine the extent to which the 1998 probability codes reflected current occupational duties. The Department's review of O*NET verified the continued appropriateness of the 1998 probability codes.[157]

Potentially Affected Exempt EAP Workers

The Department estimated that of the 47.6 million salaried white collar workers considered in the analysis, 33.4 million qualified for the EAP exemption under the currently-enforced regulations. Some of these workers were

[151] The HCE duties test is used in conjunction with the HCE total annual compensation requirement, as set in 2004 and applied to date, to determine eligibility for the HCE exemption. It is much less stringent than the standard and short duties tests to reflect that very highly paid employees are much more likely to be properly classified as exempt.

[152] References to occupational codes in this analysis refer to the 2002 Census occupational codes. Crosswalks and methodology available at: *https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html.*

[153] For the standard exemption, the relationship between earnings and exemption status is not linear and is better represented with a gamma distribution. For the HCE exemption, the relationship between earnings and exemption can be well represented with a linear function because the relationship is linear at high salary levels (as determined by the Department in the 2004 final rule). Therefore, the gamma model and the linear model would produce similar results. *See* 69 FR 22204–08, 22215–16.

[154] The gamma distribution was chosen because, during the 2004 revision, this non-linear distribution best fit the data compared to the other non-linear distributions considered (*i.e.,* normal and lognormal). A gamma distribution is a general type of statistical distribution that is based on two parameters that control the scale (alpha) and shape (in this context, called the rate parameter, beta).

[155] A binominal distribution is frequently used for a dichotomous variable where there are two possible outcomes; for example, whether one owns a home (outcome of 1) or does not own a home (outcome of 0). Taking a random draw from a binomial distribution results in either a zero or a one based on a probability of ''success'' (outcome of 1). This methodology assigns exempt status to the appropriate share of workers without biasing the results with manual assignment.

[156] The O*NET database contains hundreds of standardized and occupation-specific descriptions. *See http://www.onetcenter.org.*

[157] 81 FR 32459.

excluded from further analysis because the final rule will not affect them. This excluded group contains workers in named occupations who are not required to pass the salary requirements (although they must still pass a duties test) and therefore whose exemption status does not depend on their earnings. These occupations include physicians (identified with Census occupation codes 3010, 3040, 3060, 3120), lawyers (2100), teachers (occupations 2200–2550 and industries 7860 or 7870), academic administrative personnel (school counselors (occupation 2000 and industries 7860 or 7870) and educational administrators (occupation 0230 and industries 7860 or 7870)), and outside sales workers (a subset of occupation 4950). Out of the 33.4 million workers who were EAP exempt, 7.8 million, or 23.4 percent, were expected to be in named occupations. Thus, changes in the standard salary level and HCE compensation tests will not affect these workers. The 25.6 million EAP exempt workers remaining in the analysis are referred to in this final rule as ''potentially affected.''

Based on analysis of the occupational codes and CPS earnings data (described above), the Department has concluded that in Year 1, in the baseline scenario in which the rule does not take effect, of the 25.6 million potentially affected EAP workers, approximately 16.0 million will pass only the standard EAP test, 9.3 million will pass both the standard and the HCE tests, and approximately 343,000 will pass only the HCE test.

C. Determining the Revised Salary and Compensation Levels

For the reasons discussed in section IV.A, the Department has decided to update the 2004 standard salary level by reapplying the 2004 methodology. Using pooled 2018/19 CPS MORG data, the 20th percentile of earnings for full-time salaried workers in the South Census region and/or in the retail industry nationally roughly corresponds to a standard salary level of $684. For the HCE compensation level, the Department used the 80th percentile of all full-time salaried workers nationwide, calculated using the 2018/19 CPS MORG. This results in an HCE annual compensation level of $107,432.

i. The Policy Methodologies Chosen

This final rule uses the same methodology used in 2004 for the standard salary level, setting it at the 20th percentile of full-time salaried workers in the South and/or in the retail industry nationally. After considering public comments pertaining to the HCE total annual compensation requirement, as discussed in section IV.D, the Department has set this threshold so as to be equivalent to the earnings of the 80th percentile of all full-time salaried workers nationally, as opposed to the 90th percentile as proposed in the NPRM. Additionally, to be consistent with the methodology for setting the standard salary level, the Department now uses three-year pooled data to estimate the HCE compensation level. Lastly, the Department has chosen not to project the earnings levels to January 2020 as proposed in the NPRM.

ii. Alternative Methods for Setting the Standard Salary Level

For this final rule, the Department also considered several alternatives for setting the standard salary level. Table 4 presents alternative standard salary levels calculated using pooled 2018/19 CPS data for each alternative approach considered.

- *Alternative 1:* No change (*i.e.,* keep the salary level at the currently-enforced level of $455 per week).
- *Alternative 2:* Maintain the average minimum wage protection in place since 2004 by using the weighted average of hours at minimum wage and overtime pay represented by the minimum salary level.
- *Alternative 3:* Use the 2004 method but exclude the relatively high-wage areas from the South Census Region (Washington, DC, Maryland, and Virginia).
- *Alternative 4:* Use the Kantor method to determine the long test salary level, and set the salary level at that level. The Kantor method calculates a long test salary level by selecting the 10th percentile of earnings of likely exempt workers.
- *Alternative 5:* Use the 2016 method (*i.e.,* the 40th percentile of earnings of nonhourly full-time workers in the South Census Region).

Section VI.D details the transfers, costs, and benefits of the new salary level and the above alternatives.

TABLE 4—STANDARD SALARY LEVEL AND ALTERNATIVES IN 2018/19

Alternative	Salary level (weekly/annually)	Total increase [a]	
		$	%
Alt. #1: No change	$455/$23,660	$0	0.0
Alt. #2: Maintain average minimum wage protection since 2004 [b]	502/26,082	47	10.3
Alt. #3: 2004 Method, South (excluding Washington D.C., MD & VA) or Retail [c]	673/34,996	218	47.9
Final rule: 2004 method [c]	684/35,568	229	50.3
Alt. #4: Kantor long test [d]	724/37,648	269	59.1
Alt. #5: 2016 Method [e]	976/50,752	521	114.5

[a] Change between salary level or alternative and the salary level set in 2004 ($455 per week).

[b] When the $455 weekly threshold was established in 2004, the federal minimum wage was $5.15, so the salary threshold equated to minimum wage and overtime pay at time and one-half for hours over 40 for an employee working no more than 72.2 hours. That amount fell with increases in the minimum wage and is now 55.2 hours. The weighted average across the 15 years since the overtime threshold was last changed is 59.5 hours, and a threshold that would provide 59.5 hours of $7.25 minimum wage and overtime pay would be $502.

[c] Full-time salaried workers with various industry/region exclusions (excludes workers not subject to the FLSA, not subject to the salary level test, and in some workers in agriculture or transportation). Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[d] 10th percentile of likely exempt workers. Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[e] 40th percentile earnings of nonhourly full-time workers in the South Census region, provided by BLS. The salary level reflects the first automatic update that would have taken place under the 2016 final rule.

iii. Alternative Methods for Setting the HCE Total Annual Compensation Level

As described above, the Department is updating the HCE compensation level using earnings for the 80th percentile of all full-time salaried workers nationally, $107,432 per year. The Department also evaluated the following alternative HCE compensation levels:

- *HCE alternative 1:* No change (*i.e.,* leave the HCE compensation level at the

currently-enforced level of $100,000 per year).

• *HCE alternative 2:* Use the methodology proposed in the NPRM (*i.e.,* use the 90th percentile earnings of full-time salaried workers nationally).[158]

Table 5 presents possible 2018/19 HCE levels as calculated using each alternative approach considered. Section VI.D details the transfers, costs, and benefits of the new HCE compensation level and the two alternatives.

TABLE 5—HCE COMPENSATION LEVELS AND ALTERNATIVES IN 2018/19

Alternative	Salary level (weekly/annually)	Total increase [a]	
		$	%
HCE alt. #1: No change	$1,923/$100,000	$0	0.0
Final rule: 80th percentile of full-time salaried workers [b]	2,066/107,432	7,432	7.4
HCE alt. #2: 90th percentile of full-time salaried workers [b]	2,807/145,964	45,964	46.0

[a] Change between updated/alternative compensation level and the compensation level set in 2004 ($100,000 annually).
[b] Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

The Department believes that HCE alternative 1 is inappropriate because some increase to the HCE threshold is necessary to ensure that the HCE threshold continues to appropriately complement the more lenient HCE duties test. However, as explained in section IV.D, the Department does not believe the significantly higher threshold equal to the 90th percentile of full-time salaried workers nationally is necessary. Further, setting the HCE threshold at such a high level will result in significant administrative burdens, including the costs associated with the need to reassess, under the standard duties test, the exempt status of highly paid white collar workers, many of whom would remain exempt under that test. Accordingly, the Department rejected the second alternative because it believes that the HCE threshold set in this final rule is sufficiently high to ensure that those who meet that threshold will almost invariably pass the standard duties test.

D. Effects of Revised Salary and Compensation Levels

i. Overview and Summary of Quantified Effects

The economic effects of increasing the EAP salary and compensation levels will depend on how employers respond. Employer response is expected to vary by the characteristics of the affected EAP workers. Transfers from employers to employees and between employees, and direct employer costs, depend on how employers respond to the final rule.

The Department has derived the standard salary level using the 2004 methodology, and has set the HCE compensation level at the 80th percentile of all full-time salaried workers nationwide. In both cases we used pooled 2018/19 CPS data to calculate the levels. Given that at the time this analysis was performed data was available through June 2019, the Department believes that using current data to estimate the economic effects of the rule taking effect in January 2020 is appropriate.

Table 6 presents the estimated number of affected workers, costs, and transfers associated with increasing the salary and compensation levels. The Department estimated that the direct employer costs of this final rule will total $543.0 million in the first year, with 10-year annualized direct costs of $164.0 million per year using a 3 percent real discount rate and $173.3 million per year using a 7 percent real rate.

In addition to these direct costs, this final rule will transfer income from employers to employees. Estimated Year 1 transfers will equal $396.4 million, with annualized transfers estimated at $295.0 million and $298.8 million per year using the 3-percent and 7-percent real discount rates, respectively. Potential employer costs due to reduced profits and additional hiring were not quantified but are discussed in section VI.D.iii.5.

TABLE 6—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE EARNINGS THRESHOLDS

Impact [a]	Year 1	Future years [b]		Annualized value	
		Year 2	Year 10	3% Real discount rate	7% Real discount rate
Affected Workers (1000s)					
Standard	1,156	1,069	723		
HCE	102	114	154		
Total	1,257	1,183	877		
Direct Employer Costs (Millions in 2019$)					
Regulatory familiarization	$340.4	$0.0	$0.0	$38.7	$45.3
Adjustment [c]	68.2	2.0	4.6	10.5	11.7
Managerial	134.4	132.3	94.5	114.8	116.3

[158] Because in the final rule the Department is using pooled CPS MORG data to set the HCE compensation level, it used the same data set to calculate this alternative compensation level. Thus, this method differs slightly from that proposed in the NPRM, which was calculated using the most recent year of data provided by BLS.

TABLE 6—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE EARNINGS THRESHOLDS—Continued

Impact [a]	Year 1	Future years [b]		Annualized value	
		Year 2	Year 10	3% Real discount rate	7% Real discount rate
Total direct costs [d]	543.0	134.3	99.1	164.0	173.3
Transfers from Employers to Workers (Millions in 2019) [e]					
Due to minimum wage	75.4	42.8	26.1	36.9	38.1
Due to overtime pay	321.0	264.9	221.3	258.1	260.6
Total transfers [d]	396.4	307.7	247.4	295.0	298.8

[a] Additional costs and benefits of the rule that could not be quantified or monetized are discussed in the text.
[b] These costs/transfers represent a range over the nine-year span.
[c] Adjustment costs occur in all years when there are newly affected workers.
[d] Components may not add to total due to rounding.
[e] This is the net transfer from employers to workers. There may also be transfers between workers.

ii. Affected EAP Workers

1. Overview

The Department estimated there are 25.6 million potentially affected EAP workers—that is, EAP workers who either (1) passed the salary basis test, the standard salary level test, and the standard duties test, or (2) passed the salary basis test, the standard salary level test, the HCE total compensation level test, and the HCE duties test (but not the standard duties test). This number excluded workers in named occupations, who are not subject to the salary tests, or those who qualify for another (non-EAP) exemption.

Using the method described above, the Department estimated that the increase in the standard salary level from $455 per week to $684 per week will affect 1.2 million exempt workers in Year 1, while the increase in the HCE annual compensation level from $100,000 to $107,432 will impact 101,800 workers (Figure 2).[159] [160] In total, the Department expects that 1.3 million workers will be affected in Year 1 by the final rule earnings threshold increases, composing about 4.9 percent of the pool of potentially affected EAP workers.

Figure 2: Number of Affected Workers in Year 1

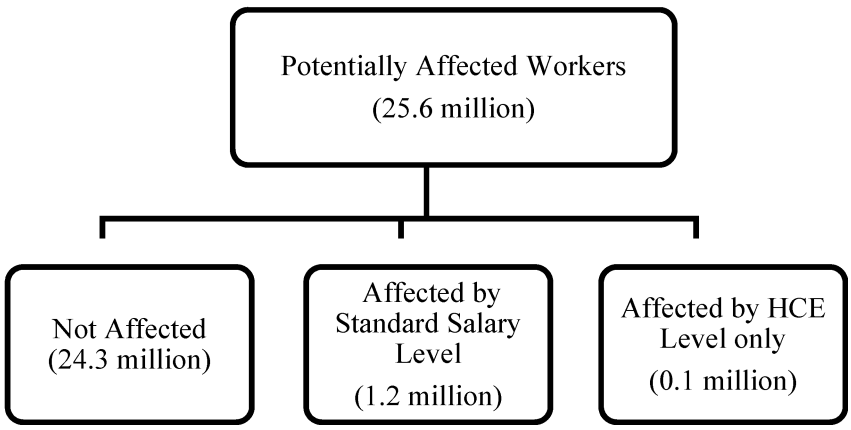


Table 7 presents the number of affected EAP workers, the mean number of overtime hours they work per week, and their average weekly earnings. The 1.2 million workers affected by the increase in the standard salary level work on average 1.6 usual hours of overtime per week and earn on average $581 per week.[161] However, the majority of these workers (about 86 percent) work zero usual hours of overtime. The 14 percent of affected workers who regularly work overtime average 11.7 hours of overtime per week. The 101,800 EAP workers affected by the change in the HCE compensation level average 4.2 hours of overtime per week and earn an average of $1,989 per week ($103,450 per year). About 65 percent of these workers work zero usual hours of overtime while the 35 percent who work usual hours of overtime average 11.9 hours of overtime per week.

Although most affected EAP workers who typically do not work overtime are unlikely to experience significant

[159] This group includes workers who may currently be nonexempt under more protective state EAP laws and regulations, such as some workers in Alaska, California, and New York.

[160] The 2016 final rule applied joint probabilities to estimate the number of affected HCE workers (*i.e.,* the number of HCE workers who pass the HCE duties test but fail the standard duties test). In order to provide a more accurate estimate, this final rule applies conditional probabilities to determine the number of affected HCE workers.

[161] CPS defines ''usual hours'' as hours worked 50 percent or more of the time.

changes in their daily work routine, those who regularly work overtime may experience significant changes. Moreover, affected EAP workers who routinely work overtime and earn less than the minimum wage are most likely to experience significant changes because of the revised standard salary level.[162] Employers might respond by paying overtime premiums; reducing or eliminating overtime hours; reducing employees' regular wage rates (provided that the reduced rates still exceed the minimum wage); increasing employees' salaries to the updated salary level to preserve their exempt status (although this will be less common for affected workers earning below the minimum wage); or using some combination of these responses.

TABLE 7—NUMBER OF AFFECTED EAP WORKERS, MEAN OVERTIME HOURS, AND MEAN WEEKLY EARNINGS, YEAR 1

Type of affected EAP worker	Affected EAP workers [a]		Mean overtime hours	Mean usual weekly earnings
	Number (1,000s)	% of Total		
Standard Salary Level				
All affected EAP workers	1,156	100%	1.6	$581
Earn less than the minimum wage [b].	22	1.9	21.4	524
Regularly work overtime	158	13.7	11.7	582
CPS occasionally work overtime [c].	42	3.7	8.3	581
HCE Compensation Level				
All affected EAP workers	102	100	4.2	1,989
Earn less than the minimum wage [b].				
Regularly work overtime	36	35.1	11.9	1,968
CPS occasionally work overtime [c].	4	3.5	9.7	1,995

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

[b] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage. HCE workers will not be affected by the minimum wage provision. These workers all regularly work overtime and are also included in that row.

[c] Workers who do not usually work overtime but did in the CPS reference week. Mean overtime hours are actual overtime hours in the reference week. Other workers may occasionally work overtime in other weeks. These workers are identified later.

The Department considered two types of overtime workers in this analysis: Regular overtime workers and occasional overtime workers.[163] Regular overtime workers typically worked more than 40 hours per week. Occasional overtime workers typically worked 40 hours or less per week, but they worked more than 40 hours in the week they were surveyed. The Department considered these two populations separately in the analysis because labor market responses to overtime pay requirements may differ for these two types of workers.

In a representative week, the increases in the standard salary level and the HCE compensation level affected an estimated 45,900 occasional overtime workers (3.7 percent of all affected EAP workers). They averaged 8.4 hours of overtime in the weeks they worked overtime. This group represents the number of workers with occasional overtime hours in the week the CPS MORG survey was conducted. Because the survey week is a representative week, the Department believes the prevalence of occasional overtime in the survey week, and the characteristics of these workers, is representative of other weeks (even though a different group of workers would be identified as occasional overtime workers in a different week).

2. Characteristics of Affected EAP Workers

In this section, the Department examined the characteristics of affected EAP workers. Table 8 presents the distribution of affected EAP workers by industry and occupation, using Census industry and occupation codes. The industry with the most affected EAP workers is education and health services (288,000), while the industry with the highest percentage of affected EAP workers is leisure and hospitality (about 10 percent). The occupation category with the most affected EAP workers is management, business, and financial (506,000), while the occupation category with the highest percentage of affected EAP workers is services (about 15 percent).

Finally, 6.1 percent of potentially affected workers in private nonprofits are affected compared with 4.6 percent in private for-profit firms. However, as discussed in section VI.B.iii, the estimates of workers subject to the FLSA include workers employed by enterprises that do not meet the enterprise coverage requirements because there is no data set that would adequately inform an estimate of the size of this worker population. Although failing to exclude workers who work for non-covered enterprises would only affect a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for workers in nonprofits because when determining enterprise coverage only

[162] A small proportion (1.9 percent) of affected EAP workers earn implicit hourly wages that are less than the applicable minimum wage (the higher of the state or federal minimum wage). The implicit hourly wage is calculated as an affected EAP employee's total weekly earnings divided by total weekly hours worked. For example, workers earning the currently-enforced $455 per week standard salary level would earn less than the federal minimum wage if they work 63 or more hours in a week ($455/63 hours = $7.22 per hour).

[163] Regular overtime workers were identified in the CPS MORG with variable PEHRUSL1. Occasional overtime workers were identified with variables PEHRUSL1 and PEHRACT1.

revenue derived from business operations, not charitable activities, is included.

TABLE 8—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY INDUSTRY AND OCCUPATION, YEAR 1

Industry/occupation/nonprofit	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Total	139.43	25.59	24.33	1.26	4.9
By Industry [d]					
Agriculture, forestry, fishing, & hunting	1.33	0.04	0.04	0.00	5.4
Mining	0.73	0.19	0.18	0.00	2.6
Construction	8.49	1.02	0.97	0.05	5.0
Manufacturing	15.56	3.61	3.52	0.09	2.5
Wholesale & retail trade	19.08	2.60	2.44	0.17	6.4
Transportation & utilities	7.65	0.92	0.88	0.04	4.1
Information	2.73	1.01	0.97	0.04	4.2
Financial activities	9.66	3.81	3.64	0.17	4.3
Professional & business services	15.80	5.75	5.53	0.21	3.7
Education & health services	34.24	4.15	3.86	0.288	6.9
Leisure & hospitality	13.13	0.92	0.83	0.09	9.8
Other services	5.62	0.64	0.59	0.05	8.3
Public administration	5.40	0.93	0.88	0.05	5.5
By Occupation [d]					
Management, business, & financial	21.12	12.76	12.25	0.51	4.0
Professional & related	32.96	9.02	8.61	0.41	4.6
Services	24.16	0.22	0.18	0.03	14.6
Sales and related	13.78	2.44	2.26	0.18	7.6
Office & administrative support	17.64	0.95	0.84	0.11	11.7
Farming, fishing, & forestry	1.01	0.00	0.00	0.00	0.0
Construction & extraction	6.75	0.02	0.02	0.00	3.2
Installation, maintenance, & repair	4.59	0.04	0.04	0.00	3.9
Production	8.48	0.11	0.10	0.00	3.9
Transportation & material moving	8.93	0.03	0.03	0.00	9.1
By Nonprofit and Government Status					
Nonprofit, private	9.65	2.04	1.91	0.12	6.1
For profit, private	111.04	21.52	20.52	1.00	4.6
Government (state, local, and federal)	18.73	2.03	1.90	0.13	6.5

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).

[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

[d] Census industry and occupation categories.

Table 9 presents the distribution of affected EAP workers based on Census Regions and Divisions, and metropolitan statistical area (MSA) status. The region with the most affected workers will be the South (544,000), but the South's percentage of potentially affected workers who are affected is still small (6.1 percent). Although 90 percent of affected EAP workers will reside in MSAs (1.13 of 1.26 million), so do a corresponding 88 percent of all workers subject to the FLSA.[164]

Employers in low-wage industries, regions, and in non-metropolitan areas may be more affected because they typically pay lower wages and salaries. However, the Department believes the salary level adopted in this final rule is appropriate for these lower-wage sectors because the methodology used in 2004, and applied for this rulemaking, used earnings data in the low-wage retail industry and the low-wage South Region. Effects by region and industry are considered in section VI.D.vi.

[164] Identified with CPS MORG variable GTMETSTA.

TABLE 9—ESTIMATED NUMBER OF POTENTIALLY AFFECTED EAP WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY REGION, DIVISION, AND MSA STATUS, YEAR 1

Region/division/metropolitan status	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Total	139.43	25.59	24.33	1.26	4.9
By Region/Division					
Northeast	*25.38*	*5.30*	*5.07*	*0.23*	*4.4*
New England	7.03	1.56	1.50	0.06	3.7
Middle Atlantic	18.35	3.74	3.57	0.17	4.6
Midwest	*30.59*	*5.23*	*5.01*	*0.23*	*4.4*
East North Central	20.77	3.56	3.40	0.16	4.4
West North Central	9.82	1.67	1.60	0.07	4.4
South	*50.90*	*8.93*	*8.39*	*0.54*	*6.1*
South Atlantic	26.77	5.01	4.72	0.30	5.9
East South Central	7.59	1.09	1.01	0.08	7.7
West South Central	16.55	2.83	2.67	0.16	5.7
West	*32.56*	*6.12*	*5.87*	*0.25*	*4.1*
Mountain	10.30	1.74	1.66	0.08	4.7
Pacific	22.26	4.38	4.21	0.17	3.9
By Metropolitan Status					
Metropolitan	122.63	23.98	22.84	1.13	4.7
Non-metropolitan	15.85	1.51	1.39	0.12	7.7
Not identified	0.95	0.10	0.10	0.01	6.0

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).

[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

3. NPRM Comments on Affected Worker Calculation

EPI and a few other commenters asserted that the Department's use of pooled 2015–2017 data to calculate the number of affected workers ''leads to an underestimate because it doesn't account for employment growth and other changes in the three years between 2017 and 2020.'' The Department is using pooled CPS MORG data for July 2016 through June 2019, adjusted to reflect 2018/2019, in this final rule. The Department is not modeling employment growth between 2018/19 and the final rule's effective date because of uncertainty in the appropriate growth rates to project earnings and employment, and because of the relatively short period of time separating June 2019—the most recent CPS MORG data available at the time this impact analysis was developed—and January 1, 2020—the effective date of the final rule. However, as a sensitivity analysis undertaken in response to these comments, the Department used the BLS National Employment Matrix (NEM) for 2016 to 2026 to calculate growth rates for each occupation-industry category. Using these rates to adjust the number of affected employees in 2018/19 for one and a half years of employment growth increased the estimated number of affected workers by less than 1.8 percent.

iii. Costs

1. Summary

The Department quantified three direct costs to employers in this analysis: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The Department estimated that in Year 1 (2020), regulatory familiarization costs will be $340.4 million, adjustment costs will be $68.2 million, and managerial costs will be $134.4 million (Table 10). Total direct employer costs in Year 1 will be $543.0 million.

TABLE 10—SUMMARY OF YEAR 1 DIRECT EMPLOYER COSTS

[Millions]

Direct employer costs	Standard salary level	HCE compensation level	Total
Regulatory familiarization [a]	.....	.....	$340.4
Adjustment	$62.7	$5.5	68.2
Managerial	121.5	12.9	134.4
Total direct costs	184.1	18.4	543.0

[a] Regulatory familiarization costs are assessed jointly for the change in the standard salary level and the HCE compensation level.

Adjustment costs and managerial costs are recurring, so we also projected them for years 2 through 10 in section VI.D.viii. The Department discusses costs that are not quantified in section VI.D.iii.5.

2. Regulatory Familiarization Costs

This rule will impose direct costs on firms by requiring them to review the regulation. To estimate these ''regulatory familiarization costs,'' three pieces of information must be estimated: (1) The number of affected establishments; (2) a wage level for the employees reviewing the rule; and (3) the amount of time employees spend reviewing the rule.

It is unclear whether regulatory familiarization costs are a function of the number of establishments or the number of firms. To avoid underestimating these costs, the Department assumed that regulatory familiarization occurs at a decentralized level and used the number of establishments in its cost estimate; this results in a higher estimate than would result from using the number of firms. The most recent data on private sector establishments at the time this final rule was drafted are from the 2016 Statistics of U.S. Businesses (SUSB), which reports 7.76 million establishments with paid employees.[165] Additionally, there were an estimated 90,126 state and local governments in 2017, the most recent data available.[166] The Department thus estimated 7.85 million establishments altogether (for ease, the Department uses the term ''establishments'' to refer to the total of establishments and government entities) might incur regulatory familiarization costs.

The Department believes that all establishments will incur some regulatory familiarization costs, even if they do not employ exempt workers, because all establishments will need to confirm whether this rule includes any provisions that may affect their employees. Firms with more affected EAP workers will likely spend more time reviewing the regulation than firms with fewer or no affected EAP workers (since a careful reading of the regulation will probably follow the initial decision that the firm is affected). However, the Department did not know the distribution of affected EAP workers across firms, so it used an average cost per establishment.

The Department believes one hour per establishment is appropriate because the EAP exemptions have existed in one form or another since 1938. The most significant change in this rulemaking is setting a new standard salary level for exempt workers, and the changed regulatory text is only a few pages. The Department thus believes that one hour is an appropriate average estimate for the time each establishment will spend reviewing the changes made by this rulemaking. Time spent to implement the necessary changes was included in adjustment costs. The Department's analysis assumed that mid-level human resource workers with a median wage of $26.56 per hour will review the final rule.[167] The Department also assumed that benefits are paid at a rate of 46 percent of the base wage [168] and overhead costs are paid at a rate of 17 percent of the base wage,[169] resulting in an hourly rate of $43.38. The Department thus estimates regulatory familiarization costs in Year 1 will be $340.4 million ($43.38 per hour × 1 hour × 7.85 million establishments).[170]

Some commenters asserted these cost estimates are too low. For example, SBA Office of Advocacy (SBA Advocacy) wrote: ''we spoke to a small retail business in Alabama, who retained the services of an attorney for 10–15 hours to review the 2016 final rule.'' International Bancshares Corporation described the necessary hours for regulatory familiarization and adjustment costs as ''countless.'' An individual commenter stated that the Department's estimated costs are too low but did not provide any information on what costs should be.

The Department continues to believe that an average of one hour per establishment is appropriate. The EAP exemptions have been in existence in one form or another since 1938, and a final rule was published as recently as 2016. Furthermore, employers who use the exemptions must apply them every time they hire an employee whom they seek to classify as exempt. Thus, employers should be familiar with the exemptions. The most significant change promulgated in this rulemaking is setting new earnings thresholds for exempt workers. The Department believes that, on average, one hour is sufficient to time to read and understand, for example, the changes to these thresholds, and we note that the regulatory text changes comprise only a few pages. Additionally, the estimated one hour for regulatory familiarization represents an average for all establishments in the U.S., even those without any affected or exempt workers, which are unlikely to spend much time reviewing the rule. Some businesses, of course, will spend more than one hour, and some will spend less, but for the reasons stated above, the Department believes that an average of one hour is an appropriate estimate.

3. Adjustment Costs

This rule will also impose direct costs on firms by requiring them to evaluate the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems.[171] The Department believes the size of these ''adjustment costs'' will depend on the number of affected EAP workers and will occur in any year when exemption status is changed for any workers. To estimate adjustment costs, three pieces of information must be estimated: (1) A wage level for the employees making the adjustments; (2) the amount of time spent making the adjustments; and (3) the estimated number of newly affected EAP workers. The Department again estimated that the average wage with benefits and overhead costs for a mid-level human resource worker will be $43.38 per hour (as explained above).

The Department estimated that it will take establishments an average of 75

[165] Statistics of U.S. Businesses 2016, *https://www.census.gov/programs-surveys/susb.html.*

[166] 2017 Census of Governments. Table 1, *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[167] The median wage in the pooled 2018/19 CPS data for workers with the Census 2010 occupations ''human resources workers'' (0630); ''compensation, benefits, and job analysis specialists'' (0640); and ''training and development specialists'' (0650). The Department determined these occupations include most of the workers who would conduct these tasks. *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook.

[168] The benefits-earnings ratio is derived from BLS's Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D. This fringe benefit rate includes some fixed costs such as health insurance.

[169] The Department believes that the overhead costs associated with this rule are small because existing systems maintained by employers to track currently hourly employees can be used for newly overtime-eligible workers. However, acknowledging that there might be additional overhead costs, we have included an overhead rate of 17 percent. Because the 2016 final rule did not include overhead costs in its cost and transfer estimates, estimated costs and transfers associated with the 2016 final rule have been recalculated for comparison purposes in section VI.D.ix.

[170] As previously noted, the Department used the number of establishments rather than the number of firms, which results in a higher estimate of the regulatory familiarization cost. Using the number of firms, 6.0 million, would result in a reduced regulatory familiarization cost estimate of $262.2 million in Year 1.

[171] While some companies may need to reconfigure information technology systems to include both exempt and overtime-protected workers, the Department notes that most organizations affected by the rule already employ overtime-eligible workers and have in place payroll systems and personnel practices (*e.g.,* requiring advance authorization for overtime hours) such that additional costs associated with the rule should be relatively small in the short run.

minutes per affected worker to make the necessary adjustments. Little applicable data were identified from which to estimate the amount of time required to make these adjustments.[172] Therefore, in the NPRM the Department used the estimate of 1.25 hours from the 2016 final rule after reviewing public comments on the 2015 NPRM, and it is again using this estimate in this final rule. The estimated number of affected EAP workers in Year 1 is 1.3 million (as discussed in section VI.D.ii). Therefore, total estimated Year 1 adjustment costs will be $68.2 million ($43.38 × 1.25 hours × 1.3 million workers).

A reduction in the cost to employers of determining employees' exempt status may partially offset adjustment costs. Currently, to determine whether an employee is exempt, employers must apply the duties test to salaried workers who earn at least $455 per week. However, when the rule takes effect, firms will no longer be required to apply the potentially time-consuming duties test to employees earning less than the new standard salary level. This will be a clear cost savings to employers for the approximately 4.1 million salaried employees (2.2 million in white collar occupations and 1.9 million in blue collar occupations) who do not pass the duties test and earn at least $455 per week but less than the updated salary level. The Department did not estimate the potential size of this cost savings.

A few commenters expressed concern that the time estimate is too low. For example, as noted above, International Bancshares Corporation described the necessary hours for regulatory familiarization and adjustment costs as ''countless.'' SBA Advocacy wrote: ''Small businesses have told Advocacy that it may take them many hours and several weeks to understand and implement this rule for their small businesses.'' Two commenters, the National Association of Manufacturers and the HR Policy Association, expressed particular concern with adjustment costs stemming from the proposed increase in the HCE compensation level, noting that for each worker earning between $100,000 and the new HCE compensation level, the employee's job duties will need to be reassessed to determine whether the worker remains exempt under the standard salary level exemption. The National Association of Manufacturers elaborated that ''across the manufacturing sector, the change in HCE threshold [proposed in the NPRM] may be even more difficult and consequential than updating the standard salary threshold.''

The Department is retaining its estimate of adjustment costs as 75 minutes per affected worker in the final rule. The Department notes that the vast majority of commenters, including employer representatives, did not contest this estimate. Additionally, this estimate is drawn from the 2016 final rule, and represents a 25 percent increase, in response to concerns from employer representatives, over the Department's original estimate of one hour per worker in the 2015 NPRM.[173] Moreover, SBA Advocacy's numbers are not necessarily inconsistent with the Department's estimates. For example, if a small business has 15 affected employees, then the Department estimated it will (on average) take 19.75 hours to make the appropriate adjustments, an amount of time that some small businesses might consider ''many hours'' and that could take place over ''several weeks.''

The Department also believes that the 75-minute-per-worker average time estimate appropriately takes into account adjustment time for HCE-affected workers (those passing only the HCE duties test and not the standard duties test). This estimate assumes that the average is concentrated in the subset of employees requiring more analysis to make a decision. For example, employers are likely to incur relatively low adjustment costs for some workers, such as those who work no overtime (described below as Type 1 workers). This leaves more time for employers to spend on adjustment costs for other workers, such as affected HCE employees who become newly subject to the more rigorous standard duties test. The Department further notes that in this final rule, the number of affected HCE employees has declined from the NPRM as a result of the Department's decision to decrease the HCE threshold from the proposed amount of $147,414 to $107,432. This adjustment also addresses concerns about the burdens that would have been associated, under the NPRM, with applying the standard duties test to a large number of formerly HCE exempt employees, many of whom would have remained exempt under the standard duties test. Thus, although some employers may spend more time adjusting for HCE-affected workers than for other workers, HCE workers will now comprise a smaller portion of the of the total number of affected workers, further affirming the Department belief that its estimate of 75 minutes per worker on average is appropriate.

4. Managerial Costs

If employers reclassify employees as overtime-eligible due to the changes in the salary levels, then firms may incur ongoing managerial costs because the employer may spend more time developing work schedules and closely monitoring an employee's hours to minimize or avoid overtime. For example, the manager of a reclassified worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime premium. Additionally, the manager may have to spend more time monitoring the employee's work and productivity since the marginal cost of employing the worker per hour has increased. Unlike regulatory familiarization and adjustment costs, which occur primarily in Year 1, managerial costs are incurred more uniformly every year. The Department applied managerial costs to workers who (1) are reclassified as nonexempt, overtime-protected and (2) either regularly work overtime or occasionally work overtime, but on a predictable basis—an estimated 304,500 workers (*see* Table 13 and accompanying explanation). The Department estimated these costs assuming that management spends an additional ten minutes per week scheduling and monitoring each affected worker expected to be reclassified as nonexempt, overtime-eligible as a result of this rule, and whose hours are adjusted. As discussed in detail below, most affected workers do not currently work overtime, and there is no reason to expect their hours worked to change when their status changes from exempt to nonexempt. For that group of workers, management will have little or no need to increase their monitoring of hours worked; therefore, these workers are not included in the managerial cost calculation. Under these assumptions, the additional managerial hours worked per week will be 50,751 hours ((10 minutes/60 minutes) × 304,500 workers).

The median hourly wage in 2018/19 for a manager was $31.18 and benefits were estimated to be paid at a rate of 46 percent of the base wage.[174] Together

[172] Costs from the 2004 final rule were considered, but because that revision included changes to the duties test, the cost estimates are not directly applicable; in addition, the 2004 final rule did not separately account for managerial costs. The 2015 NPRM separately accounted for managerial costs. Some commenters responded with higher time estimates, but these estimates were not substantiated with data.

[173] 81 FR at 32475.

[174] Calculated as the median wage in the pooled 2018/19 CPS MORG data for workers in management occupations (excluding chief

Continued

with the 17 percent overhead costs used for this analysis, this totals $50.92 per hour. Thus, the estimated Year 1 managerial costs total $134.4 million (50,751 hours/week × 52 weeks × $50.92/hour). Although the exact magnitude will vary with the number of affected EAP workers each year, the Department anticipates that employers will incur managerial costs annually.

There was little precedent or data to aid in evaluating managerial costs. With the exception of the 2016 rulemaking, prior part 541 rulemakings did not estimate managerial costs. The Department likewise found no estimates of managerial costs after reviewing the literature. Thus, in the NPRM, the Department used the same methodology as the 2016 final rule, which the Department adopted after considering comments on the 2015 NPRM. However, for this final rule, the Department has increased the time estimate from 5 minutes to 10 minutes.

A few commenters generally expressed concern about the managerial costs for businesses. For example, one commenter noted: ''There is no easy way to track hours for salaried folks easily, in most businesses. As a result, companies will be forced to begin this practice, adding more costs in administrative ways.'' Another individual wrote that the proposed rule ''would create a challenge by placing a burden on the employers to exaustively [sic] track these newly nonexempt employees' hours to ensure compliance with overtime pay and other requirements. This tracking of hours would also produce increased human resources paperwork and technology costs to our company.'' The Kentucky Retail Federation wrote: ''Reclassifying managers to hourly workers will require hours spent scheduling work hours to avoid overtime costs.'' SBA Advocacy, asserting that the Department underestimated compliance costs, wrote: ''Employers reclassifying managers to hourly staff may spend many hours a week scheduling and keeping track of employee work to avoid these extra overtime costs.''

The Department acknowledges that firms may incur costs monitoring and managing the hours of formerly exempt staff. In addition, the Department acknowledges that to the extent workers who lose their exempt status as a result of the change in the standard salary level telecommute, but hourly and other nonexempt salaried workers do not telecommute, it may be necessary to develop ways of tracking such work by newly nonexempt workers. However, the Department does not expect that such firms will spend ''many hours a week'' on such tasks, and believes an estimate of 10 minutes per worker per week is appropriate. First, the Department notes that EAP exempt employees account for less than 20 percent of the U.S. labor force; as such, the Department expects that the vast majority of employers of EAP exempt workers also employ nonexempt workers. Such employers already have in place recordkeeping systems and standard operating procedures for ensuring employees work overtime under only employer-prescribed circumstances. Thus, such systems generally do not need to be invented for managing formerly-exempt EAP employees. Second, the Department also notes that under the FLSA recordkeeping regulations in part 516, employers determine how to make and keep an accurate record of hours worked by employees; for example, employers may tell their workers to write their own time records and any timekeeping plan is acceptable as long as it is complete and accurate. Additionally, if the nonexempt employee works a fixed schedule, *e.g.,* 9:00 a.m.–5:30 p.m. Monday–Friday, the employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate exceptions to that schedule. *See* Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (*https://www.dol.gov/whd/regs/compliance/whdfs21.pdf*). However, as previously noted, in response to concerns raised by commenters the Department has doubled the amount of time attributed to managerial costs.

5. Other Potential Costs

In addition to the costs discussed above, the final rule may impose additional costs that have not been quantified. These costs are discussed qualitatively below, but we note that in some cases (*e.g.,* schedule flexibility, salaried status) these costs may directly affect workers' wages because workers face a tradeoff in the labor market between cash wages and the nonpecuniary aspects of jobs.[175]

Reduced Scheduling Flexibility

Exempt workers may enjoy more scheduling flexibility because their hours are less likely to be monitored than nonexempt workers. If so, the final rule could impose costs on newly nonexempt, overtime-eligible workers by, for example, limiting their ability to adjust their schedules to meet personal and family obligations. But the rule does not require employers to reduce scheduling flexibility. Employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules. Additionally, some exempt workers already monitor their hours for billing purposes. For these reasons, and because there is little data or literature on these costs, the Department did not quantify potential costs regarding scheduling flexibility.

Preference for Salaried Status

Some of the workers who become nonexempt as a result of the final rule and whose pay is changed by their employer from salaried to hourly status may have preferred to remain salaried. Research has shown that salaried workers are more likely than hourly workers to receive benefits such as paid vacation time and health insurance,[176] and are more satisfied with their benefits.[177] Additionally, when employer demand for labor decreases, hourly workers tend to see their hours cut before salaried workers, making earnings for hourly workers less predictable.[178] However, this literature generally does not control for differences between salaried and hourly workers such as education, job title, or earnings; therefore, this correlation is not necessarily attributable to hourly status.

If workers are reclassified as hourly, and hourly workers have fewer benefits than salaried workers, reclassification could reduce workers' benefits. But the Department notes that this rule does not require such reclassification. These newly nonexempt workers may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent

executives). The adjustment ratio is derived from BLS' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

[175] *See, e.g.,* Ashenfelter, O. & Layard, R. (1986). Handbook of Labor Economics. Volume 1 641–92. *https://www.sciencedirect.com/science/article/abs/pii/S1573446386010155.*

[176] Lambert, S.J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A.C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

[177] Balkin, D.B., & Griffeth, R.W. (1993). The Determinants of Employee Benefits Satisfaction. *Journal of Business and Psychology,* 7(3), 323–339.

[178] Lambert, S.J., & Henly, J.R. (2009). *Scheduling in Hourly Jobs: Promising Practices for the Twenty-First Century Economy.* The Mobility Agenda. Lambert, S.J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A.C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

premium on that base wage for any overtime hours each week.[179] Similarly, employers may continue to provide these workers with the same level of benefits as previously, whether paid on an hourly or salary basis.

Quality of Public Services

To the extent that employers respond to this rule by restricting employee work hours, this rulemaking could negatively affect the quality of public services provided by local governments and nonprofits. However, the Department believes the effect of the rule on public services will be small. The Department acknowledges that some employees who work overtime providing public services may see a reduction in hours as an effect of the rulemaking. But if the services are in demand, the Department believes additional workers may be hired, as funding availability allows, to make up some of these hours, and productivity increases may offset some reduction in services. In addition, the Department expects many employers will adjust base wages downward to some degree so that even after paying the overtime premium, overall pay and hours of work for many employees will be relatively minimally impacted. Additionally, as noted above, many nonprofits are non-covered enterprises because when determining enterprise coverage only revenue derived from business operations, not charitable activities, is included.

Increased Prices

Business firms may pass along increased labor costs to consumers through higher prices. The Department anticipates that some firms may offset part of the additional labor costs through charging higher prices for the firms' goods and services. However, because costs and transfers are, on average, small relative to payroll and revenues, the Department does not expect the final rule to have a significant effect on prices. The Department estimated that, on average, costs and transfers make up less than 0.02 percent of payroll and less than 0.003 percent of revenues, although for specific industries and firms this percentage may be larger. Therefore, any potential change in prices would be modest. Further, any significant price increases would not represent a separate category of effects from those estimated in this economic analysis; rather, such price increases (where they occur) would be the channel through which consumers, rather than employers or employees, bear rule-induced costs (including transfers).

International Bancshares Corporation commented that the increased salary level could lead to increased prices, if ''anticipated wage gains do not result in productivity increases.'' As noted above, however, costs and transfers make up less than 0.02 percent of payroll; furthermore, payroll comprises only a fraction of the costs of producing goods and services in the U.S. economy. Therefore, the Department concludes the final rule will add little upward pressure to prices. To the extent that EAP-exempt employees are concentrated in some industries more than others, and thus specific industries might experience more pressure on wages, the Department notes that even in the industry where costs and transfers compose the highest percentage of payroll (agriculture, forestry, fishing, and hunting), that percentage is only 0.038 percent.

Reduced Profits

The increase in workers' earnings resulting from the revised salary level is a transfer of income from firms to workers, not a cost. The Department acknowledges that the increased employer costs and transfer payments as a result of this final rule may reduce the profits of business firms, although (1) some firms may offset some of these costs and transfers by making payroll adjustments, and (2) some firms may mitigate their reduced profits due to these costs and transfers through increased prices. To the extent that the final rule reduces profits at some business firms after all these adjustments are made, these firms would have marginally lower after-tax returns on new investments in equipment, structures, and intellectual property and could therefore make fewer such investments going forward. All else equal, less business investment slows economic growth and reduces employment. However, the Department expects that any anti-growth effects of the final rule would be minimal.

Hiring Costs

To the extent that firms respond to an update to the salary level test by reducing overtime hours, they may do so by spreading hours to other workers, including current workers employed for less than 40 hours per week by that employer, current workers who retain their exempt status, and newly hired workers. If new workers are hired to absorb these transferred hours, then the associated hiring costs are a cost of this final rule.

Other Costs Raised by Commenters

Some commenters asserted that the proposed rule would entail additional costs not detailed above. A few believe that the rule will result in increased employee turnover. SBA Advocacy wrote: ''Small businesses that reclassified their salaried staff to hourly staff as a result of the 2016 final rule reported that their employee turnover increased by up to 50 percent,'' forcing them to incur costs to hire and train new workers. According to SBA Advocacy, small businesses attributed this turnover to previously-exempt managers feeling ''demoralized'' by having to ''clock in'' due to their changed status, and suggested that this rule may have similar effects. Similarly, International Bancshares Corporation predicted that the proposed rule would result in layoffs, asserting that costs associated with ''reviewing the final regulations and building a software system to implement and monitor their compliance with the regulations'' would make it ''extremely difficult for community and regional banks to . . . [avoid] laying off employees or curtailing their operations.''

The Department believes these concerns are overstated. First, this final rule's increases to the earnings thresholds are much more modest than the 2016 final rule's, and the associated impacts are correspondingly more moderate. Thus, the Department believes that any adverse effects, such as increased turnover, will be minimal. Therefore, the Department has not quantified the potential costs associated with increased turnover. Likewise, the Department does not believe that this final rule will cause a significant number of layoffs. As explained above, the vast majority of firms employ both exempt and nonexempt workers and therefore have systems in place for managing nonexempt employees, and affected employees comprise less than 4 percent of EAP exempt employees. As such, the Department does not believe that the increased earnings thresholds in this final rule will cause layoffs to any significant extent, and has not quantified such costs.

iv. Transfers

1. Overview

Transfer payments occur when income is redistributed from one party to another. The Department has quantified two transfers from employers to employees that will result from the final rule: (1) Transfers to ensure compliance with the FLSA minimum wage provision; and (2) transfers to ensure compliance with the FLSA

[179] §§ 778.113–.114.

overtime pay provision. Transfers in Year 1 due to the minimum wage provision were estimated to be $75.4 million. The increase in the HCE compensation level does not affect minimum wage transfers because workers eligible for the HCE exemption earn well above the minimum wage. The Department estimates that transfers due to the overtime pay provision will be $321.0 million: $220.7 million from the increased standard salary level and $100.3 million from the increased HCE compensation level. Total Year 1 transfers are estimated at $396.4 million (Table 11).

TABLE 11—SUMMARY OF YEAR 1 REGULATORY TRANSFERS

[Millions]

Transfer from employers to workers	Standard salary level	HCE compensation level	Total
Due to minimum wage	$75.4	$0.0	$75.4
Due to overtime pay	220.7	100.3	321.0
Total transfers	296.1	100.3	396.4

Because the overtime premium depends on the base wage, the estimates of minimum wage transfers and overtime transfers are linked. This can be considered a two-step approach. The Department first identified affected EAP workers with an implicit regular hourly wage lower than the minimum wage, and then calculated the wage increase necessary to reach the minimum wage.

2. Transfers Due to the Minimum Wage Provision

For purposes of this analysis, the hourly rate of pay was calculated as usual weekly earnings divided by usual weekly hours worked. To earn less than the federal or most state minimum wages, this set of workers must work many hours per week. For example, a worker paid $455 per week must work 62.8 hours to earn less than the federal minimum wage of $7.25 per hour ($455/$7.25 = 62.8).[180] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage as of July 1, 2018. Most affected EAP workers already receive at least the minimum wage; only an estimated 1.8 percent of them (22,200 in total) earn an implicit hourly rate of pay less than the minimum wage. The Department estimated transfers due to payment of the minimum wage by calculating the change in earnings if wages rose to the minimum wage for workers who become nonexempt.[181]

In response to an increase in the regular rate of pay to the minimum wage, employers may reduce the workers' hours. Since the quantity of labor hours demanded is inversely related to wages, a higher mandated wage will result in fewer hours of labor demanded. For the first year, the Department estimated the potential disemployment effects (*i.e.,* the estimated reduction in hours) of the transfer attributed to the minimum wage by multiplying the percent change in the regular rate of pay by a labor demand elasticity of −0.2 (years 2–10 use a long run elasticity of −0.4) [182] [183]

At the new standard salary level, the Department estimated that 22,200 affected EAP workers will, on average, see an hourly wage increase of $1.39, work 2.4 fewer hours per week, and receive an increase in weekly earnings of $65.29 as a result of coverage by the minimum wage provisions (Table 12). The total change in weekly earnings due to the payment of the minimum wage was estimated to be $1.4 million per week ($65.29 × 22,200) or $75.4 million in Year 1.

TABLE 12—MINIMUM WAGE ONLY: MEAN HOURLY WAGES, USUAL OVERTIME HOURS, AND WEEKLY EARNINGS FOR AFFECTED EAP WORKERS, YEAR 1

	Hourly wage [a]	Usual weekly hours	Usual weekly earnings	Total weekly transfer (1,000s)
Before Final Rule	$8.75	61.4	$524.37	.....
After Final Rule	10.14	59.0	589.66	.....
Change	1.39	−2.4	65.29	1,450

Note: Pooled data for 7/2016–6/2018 adjusted to reflect 2018/2019.

[a] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage.

[180] Workers in states with minimum wages higher than the federal minimum wage could earn less than the state minimum wage working fewer hours.

[181] Because these workers' hourly wages will be set at the minimum wage after this final rule, their employers will not be able to adjust their wages downward to offset part of the cost of paying the overtime pay premium (which will be discussed in the following section). Therefore, these workers will generally receive larger transfers attributed to the overtime pay provision than other workers.

[182] Labor demand elasticity is the percentage change in labor hours demanded in response to a one percent change in wages.

[183] This elasticity estimate represents a short run demand elasticity for general labor, and is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958. We selected a general labor demand elasticity because employers will adjust their demand based on the cumulative change in employees' earnings, not on a conceptual differentiation between increases attributable to the minimum wage and the overtime provisions of the FLSA.

3. Transfers Due to the Overtime Pay Provision

Introduction

The final rule will transfer income to affected workers who work in excess of 40 hours per week. Requiring an overtime premium increases the marginal cost of labor, which employers will likely try to offset by adjusting wages and/or hours of affected workers. The size of the transfer will depend largely on how employers respond to the updated salary levels. Employers may respond by: (1) Paying overtime premiums to affected workers; (2) reducing overtime hours of affected workers and potentially transferring some of these hours to other workers; (3) reducing the regular rate of pay for affected workers working overtime (provided that the reduced rates still exceed the minimum wage); (4) increasing affected workers' salaries to the updated salary or compensation level to preserve their exempt status; or (5) using some combination of these responses. How employers will respond depends on many factors, including the relative costs of each of these alternatives; in turn, the relative costs of each of these alternatives are a function of workers' earnings and hours worked.

Literature on Employer Adjustments

Two conceptual models are useful for thinking about how employers may respond to reclassifying certain employees as overtime-eligible: (1) The ''fixed-wage'' or ''labor demand'' model, and (2) the ''fixed-job'' or ''employment contract'' model.[184] These models make different assumptions about the demand for overtime hours and the structure of the employment agreement, which result in different implications for predicting employer responses. The fixed-wage model assumes that the standard hourly wage is independent of the statutory overtime premium. Under the fixed-wage model, a reclassification of workers from overtime exempt to overtime nonexempt would cause a reduction in overtime hours for affected workers, an increase in the prevalence of a 40-hour workweek among affected workers, and an increase in the earnings of affected workers who continue to work overtime.

In contrast, the fixed-job model assumes that the standard hourly wage is affected by the statutory overtime premium. Thus, employers can neutralize any reclassification of workers from overtime exempt to overtime nonexempt by reducing the standard hourly wage of affected workers so that their weekly earnings and hours worked are unchanged, except when minimum wage laws prevent employers from lowering the standard hourly wage below the minimum wage. Under the fixed-job model, a reclassification of workers from overtime exempt to overtime nonexempt would have different effects on minimum-wage workers and above-minimum-wage workers. Similar to the fixed-wage model, minimum-wage workers would experience a reduction in overtime hours, an increase in the prevalence of a 40-hour workweek at a given employer (though not necessarily overall), and an increase in earnings for the portion of minimum-wage workers who continue to work overtime for a given employer. Unlike the fixed-wage model, however, above-minimum-wage workers would experience no change.

The Department conducted a literature review to evaluate studies of how labor markets adjust to a change in the requirement to pay overtime. In general, these studies are supportive of the fixed-job model of labor market adjustment, in that wages adjust to offset the requirement to pay an overtime premium as predicted by the fixed-job model, but do not adjust enough to completely offset the overtime premium as predicted by the model.

The Department believes the two most important papers in this literature are the studies by Trejo (1991) and Barkume (2010). Analyzing the economic effects of the overtime pay provisions of the FLSA, Trejo (1991) found ''the data analyzed here suggest the wage adjustments occur to mitigate the purely demand-driven effects predicted by the fixed-wage model, but these adjustments are not large enough to neutralize the overtime pay regulations completely.'' Trejo noted, ''In accordance with the fixed job model, the overtime law appears to have a greater impact on minimum-wage workers.'' He also stated, ''[T]he finding that overtime pay coverage status systematically influences the hours-of-work distribution for non-minimum wage works is supportive of the fixed-wage model. No significant differences in weekly earnings were discovered between the covered and non-covered sectors, which is consistent with the fixed-job model.'' However, ''overtime pay compliance is higher for union than for nonunion workers, a result that is more easily reconciled with the fixed wage model.'' Trejo's findings are supportive of the fixed-wage model whose adjustment is incomplete largely due to the minimum-wage requirement.[185]

A second paper by Trejo (2003) took a different approach to testing the consistency of the fixed-wage adjustment models with overtime coverage and data on hours worked. In this paper, he examined time-series data on employee hours by industry. After controlling for underlying trends in hours worked over 20 years, he found changes in overtime coverage had no impact on the prevalence of overtime hours worked. This result supports the fixed-job model. Unlike the 1991 paper, however, he did not examine impacts of overtime coverage on employees' weekly or hourly earnings, so this finding in support of the fixed-job model only analyzes one implication of the model.[186]

Barkume (2010) built on the analytic method used in Trejo (1991).[187] However, Barkume observed that Trejo did not account for ''quasi-fixed'' employment costs (*e.g.,* benefits) that do not vary with hours worked, and therefore affect employers' decisions on overtime hours worked. After incorporating these quasi-fixed costs in the model, Barkume found results consistent with those of Trejo (1991): ''though wage rates in otherwise similar jobs declined with greater overtime hours, they were not enough to prevent the FLSA overtime provisions from increasing labor costs.'' Barkume also determined that the 1991 model did not account for evidence that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[188] Barkume found that how much wages and hours worked adjusted in response to the overtime pay requirement

[184] *See* Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740, and Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[185] Trejo, S. J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740.

[186] Trejo, S. J. (2003). Does the Statutory Overtime Premium Discourage Long Workweeks? Industrial and Labor Relations Review, 56(3), 375–392.

[187] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[188] Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238, demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.

depended on what overtime pay would be in absence of regulation.

In addition, Bell and Hart (2003) examined the standard hourly wage, average hourly earnings (including overtime), the overtime premium, and overtime hours worked in Britain. Unlike the United States, Britain does not have national labor laws regulating overtime compensation. Bell and Hart found that after accounting for overtime, average hourly earnings are generally uniform in a given industry because firms paying below-market level straight-time wages tend to pay above-market overtime premiums and firms paying above-market level straight-time wages tend to pay below-market overtime premiums. Bell and Hart concluded ''this is consistent with a model in which workers and firms enter into an implicit contract that specifies total hours at a constant, market-determined, hourly wage rate.[189] Their research is also consistent with studies showing that employers may pay overtime premiums either in the absence of a regulatory mandate (*e.g.,* Britain), or when the mandate exists but the requirements are not met (*e.g.,* United States).[190]

Finally, Kuroda and Yamamoto (2009) examined ''name only managers'' in Japanese labor markets and found essentially 100 percent adjustment of implicit hourly wages to offset the overtime pay requirement.[191] [192] This study suggests that these affected workers are all employed under the pure fixed-job model, so the implicit wage adjusted so that workers received no additional pay, and had essentially no change to hours worked. If applied to this rulemaking, transfers from employers to employees would occur only in cases in which the implicit hourly rate is less than the minimum wage. The Department estimates transfers would be about $193.4 million in Year 1 with 100 percent adjustment to the fixed-job model (compared with the Department's estimate of $396.4 million using the substantial, but incomplete fixed-job model, described in further detail below).

However, there are some challenges in generalizing Kuroda and Yamamoto's results to U.S. labor markets. First, ''name-only-managers would not be exempt in the U.S. because they do not meet the duties test for exemption. ''Name-only-managers'' are essentially identical to their peers, have no managerial responsibilities, and are distinguished only by their job title. This is not directly analogous to the case of EAP exempt employees, who do have managerial responsibilities, and must pass the duties test while other similar (but nonexempt) employees do not. Second, Kuroda also found that the pure fixed-job model results may not hold under all conditions. For example, in a following paper he found that during a recession, the labor market for ''name-only-managers'' behaved more like the fixed-wage model than the fixed-job model.[193] Third, some commenters on the NPRM provided survey results supporting that, among other responses, employers planned to respond to this rule (or responded or planned to respond to the 2016 final rule) by increasing salaries of some exempt employees to maintain their exempt status (*see* section VI.D.iv.5). This is inconsistent with Kuroda and Yamamoto's findings.

On balance, the Department finds strong support for the fixed-job model as the best approximation for the likely effects of a reclassification of above-minimum-wage workers from overtime exempt to overtime nonexempt and the fixed-wage model as the best approximation of the likely effects of a reclassification of minimum-wage workers from overtime exempt to overtime nonexempt. In addition, the studies suggest that although observed wage adjustment patterns are consistent with the fixed-job model, this evidence also suggests that the actual wage adjustment might, especially in the short run, be less than 100 percent as predicted by the fixed-job model. Thus, the hybrid model used in this analysis may be described as a substantial, but incomplete fixed-job model.

To determine the magnitude of the adjustment, the Department accounted for the following findings. Earlier research had demonstrated that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[194] Barkume (2010) found that the measured adjustment of wages and hours to overtime premium requirements depended on what overtime premium might be paid in absence of any requirement to do so. Thus, when Barkume assumed that workers would receive an average voluntary overtime pay premium of 28 percent in the absence of an overtime pay regulation, which is the average overtime premium that Bell and Hart (2003) found British employers paid in the absence of any overtime regulations, the straight-time hourly wage adjusted downward by 80 percent of the amount that would occur with the fixed-job model.[195] When Barkume assumed workers would receive no voluntary overtime pay premium in the absence of an overtime pay regulation, the results were more consistent with Trejo's (1991) findings that the adjustment was a smaller percentage. The Department modeled an adjustment process between these two findings. Although it seemed reasonable that some premium was paid for overtime in the absence of regulation, Barkume's assumption of a 28 percent initial overtime premium is likely too high for the salaried workers potentially affected by a change in the salary and compensation level requirements for the EAP exemptions because this assumption is based on a study of workers in Britain. British workers were likely paid a larger voluntary overtime premium than American workers because Britain did not have a required overtime pay regulation and so collective bargaining played a larger role in implementing overtime pay.[196] If the Department were to use only Barkume's assumptions and results to model employer adjustment to the overtime wage premium requirement for affected workers, estimated Year 1 transfers would total $247.9 million; further estimates derived from Barkume's findings will be presented later in the analysis. However, in the sections that

[189] Bell, D. N. F. and Hart, R. A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, *Industrial and Labor Relations Review,* 56(3), 470–480.

[190] Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163.

[191] Kuroda, S. and Yamamoto, I. (2009). How Are Hours Worked and Wages Affected by Labor Regulations?: The White-Collar Exemption and 'Name-Only Managers' in Japan. University of Tokyo Institute of Social Science. *Discussion Paper Series* No. F–147.

[192] The implicit hourly wage is calculated by dividing reported weekly earnings by reported hours worked.

[193] Kuroda, S. and Yamamoto, I. (2012). Impact of Overtime Regulations on Wages and Work Hours, *Journal of the Japanese and International Economies,* 26(2), 249–262.

[194] Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238, demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.

[195] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[196] Bell, D. N. F. and Hart, R. A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, *Industrial and Labor Relations Review,* 56(3), 470–480.

immediately follow, the Department uses both papers to model transfers.

Identifying Types of Affected Workers

The Department identified four types of workers whose work characteristics affect how it modeled employers' responses to the changes in both the standard and HCE salary levels:

- *Type 1:* Workers who do not work overtime.
- *Type 2:* Workers who do not regularly work overtime but occasionally work overtime.
- *Type 3:* Workers who regularly work overtime and become overtime eligible (nonexempt).
- *Type 4:* Workers who regularly work overtime and remain exempt, because it is less expensive for the employer to pay the updated salary level than to pay overtime and incur additional managerial costs.

The Department began by identifying the number of workers in each type. After modeling employer adjustments, it estimated transfer payments. Type 3 and 4 workers were identified as those who regularly work overtime (CPS variable PEHRUSL1 greater than 40). Distinguishing Type 3 workers from Type 4 workers involved a four-step process. First, the Department identified all workers who regularly work overtime. Then the Department estimated each worker's weekly earnings if they became nonexempt, to which it added weekly managerial costs for each affected worker of $8.49 ($50.92 per hour × (10 minutes/60 minutes)).[197] Last, the Department identified as Type 4 those workers whose expected nonexempt earnings plus weekly managerial costs exceeds the updated standard salary level, and, conversely, as Type 3 those whose expected nonexempt earnings plus weekly managerial costs are less than the new standard salary.[198] The Department assumed that firms will include incremental managerial costs in their determination of whether to treat an affected employee as a Type 3 or Type 4 worker because those costs are only incurred if the employee is a Type 3 worker.

Identifying Type 2 workers involved two steps. First, using CPS MORG data, the Department identified those who do not usually work overtime but did work overtime in the survey week (the week referred to in the CPS questionnaire, variable PEHRACT1 greater than 40). Next, the Department supplemented the CPS data with data from the Survey of Income and Program Participation (SIPP) to look at likelihood of working some overtime during the year. Based on 2012 data, the most recent available, the Department found that 39.4 percent of non-hourly workers worked overtime at some point in a year. Therefore, the Department classified a share of workers who reported they do not usually work overtime, and did not work overtime in the reference week (previously identified as Type 1 workers), as Type 2 workers such that a total of approximately 39.4 percent of affected workers were Type 2, 3, or 4.

Modeling Changes in Wages and Hours

The substantial, but incomplete fixed-job model (hereafter referred to as the incomplete fixed-job model) predicts that employers will adjust wages of regular overtime workers but not to the full extent indicated by fixed-job model, and thus some employees may receive a small increase in weekly earnings due to overtime pay coverage. When modeling employer responses with respect to the adjustment to the regular rate of pay, the Department used the incomplete fixed-job model.

In this portion of the analysis, the Department presents an estimate of the effect on the implicit hourly rate of pay for regular overtime workers should be determined using the average of two estimates of the incomplete fixed-job model adjustments: Trejo's (1991) estimate that the overtime-induced wage change is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and Barkume's (2010) estimate that the wage change is 80 percent of the predicted adjustment assuming an initial 28 percent overtime pay premium.[199] This is approximately equivalent to assuming that salaried overtime workers implicitly receive the equivalent of a 14 percent overtime premium in the absence of regulation (the midpoint between 0 and 28 percent).

Modeling changes in wages, hours, and earnings for Type 1 and Type 4 workers was relatively straightforward. Type 1 affected EAP workers will become overtime-eligible, but because they do not work overtime, they will see no change in their weekly earnings. Type 4 workers will remain exempt because their earnings will be raised to at least the updated EAP level (either the standard salary level or HCE compensation level). These workers' earnings will increase by the difference between their current earnings and the amount necessary to satisfy the new salary or compensation level. It is possible employers will increase these workers' hours in response to paying them a higher salary, but the Department did not have enough information to model this potential change.[200]

Modeling changes in wages, hours, and earnings for Type 2 and Type 3 workers was more complex. The Department distinguished those who regularly work overtime (Type 3 workers) from those who occasionally work overtime (Type 2 workers) because employer adjustment to the final rule may differ accordingly. Employers are more likely to adjust hours worked and wages for regular overtime workers because their hours are predictable. However, in response to a transient, perhaps unpredicted, shift in market demand for the good or service such employers provide, employers are more likely to pay for occasional overtime rather than adjust hours worked and pay.

The Department treated Type 2 affected workers in two ways due to the uncertainty of the nature of these occasional overtime hours. The Department assumed that 50 percent of these occasional overtime workers worked *expected* overtime hours and the other 50 percent worked *unexpected* overtime. Workers were randomly assigned to these two groups. Workers with *expected* occasional overtime hours were treated like Type 3 affected workers (incomplete fixed-job model adjustments). Workers with *unexpected* occasional overtime hours were assumed to receive a 50 percent pay premium for the overtime hours worked and receive no change in base wage or hours (full overtime premium

[197] *See supra* § VI.D.iii.4 (managerial costs).

[198] When analyzing impacts of increasing the standard salary level, Rohwedder and Wenger conducted a similar analysis; however, they use straight-time pay rather than overtime pay to calculate earnings in the absence of a pay raise to remain exempt. Rohwedder, S. and Wenger, *supra* note 130.

[199] Both studies considered a population that included hourly workers. Evidence is not available on how the adjustment towards the employment contract model differs between salaried and hourly workers. The employment contract model may be more likely to hold for salaried workers than for hourly workers since salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage. Thus, applying the partial adjustment to the employment contract model as estimated by these studies may overestimate the transfers from employers to salaried workers. We do not attempt to quantify the magnitude of this potential overestimate.

[200] Cherry, Monica, ''Are Salaried Workers Compensated for Overtime Hours?'' *Journal of Labor Research* 25(3): 485–494, September 2004, found that exempt full-time salaried employees earn more when they work more hours, but her results do not lend themselves to the quantification of the effect *on* hours of an increase in earnings.

model).[201] When modeling Type 2 workers' hour and wage adjustments, the Department treated those identified as Type 2 using the CPS data as representative of all Type 2 workers. The Department estimated employer adjustments and transfers assuming that the patterns observed in the CPS reference week are representative of an average week in the year. Thus, the Department assumes total transfers for the year are equal to 52 times the transfers estimated for the single representative week for which the Department has CPS data. However, these transfers are spread over a larger group including those who occasionally work overtime but did not do so in the CPS reference week.[202]

Since employers must now pay more for the same number of labor hours, for Type 2 and Type 3 EAP workers, the quantity of labor hours demanded by employers will decrease. It is the net effect of these two changes that will determine the final weekly earnings for affected EAP workers. The reduction in hours is calculated using the elasticity of labor demand with respect to wages. The Department used a short-term demand elasticity of -0.20 to estimate the percentage decrease in hours worked in Year 1 and a long-term elasticity of -0.4 to estimate the percentage decrease in hours worked in Years 2–10.[203]

For Type 3 affected workers, and the 50 percent of Type 2 affected workers who worked *expected* overtime, the Department estimated adjusted total hours worked after making wage adjustments using the incomplete fixed-job model. To estimate adjusted hours worked, the Department set the percent change in total hours worked equal to the percent change in average wages multiplied by the wage elasticity of labor demand.[204]

Figure 3 is a flow chart summarizing the four types of affected EAP workers. Also shown are the effects on exempt status, weekly earnings, and hours worked for each type of affected worker.

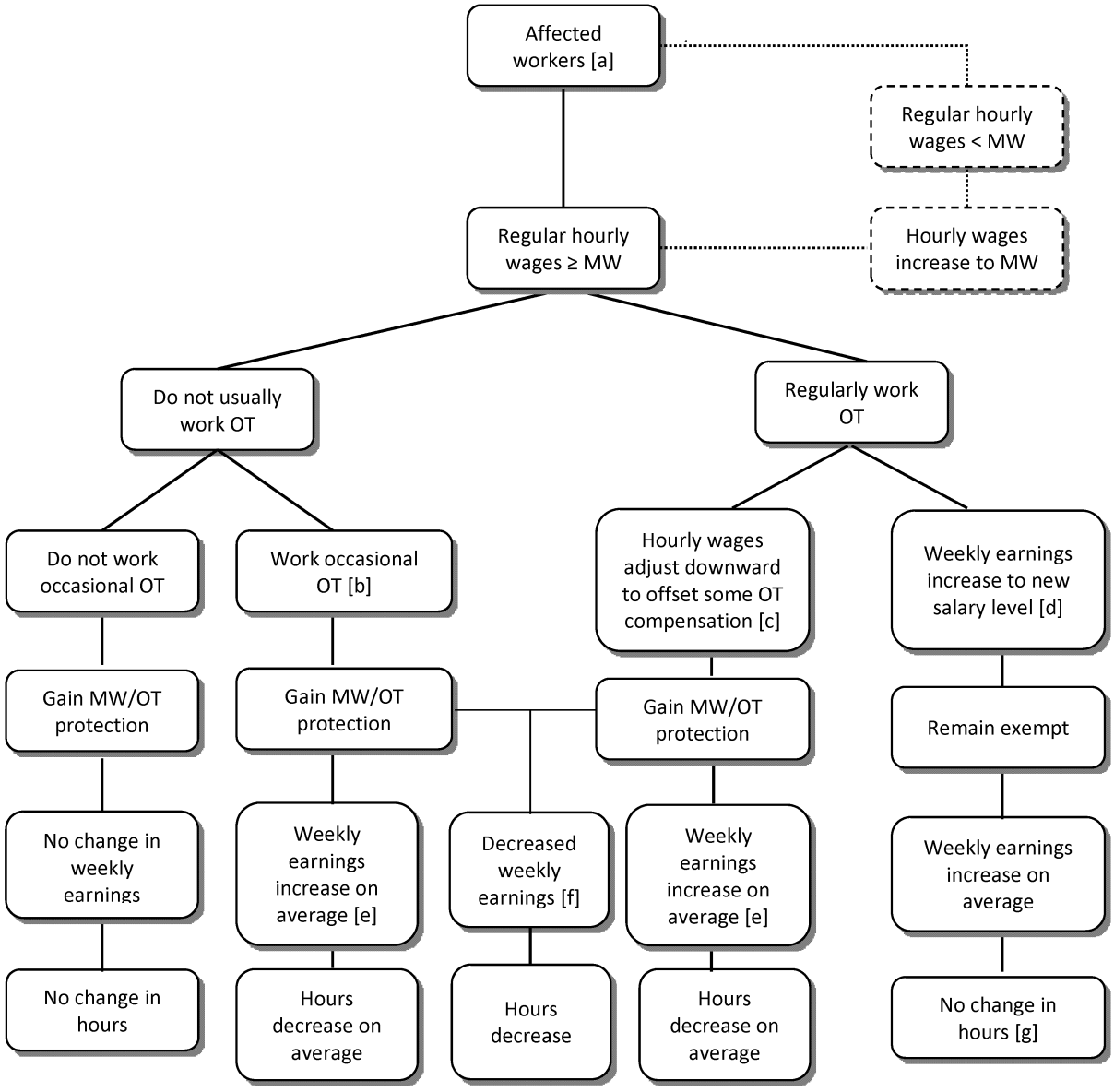
[201] We use the term ''full overtime premium'' to describe the adjustment process as modeled. The full overtime premium model is a special case of the general fixed-wage model in that the Department assumes the demand for labor under these circumstances is completely inelastic. That is, employers make no changes to employees' hours in response to these temporary, unanticipated changes in demand.

[202] If a different week was chosen as the survey week, then likely some of these workers would not have worked overtime. However, because the data are representative of both the population and all twelve months in a year, the Department believes the share of Type 2 workers identified in the CPS data in the given week is representative of an average week in the year.

[203] This elasticity estimate is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958. Some researchers have estimated larger impacts on the number of overtime hours worked (Hamermesh, D. and S. Trejo. (2000)). The Demand for Hours of Labor: Direct Evidence from California. *The Review of Economics and Statistics,* 82(1), 38–47 concludes the price elasticity of demand for overtime hours is at least -0.5. The Department decided to use a general measure of elasticity applied to the average change in wages since the increase in the overtime wage is somewhat offset by a decrease in the non-overtime wage as indicated in the fixed-job model.

[204] In this equation, the only unknown is adjusted total hours worked. Since adjusted total hours worked is in the denominator of the left side of the equation and is also in the numerator of the right side of the equation, solving for adjusted total hours worked requires solving a quadratic equation.

Figure 3: Flow Chart of Final Rule's Effect on Earnings and Hours Worked



Type 1 Type 2 Type 3 Type 4

[a] Affected EAP workers are those who are exempt under the current EAP exemptions and will gain minimum wage and overtime protection or receive a raise to the increased salary or compensation level.

[b] There are two methods the Department uses to identify occasional overtime workers. The first includes workers who report they usually work 40 hours or less per week (identified with variable PEHRUSL1 in CPS MORG) but in the reference week worked more than 40 hours (variable PEHRACT1 in CPS MORG). The second includes reclassifying some additional workers who usually work 40 hours or less per week, and in the reference week worked 40 hours

or less, to match the proportion of workers measured in other data sets who work overtime at any point in the year.
[c] The amount wages are adjusted downwards depends on whether the fixed-job model or the fixed-wage model holds. The Department's preferred method uses a combination of the two. Employers reduce the regular hourly wage rate somewhat in response to overtime pay requirements, but the wage is not reduced enough to keep total compensation constant.
[d] Based on hourly wage and weekly hours it is more cost efficient for the employer to increase the worker's weekly salary to the updated salary level than to pay overtime pay.
[e] On average, the Department expects employees' overall weekly earnings will increase despite a small decrease in average hours worked.
[f] In some cases, employers might decrease employees' hours enough to cause those employees' weekly earnings to decrease. If so, such employees may seek a second job to offset their lost weekly earnings. In extreme cases, some workers may become unemployed.
[g] The Department assumed hours would not change, due to lack of data and relevant literature; however, it is possible employers will increase these workers' hours in response to paying them a higher salary or to avoid paying overtime premiums to newly nonexempt coworkers.

Estimated Number of and Effects on Affected EAP Workers

The Department estimated the final rule will affect 1.3 million workers (Table 13), of which 762,200 were Type 1 workers (60.6 percent of all affected EAP workers), 300,900 were estimated to be Type 2 workers (23.9 percent of all affected EAP workers), 154,000 were Type 3 workers (12.3 percent of all affected EAP workers), and 40,100 were estimated to be Type 4 workers (3.2 percent of all affected workers). All Type 3 workers and half of Type 2 employees (304,500) are assumed to work predictable overtime.

TABLE 13—AFFECTED EAP WORKERS BY TYPE (1,000S), YEAR 1

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard salary level	1,155.6	700.3	296.8	126.8	31.7
HCE compensation level	101.8	62.0	4.1	27.2	8.5
Total	1,257.3	762.2	300.9	154.0	40.1

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

The final rule will affect some affected workers' hourly wages, hours, and weekly earnings. Predicted changes in implicit wage rates are outlined in Table 14, changes in hours in Table 15, and changes in weekly earnings in Table 16. How these will change depends on the type of worker, but on average the Department projects that weekly earnings will be unchanged or increase while hours worked will be unchanged or decrease.

Type 1 workers will have no change in wages, hours, or earnings.[205] Employers were assumed to be unable to adjust the hours or regular rate of pay for the occasional overtime workers whose overtime is irregularly scheduled and unpredictable. The Department used the incomplete fixed-job model to estimate changes in the regular rate of pay for Type 3 workers and the 50 percent of Type 2 workers who regularly work occasional overtime. As a group, Type 2 workers will see a decrease in their average regular hourly wage; however, because these workers will now receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, average weekly earnings for Type 2 workers will increase.[206]

Similarly, Type 3 workers will also receive decreases in their regular hourly wage as predicted by the incomplete fixed-job model but an increase in weekly earnings because these workers will now be eligible for the overtime premium. Type 4 workers' implicit hourly rates of pay will increase to meet the updated standard salary level or HCE annual compensation level.

[205] It is possible that these workers may experience an increase in hours and weekly earnings because of transfers of hours from other newly nonexempt workers who do usually work overtime. Due to the high level of uncertainty in employers' responses regarding the transfer of hours, the Department did not have credible evidence to support an estimation of the number of hours transferred to other workers.

[206] Type 2 workers do not see increases in regular earnings to the new salary level (as Type 4 workers do) even if their new earnings in this week exceed that new level. This is because the estimated new earnings only reflect their earnings in that week when overtime is worked; their earnings in typical weeks that they do not work overtime do not exceed the salary level.

TABLE 14—AVERAGE REGULAR RATE OF PAY BY TYPE OF AFFECTED EAP WORKER, YEAR 1

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level					
Before Final Rule	$15.85	$16.71	$16.15	$11.39	$11.91
After Final Rule	$15.81	$16.71	$16.09	$10.97	$12.51
Change ($)	−$0.04	$0.00	−$0.06	−$0.42	$0.60
Change (%)	−0.3%	0.0%	−0.4%	−3.7%	5.1%
HCE Compensation Level					
Before Final Rule	$46.94	$51.63	$49.81	$38.80	$37.46
After Final Rule	$46.32	$51.63	$47.53	$36.55	$38.27
Change ($)	−$0.63	$0.00	−$2.29	−$2.26	$0.81
Change (%)	−1.3%	0.0%	−4.6%	−5.8%	2.2%

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime-eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

Hours for Type 1 workers will not change. Similarly, hours will not change for the half of Type 2 workers who work irregular overtime. Half of Type 2 and all Type 3 workers will see a small decrease in their hours of overtime worked. This reduction in hours is relatively small and is due to the effect on labor demand from the increase in the average hourly wage as predicted by the incomplete fixed-job model (Table 15). Type 4 workers' hours may increase, but due to lack of data, the Department assumed hours would not change.

TABLE 15—AVERAGE WEEKLY HOURS FOR AFFECTED EAP WORKERS BY TYPE, YEAR 1

	Total	No overtime worked (T1)	Occasional OT (T2)	Regular OT	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before Final Rule	39.9	37.5	39.2	50.4	56.6
After Final Rule	39.8	37.5	39.1	49.8	56.6
Change (hours)	−0.1	0.0	0.0	−0.6	0.0
Change (%)	−0.2%	0.0%	−0.1%	−1.2%	0.0%
HCE Compensation Level [a]					
Before Final Rule	44.2	39.4	48.4	51.0	54.9
After Final Rule	44.1	39.4	48.2	50.7	54.9
Change (hours)	−0.1	0.0	−0.3	−0.3	0.0
Change (%)	−0.2%	0.0%	−0.5%	−0.7%	0.0%

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Usual hours for Types 1, 3, and 4 but actual hours for Type 2 workers identified in the CPS MORG.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

Because most Type 1 workers will not experience a change in their regular rate of pay or hours, they will have no change in earnings due to the final rule (Table 16).[207] Although Type 2 and Type 3 workers will, on average, experience a decrease in both their regular rate of pay and hours worked, their weekly earnings will increase as a result of the overtime premium. Weekly earnings after the standard salary level increased were estimated using the new wage (*i.e.,* the incomplete fixed-job model wage) and the reduced number of overtime hours worked. Type 4 workers' salaries will increase to the new standard salary level or the HCE compensation level.

[207] The small increase in average weekly earnings for Type 1 workers is due to increasing the weekly earnings in the District of Columbia to the minimum wage ($13.25 per hour).

TABLE 16—AVERAGE WEEKLY EARNINGS FOR AFFECTED EAP WORKERS BY TYPE, YEAR 1

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before Final Rule	$581.42	$575.71	$594.52	$566.67	$643.94
After Final Rule	$586.34	$575.72	$599.48	$589.91	$684.00
Change ($)	$4.93	$0.01	$4.96	$23.24	$40.06
Change (%)	0.8%	0.0%	0.8%	4.1%	6.2%
HCE Compensation Level [a]					
Before Final Rule	$1,989.41	$1,973.57	$2,415.63	$1,950.93	$2,021.82
After Final Rule	$2,008.37	$1,973.57	$2,467.78	$2,000.16	$2,066.00
Change ($)	$18.96	$0.00	$52.15	$49.24	$44.18
Change (%)	1.0%	0.0%	2.2%	2.5%	2.2%

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] The mean of the hourly wage multiplied by the mean of the hours does not necessarily equal the mean of the weekly earnings because the product of two averages is not necessarily equal to the average of the product.

* *Type 1:* Workers without regular OT and without occasional OT and become overtime eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

At the new standard salary level, the average weekly earnings of affected workers will increase $4.93 (0.8 percent), from $581.42 to $586.34. Multiplying the average change of $4.93 by the 1.2 million EAP workers affected by the change in the standard salary level and 52 weeks equals an increase in earnings of $296.1 million in the first year (Table 17). For workers affected by the change in the HCE compensation level, average weekly earnings will increase by $18.96. When multiplied by 101,800 affected workers and 52 weeks, the national increase will be $100.3 million in the first year. Thus, total Year 1 transfer payments attributable to this final rule will total $396.4 million.

TABLE 17—TOTAL CHANGE IN WEEKLY AND ANNUAL EARNINGS FOR AFFECTED EAP WORKERS BY PROVISION, YEAR 1

Provision	Annual change in earnings (1,000s)
Total	$396,424
Standard salary level:	
Total	296,078
Minimum wage only	75,376
Overtime pay only [a]	220,702
HCE compensation level:	
Total	100,345
Minimum wage only	.....
Overtime pay only [a]	100,345

[a] Estimated by subtracting the minimum wage transfer from the total transfer.

Rohwedder and Wenger (2015) analyzed the effects of increasing the standard salary level.[208] They compared hourly and salaried workers in the CPS using quantile treatment effects. This methodology estimates the effect of a worker becoming nonexempt by comparing similar workers who are hourly and salaried. They found no statistically significant change in hours or wages on average. However, their point estimates, averaged across all affected workers, show small increases in earnings and decreases in hours, similar to our analysis. For example, using a salary level of $750, they estimated weekly earnings may increase between $2 and $22 and weekly hours may decrease by approximately 0.4 hours. The Department estimated weekly earnings for workers affected by the standard salary level will increase by $4.93 and hours will decrease by 0.1 hours.

4. Potential Transfers Not Quantified

There may be additional transfers attributable to this final rule; however, the magnitude of these other transfers could not be quantified and therefore are discussed only qualitatively.

Reduced Earnings for Some Workers

Holding regular rate of pay and work hours constant, payment of an overtime premium will increase weekly earnings for workers who work overtime. However, as discussed previously, employers may try to mitigate cost increases by reducing the number of overtime hours worked, either by transferring these hours to other workers or monitoring hours more closely. Depending on how hours are adjusted, a specific worker may earn less pay after this final rule.

Additional Work for Some Workers

Affected workers who remain exempt will see an increase in pay but may also see an increase in workload. The Department estimated the net changes in hours, but due to the data limitations as noted in section VI.D.iv.3, did not estimate changes in hours for affected workers whose salary is increased to the new threshold so they remain overtime exempt.

Reduction in Bonuses and Benefits for Some Workers

Employers may offset increased labor costs by reducing bonuses or benefits instead of reducing base wages or hours worked. Due to data limitations, the Department has not modeled this effect separately. The Department observes that any reductions in bonuses or benefits would be likely accompanied by smaller reductions in base wages or hours worked.

Several commenters stated that in order to pay for the higher payroll costs, they would decrease employee benefits. These comments were mostly general statements, often included in a list of changes the employer intends to make in response to the increased salary threshold. Others stated that employees would lose benefits due to being reclassified as hourly workers. However, as the Department previously noted, this regulation does not require that workers who become nonexempt must be

[208] Rohwedder and Wenger, *supra* note 130.

reclassified as hourly nor does it require that hourly workers receive fewer benefits than salaried workers. Additionally, some commenters stated that these employees would have reductions in their ability to earn commissions, bonuses, or other types of incentive payments, but these commenters generally did not discuss the net impact on these employees' earnings. These comments did not provide information that would allow the Department to estimate the purported impact of the final rule on employee benefits.

5. NPRM Comments on Transfer Calculations

In response to the NPRM, the Department's RFI, and at listening sessions, some commenters provided information concerning their proposed wage and hour adjustments in anticipation of an increase to the standard salary level and HCE total compensation level. In comments on the NPRM, Capital Associated Industries submitted the results from a survey of their members, which conveyed that employers plan to respond in different ways such as increasing salaries of exempt employees so that they remain exempt, or decreasing the hours or hourly rates of newly nonexempt employees. A survey of members of the International Public Management Association for Human Resources found ''an almost even split between those who would increase salaries of exempt employees to the new threshold and those who would shift currently exempt employees to nonexempt status'' in response to the proposed standard salary level.

In responses to the Department's RFI, commenters representing employer interests indicated that employers would respond to a new salary level by making a variety of adjustments to wages, hours worked, or both. Some commenters' feedback supports adoption of an incomplete fixed-job model. For example, Littler Mendelson and the U.S. Chamber of Commerce reported that, among surveyed employers with exempt employees who would become nonexempt under the 2016 final rule, 28.7 percent reported that they planned to ''allow [newly nonexempt employees] to work the same number of hours and earn overtime compensation without restriction,'' compared to just 18.6 percent who planned to reduce effective hourly rates ''so that their total pay remained the same.'' The Chamber's survey did not ask whether employers planned to adopt a combination of those two responses (*i.e.,* paying overtime premiums while partially reducing effective hourly rates).

In this final rule, the Department estimated that some workers will see their earnings increase to the new earnings levels and remain exempt. There is some evidence that employers will respond in this manner. For example, in response to the RFI, the Chamber reported that, of surveyed employers who had implemented or made plans to implement changes to comply with the 2016 final rule, 76.4 percent reported that they had increased or planned to increase the salaries of some exempt employees to retain their exempt status. Similarly, the American Hotel and Lodging Association reported that 43 percent of their members raised the salaries of at least one worker to a figure above the 2016 final rule's salary threshold. It is possible that employers will increase the salaries paid to some ''occasional'' overtime workers to maintain the exemption for those workers, but the Department has no way of identifying these workers.

Regarding the proposed transfer calculations, SBA Advocacy took issue with the Department's estimates that affected small business establishments would have, on average, $422 to $3,187 in additional payroll costs in the first year of the proposed rule. Rather, SBA Advocacy stated that ''[s]mall businesses have told Advocacy that their [additional] payroll costs will be in the thousands of dollars.'' This comment, however, does not explain what methodological approach the Department should use to estimate transfers; what error(s), if any, the Department's method contains; or how much, if at all, the Department's approach underestimated such transfers. Therefore, the Department has not made any changes to the methodology in response to this comment.

The National Association of Manufacturers (NAM), in its comment opposing the proposed rule's HCE total annual compensation threshold of $147,414, stated that such a threshold would impact many manufacturers who currently employ numerous exempt HCE employees. It contended that ''[i]n the representative case of one large manufacturer, approximately 1,200 individuals—nearly 11% of the company's workforce—are exempt employees earning between $100,000 and $147,414 annually. For this manufacturer, the difference between 'exempt' and 'almost exempt' is estimated to be between $8 million and $20 million in potential overtime exposure per year.'' Using the upper end of NAM's transfer cost range, this equates to $16,667 per affected worker. This single anecdote, however, does not provide a sufficient basis for the Department to change the methodology used to calculate transfers. Moreover, NAM's concerns are mitigated by the Department's decision to set the HCE total annual compensation level to $107,432 instead of to $147,414.

The Department further notes that its estimates of transfers are informed by its projection that employers will respond to the final rule in a number of ways. If, for example, an employer simply pays each affected employee the overtime premium for each hour worked in excess of 40 hours per week, without making any adjustments to wages, hours or duties, such an approach would maximize transfers from employers to employees. However, as discussed above, the Department believes that employers will respond to the final rule by adjusting wages, hours, and duties to minimize the cost of the rule. The Department's approach is supported by both the literature the Department reviewed examining employers' response to overtime premium pay requirements, as well as survey data and anecdotal evidence provided in response to the NPRM and RFI regarding employers' responses to the 2016 final rule and planned responses to this rulemaking. Accordingly, the actual amount of transfers will fall well short of the transfers that would result if employers simply paid each affected employee overtime premiums without adjusting wages, hours, or duties.

v. Benefits and Cost Savings

Potential Benefits and Effects Not Discussed Elsewhere

The Department has determined that the final rule will provide some benefits; however, these benefits could not be quantified due to data limitations, requiring the Department to discuss such benefits only qualitatively.

1. Reduce Employee Misclassification

The revised salary level reduces the likelihood of workers being misclassified as exempt from overtime pay, providing an additional measure of the effectiveness of the salary level as a bright-line test delineating exempt and nonexempt workers. The Department's analysis of misclassification drew on CPS data and looked at workers who are white collar, salaried, subject to the FLSA and covered by part 541 regulations, earn a weekly salary of at least $455 but less than $684, and fail the duties test. Because only workers who work overtime may receive overtime pay, when determining the share of workers who are misclassified

the sample was limited to those who usually work overtime. Workers were considered misclassified if they did not receive overtime pay.[209] The Department estimated that 9.3 percent of workers in this analysis who usually worked overtime did not receive overtime compensation and are therefore misclassified as exempt. Applying this estimate to the sample of white collar salaried workers who fail the duties test and earn at least $455 but less than $684, the Department estimated that there are approximately 206,900 white collar salaried workers who are overtime-eligible but whose employers do not recognize them as such.[210] These employees' entitlement to overtime pay will now be abundantly evident.

RAND has conducted a survey to identify the number of workers who may be misclassified as EAP exempt. The survey, a special module to the American Life Panel, asks respondents: (1) Their hours worked, (2) whether they are paid on an hourly or salary basis, (3) their typical earnings, (4) whether they perform certain job responsibilities that are treated as proxies for whether they would justify exempt status, and (5) whether they receive any overtime pay. Using these data, Susann Rohwedder and Jeffrey B. Wenger [211] found that ''11.5 percent of salaried workers were classified as exempt by their employer although they did not meet the criteria for being so.'' Using RAND's estimate of the rate of misclassification (11.5 percent), the Department estimated that approximately 255,400 salaried workers earning between $455 and $684 per week who fail the standard duties test are currently misclassified as exempt.[212] By raising the salary level the final rule will increase the likelihood that these workers will be correctly classified as nonexempt.

[209] Overtime pay status was based on worker responses to the CPS MORG question concerning whether they receive overtime pay, tips, or commissions at their job (''PEERNUOT'' variable).

[210] The Department applies the misclassification estimate derived here to both the group of workers who usually work more than 40 hours and to those who do not.

[211] Rohwedder and Wenger, *supra* note 130.

[212] The number of misclassified workers estimated based on the RAND research cannot be directly compared to the Department's estimates because of differences in data, methodology, and assumptions. Although it is impossible to reconcile the two different approaches without further information, by calculating misclassified workers as a percent of all salaried workers in its sample, RAND uses a larger denominator than the Department. If calculated on a more directly comparable basis, the Department expects the RAND estimate of the misclassification rate would still be higher than the Department's estimate.

2. Reduced Litigation

One result of enforcing the 2004 standard salary level for 15 years is that the established ''dividing line'' between EAP workers who are exempt and not exempt has gradually eroded and no longer holds the same relative position in the distribution of nominal wages and salaries. Therefore, as nominal wages and salaries for workers have increased over time, while the standard salary level has remained constant, more workers earn above the ''dividing line'' and have moved from nonexempt to potentially exempt. The Department's enforcement of the 2004 salary levels has burdened employers with performing duties tests to determine overtime exemption status of white collar workers for a larger proportion of workers than in 2004 and has created uncertainty regarding the correct classification of workers as nonexempt or exempt. This may have contributed to an increase in FLSA lawsuits since 2004,[213] much of which has involved cases regarding whether workers who satisfy the salary level test also meet the duties test for exemption.

Updating the standard salary level should restore the relative position of the standard salary level in the overall distribution of nominal wages and salaries as set forth in the 2004 rule. Increasing the standard salary level from $455 per week to the level set in this final rule of $684 per week will increase the number of white collar workers for whom the standard salary level test is determinative of their nonexempt status, and employers will no longer have to perform a duties analysis for these employees. This final rule's update to the standard salary level will reduce the burden on employers and may reduce legal challenges and the overall cost of litigation faced by employers in FLSA overtime lawsuits, specifically litigation that turns on whether workers earning above the current salary and earnings thresholds but below the levels set in this final rule pass the duties test. The size of the potential social benefit from fewer legal challenges and the corresponding decline in overall litigation costs is difficult to quantify, but a reduction in litigation costs would benefit employers and workers.

To provide a general estimate of the size of the potential benefits from reducing litigation, the Department used data from the federal courts' Public Access to Court Electronic Records (PACER) system and the CPS to estimate the number and percentage of FLSA cases that concern EAP exemptions and are likely to be affected by the final rule. For this step of the analysis, to avoid using data that could reflect changed behavior in anticipation of the 2016 final rule, the Department used the data gathered during the 2016 rulemaking. As explained in that rule, to determine the potential number of cases that will likely be affected by the final rule, the Department obtained a list of all FLSA cases closed in 2014 from PACER (8,256 cases).[214] From this list, the Department selected a random sample of 500 cases. The Department identified the cases within this sample that were associated with the EAP exemptions. The Department found that 12.0 percent of these FLSA cases (60 of 500) were related to the EAP exemptions. Next, the Department determined what share of these cases could potentially be avoided by an increase in the standard salary and HCE compensation levels.

The Department estimated the share of EAP cases that may be avoided due to the final rule by using data on the salaried earnings distribution from the 2018/19 CPS MORG to determine the share of EAP cases in which workers earn at least $455 but less than $684 per week or at least $100,000 but less than $107,432 annually. From CPS, the Department selected white collar, nonhourly workers as the appropriate reference group for defining the earnings distribution rather than exempt workers because if a worker is litigating his or her exempt status, then we do not know if that worker is exempt or not. Based on this analysis, the Department determined that 13.5 percent of white collar nonhourly workers had earnings within these ranges. Applying these findings to the 12 percent of cases associated with the EAP exemption yields an estimated 1.6 percent of FLSA cases, or about 133 cases, that may be avoidable. The assumption underlying this method is that workers who claim they are misclassified as EAP exempt have a similar earnings distribution as all white collar nonhourly workers.

After determining the potential number of EAP cases that the final rule may avoid, the Department examined a selection of 56 FLSA cases concluded between 2012 and 2015 that contained litigation cost information to estimate the average costs of litigation to assign

[213] *See* Lydia DePillis, *Why wage and hour litigation is skyrocketing,* Washington Post (Nov. 25, 2015), *https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours; Uptick in FLSA Litigation Expected to Continue in 2016,* BNA Daily Labor Report (Nov. 25, 2015), *https://bnanews.bna.com/daily-labor-report/uptick-in-flsa-litigation-expected-to-continue-in-2016.*

[214] *See* 81 FR 32501.

to the potentially avoided EAP cases.[215] To calculate average litigation costs associated with these cases, the Department looked at records of court filings in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases were paid for attorney fees, administrative fees, and/or other costs, apart from any monetary damages attributable to the alleged FLSA violations. (The FLSA provides for successful plaintiffs to be awarded reasonable attorney's fees and costs, so this data is available in some FLSA cases.) After determining the plaintiff's total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred.[216] According to this analysis, the average litigation cost for FLSA cases concluded between 2012 and 2015 was $654,182.[217] Applying this figure to the approximately 133 EAP cases that could be prevented as a consequence of this rulemaking, the Department estimated that avoided litigation costs resulting from the rule may total approximately $87.0 million per year. The Department believes these totals may underestimate total litigation costs because some FLSA overtime cases are heard in state court and thus were not captured by PACER; some FLSA overtime matters are resolved before litigation or by alternative dispute resolution; and some attorneys representing FLSA overtime plaintiffs may take a contingency fee atop their statutorily awarded fees and costs.

The Department did not receive any comments on the methodology it used to estimate potential reduced litigation costs.

[215] The 56 cases used for this analysis were retrieved from Westlaw's Case Evaluator database using a keyword search for case summaries between 2012 and 2015 mentioning the terms ''FLSA'' and ''fees.'' Although the initial search yielded 64 responsive cases, the Department excluded one duplicate case, one case resolving litigation costs through a confidential settlement agreement, and six cases where the defendant employer(s) ultimately prevailed. Because the FLSA only entitles prevailing plaintiffs to litigation cost awards, information about litigation costs was only available for the remaining 56 FLSA cases that ended in settlement agreements or court verdicts favoring the plaintiff employees.

[216] This is likely a conservative approach to estimate the total litigation costs for each FLSA lawsuit, as defendant employers tend to incur greater litigation costs than plaintiff employees because of, among other things, typically higher discovery costs.

[217] The median cost was $111,835 per lawsuit.

3. NPRM Comments on Benefits

Some commenters contended that the proposed salary level would not yield the benefits that a higher salary level would. They asserted that raising the salary level higher than the proposed level would result in less misclassification and less litigation. The law firm Winebrake & Santillo, LLC estimated that ''if the executive exemption carried a $50,000/year salary threshold, over 75% of the [lawsuits the firm litigated involving alleged misclassification under the executive exemption] would never have been filed.'' NELA provided an example of a misclassification case involving managers at a fast food chain earning $32,000-$40,000 whom a jury found had been misclassified, and stated that such litigation would have been unnecessary under a higher salary level such as the one in the 2016 final rule. EPI, a group of 14 State attorneys general and the Attorney General for the District of Columbia, and other commenters similarly stated that a higher salary level was necessary to further reduce the risk of employee misclassification and the costs of litigation.

While a higher salary level would likely result in fewer workers being misclassified as exempt, and potentially less litigation as a result, as explained above, the aim of reducing misclassification cannot be prioritized over the statutory text, which grounds an analysis of exemption status in the ''capacity'' in which someone is employed—*i.e.,* that employee's duties. The salary level test's limited purpose is therefore to screen out only those employees who are clearly nonexempt because they are not performing bona fide EAP duties.

Likewise, many commenters expressed concern that the proposed salary level is too low and thus does not do enough to address income inequality. Other commenters asserted that a higher salary level would create jobs and/or stimulate the economy. As explained in greater detail above, however, the Department declined to set a higher salary level because it believes that the salary level set in this final rule appropriately screens out obviously nonexempt workers and distinguishes between nonexempt and potentially exempt employees, without threatening to supplant the role of the duties test. Accordingly, the Department declines to change the salary level methodology in response to these comments.

vi. Sensitivity Analysis

This section includes estimated costs and transfers using either different assumptions or segments of the population. First, the Department presents bounds on transfer payments estimated using alternative assumptions. Second, the Department considers costs and transfers by region and by industry.

1. Bounds on Transfer Payments

Because the Department cannot predict employers' precise reactions to the final rule, the Department calculated bounds on the size of the estimated transfers from employers to workers. These bounds on transfers do not generate bounded estimates for costs.

For a reasonable upper bound on transfer payments, the Department assumed that all occasional overtime workers and half of regular overtime workers will receive the full overtime premium (*i.e.,* such workers will work the same number of hours but be paid 1.5 times their implicit initial hourly wage for all overtime hours) (Table 18). The full overtime premium model is a special case of the fixed-wage model where there is no change in hours. For the other half of regular overtime workers, the Department assumed in the upper-bound method that they will have their implicit hourly wage adjusted as predicted by the incomplete fixed-job model (wage rates fall and hours are reduced but total earnings continue to increase, as in the preferred method). In the preferred model, the Department assumed that only 50 percent of occasional overtime workers and no regular overtime workers will receive the full overtime premium.

The plausible lower-transfer bound also depends on whether employees work regular overtime or occasional overtime. For those who regularly work overtime hours and half of those who work occasional overtime, the Department assumes the employees' wages will fully adjust as predicted by the fixed-job model.[218] For the other half of employees with occasional overtime hours, the lower bound assumes they will be paid one and one-half times their implicit hourly wage for overtime hours worked (full overtime premium).

[218] The straight-time wage adjusts to a level that keeps weekly earnings constant when overtime hours are paid at 1.5 times the straight-time wage. In cases where adjusting the straight-time wage results in a wage less than the minimum wage, the straight-time wage is set to the minimum wage.

TABLE 18—SUMMARY OF THE ASSUMPTIONS USED TO CALCULATE THE LOWER ESTIMATE, PREFERRED ESTIMATE, AND UPPER ESTIMATE OF TRANSFERS

Lower transfer estimate	Preferred estimate	Upper transfer estimate
Occasional Overtime Workers (Type 2)		
50% fixed-job model 50% full overtime premium	50% incomplete fixed-job model 50% full overtime premium.	100% full overtime premium.
Regular Overtime Workers (Type 3)		
100% fixed-job model	100% incomplete fixed-job model	50% incomplete fixed-job model. 50% full overtime premium.

* Full overtime premium model: Regular rate of pay equals the implicit hourly wage prior to the regulation (with no adjustments); workers are paid 1.5 times this base wage for the same number of overtime hours worked prior to the regulation.
* Fixed-job model: Base wages are set at the higher of: (1) A rate such that total earnings and hours remain the same before and after the regulation; thus the base wage falls, and workers are paid 1.5 times the new base wage for overtime hours (the fixed-job model) or (2) the minimum wage.
* Incomplete fixed-job model: Regular rates of pay are partially adjusted to the wage implied by the fixed-job model.

The cost and transfer payment estimates associated with the bounds are presented in Table 19. Regulatory familiarization costs and adjustment costs do not vary across the scenarios. Managerial costs are lower under these alternative employer response assumptions because fewer workers' hours are adjusted by employers and thus managerial costs, which depend in part on the number of workers whose hours change, will be smaller.[219] Depending on how employers adjust the implicit regular hourly wage, estimated transfers may range from $233.7 million to $644.8 million, with the preferred estimate equal to $396.4 million.

TABLE 19—BOUNDS ON YEAR 1 COST AND TRANSFER PAYMENT ESTIMATES, YEAR 1

[Millions]

Cost/transfer	Lower transfer estimate	Preferred estimate	Upper transfer estimate
Direct employer costs	$413.5	$476.6	$422.9
Reg. familiarization	340.4	340.4	340.4
Adjustment costs	68.2	68.2	68.2
Managerial costs	9.8	134.4	27.7
Transfers	233.7	396.4	644.8

Note 1: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

2. Effects by Regions and Industries

This section presents estimates of the effects of this final rule by region and by industry. The Department compared the number of affected workers, costs, and transfers across the four Census Regions. The region with the largest number of affected workers will be the South (544,000). As a share of potentially affected workers in the region, the South has somewhat more affected workers relative to other regions (6.1 percent are affected compared with 4.1 to 4.4 percent in other regions). However, as a share of all workers in the region, the South will not be particularly affected relative to other regions (1.1 percent are affected compared with 0.7 to 0.9 percent in other regions).

TABLE 20—POTENTIALLY AFFECTED AND AFFECTED WORKERS, BY REGION, YEAR 1

Region	Workers subject to FLSA (millions)	Potentially affected workers (millions) [a]	Affected workers			
			Number (millions) [b]	Percent of total affected workers	Affected workers as a percent of potentially affected workers	Affected workers as a percent of all workers
All	139.4	25.6	1.257	100	4.9	0.9
Northeast	25.4	5.3	0.231	18.4	4.4	0.9
Midwest	30.6	5.2	0.229	18.2	4.4	0.7
South	50.9	8.9	0.544	43.2	6.1	1.1
West	32.6	6.1	0.253	20.2	4.1	0.8

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] EAP exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[219] In the lower transfer estimate, managerial costs are for employees whose hours change because their hourly rate increased to the minimum wage.

[b] Currently EAP exempt workers who will be entitled to overtime protection under the updated earnings levels or whose weekly earnings will increase to the new earnings levels to remain exempt.

Total transfers in the first year were estimated to be $396.4 million (Table 21). As expected, the transfers in the South will be the largest portion because the largest number of affected workers will be in the South; however, transfers per affected worker will be the lowest in the South. Annual transfers per worker will be $255 in the South, and $317 to $436 in other regions.

TABLE 21—TRANSFERS BY REGION, YEAR 1

Region	Total change in earnings (millions)	Percent of total	Per affected worker
All	$396.4	100	$315.29
Northeast	73.3	18.5	317.35
Midwest	73.8	18.6	321.60
South	138.8	35.0	255.39
West	110.6	27.9	436.18

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

Direct employer costs are composed of regulatory familiarization costs, adjustment costs, and managerial costs. The Department estimates that total direct employer costs will be the highest in the South ($208.3 million) and lowest in the Northeast ($100.4 million) (Table 22). Direct employer costs in each region, as a percentage of the total direct costs, will range from 18.5 percent in the Northeast to 38.4 percent in the South. These proportions are almost the same as the proportions of the total workforce in each region: 18.2 percent in the Northeast and 36.5 percent in the South.

TABLE 22—DIRECT EMPLOYER COSTS BY REGION, YEAR 1

Region	Regulatory familiarization	Adjustment	Managerial	Total direct costs
Costs (Millions)				
All	$340.4	$68.2	$134.4	$543.0
Northeast	65.7	12.5	22.2	100.4
Midwest	74.8	12.4	27.7	114.9
South	119.6	29.5	59.2	208.3
West	80.3	13.7	25.3	119.4
Percent of Total Costs by Region				
All	100.0	100.0	100.0	100.0
Northeast	19.3	18.4	16.5	18.5
Midwest	22.0	18.2	20.6	21.2
South	35.1	43.2	44.0	38.4
West	23.6	20.2	18.9	22.0

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

Another way to compare the relative effects of this final rule by region is to consider the transfers and costs as a proportion of payroll and revenues (Table 23). Nationally, employer costs and transfers will be approximately 0.012 percent of payroll. By region, direct employer costs and transfers as a percent of payroll will be approximately the same (between 0.010 and 0.013 percent of payroll). Employer costs and transfers as a percent of revenue will be 0.002 percent nationally and in each region.

TABLE 23—ANNUAL TRANSFERS AND COSTS AS PERCENT OF PAYROLL AND OF REVENUE BY REGION, YEAR 1

Region	Payroll (billions)	Revenue (billions)	Costs and transfers	
			As percent of payroll	As percent of revenue
All	$7,867	$45,023	0.012	0.002
Northeast	1,733	9,048	0.010	0.002
Midwest	1,673	10,251	0.011	0.002
South	2,618	16,109	0.013	0.002

TABLE 23—ANNUAL TRANSFERS AND COSTS AS PERCENT OF PAYROLL AND OF REVENUE BY REGION, YEAR 1—Continued

Region	Payroll (billions)	Revenue (billions)	Costs and transfers	
			As percent of payroll	As percent of revenue
West	1,843	9,616	0.012	0.002

Notes: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019. Payroll, revenue, costs, and transfers all exclude the federal government.

Sources: Private sector payroll and revenue data from 2012 SUSB. State and local payroll and revenue data from State and Local Government Finances Summary: FY2016. Inflated to 2018$ using GDP deflator.

In order to gauge the effect of the final rule on industries, the Department compared estimates of combined direct costs and transfers as a percent of payroll, profit, and revenue for the 13 major industry groups (Table 24).[220] This provides a common method of assessing the relative effects of the rule on different industries, and the magnitude of adjustments the rule may require on the part of enterprises in each industry. The relative costs and transfers expressed as a percentage of payroll are particularly useful measures of the relative size of adjustment faced by organizations in an industry because they benchmark against the cost category directly associated with the labor force. Measured in these terms, costs and transfers as a percent of payroll will be highest in agriculture, forestry, fishing, and hunting; leisure and hospitality; and other services. However, the magnitude of the relative shares will be small, representing less than 0.04 percent of payroll costs in all industries.

The Department also estimated transfers and costs as a percent of profits.[221] Benchmarking against profits is potentially helpful in the sense that it provides a measure of the final rule's effect against returns on investment. However, this metric must be interpreted carefully as it does not account for differences across industries in risk-adjusted rates of return, which are not readily available for this analysis. The ratio of costs and transfers to profits also does not reflect differences in the firm-level adjustment to changes in profits reflecting cross-industry variation in market structure.[222] Nonetheless, the magnitude of costs and transfers as a percentage of profits will be small, with total costs and transfers as a percent of profits will vary among industries, ranging from a low of 0.01 percent (financial activities and manufacturing) to a high of 0.18 percent (other services). However, because the share is not more than 0.2 percent, even for the industry with the largest impact, we believe this final rule will not disproportionately affect any industries.

Finally, the Department's estimates of transfers and costs as a percent of revenue by industry also indicated very small effects (Table 24) of less than 0.01 percent of revenues in any industry. The industry with the largest costs and transfers as a percent of revenue will be leisure and hospitality. However, the difference between this industry and the industry with the lowest costs and transfers as a percent of revenue (public administration) is only 0.008 percentage points. Table 24 illustrates that the differences in costs relative to revenues will be quite small across industry groupings.

TABLE 24—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, YEAR 1

Industry	Transfers (millions)	Direct costs (millions)	Costs and transfers		
			As percent of payroll	As percent of revenue	As percent of profit [a]
All	$396.3	$528.6	0.012	0.002	0.03
Agriculture, forestry, fishing, & hunting	1.5	1.4	0.038	0.007	0.16
Mining	2.0	2.1	0.005	0.001	0.02
Construction	20.1	37.4	0.017	0.003	0.10
Manufacturing	36.0	27.5	0.008	0.001	0.01
Wholesale & retail trade	64.5	97.2	0.017	0.001	0.04
Transportation & utilities	9.7	16.4	0.008	0.002	0.06
Information	22.8	13.5	0.011	0.002	0.03
Financial activities	38.6	60.4	0.013	0.002	0.01
Professional & business services	73.5	90.9	0.010	0.005	0.06
Education & health services	57.3	81.4	0.012	0.005	0.09
Leisure & hospitality	47.6	49.7	0.029	0.008	0.16
Other services	12.5	40.2	0.028	0.007	0.18

[220] Note that the totals in this table do not match the totals in other sections due to the exclusion of transfers to federal workers and costs to federal entities. Federal costs and transfers are excluded to be consistent with payroll and revenue which exclude the federal government.

[221] Internal Revenue Service. (2013). Corporation Income Tax Returns. Available at: *https://www.irs.gov/statistics/soi-tax-stats-corporation-complete-report.* Table 5 of the IRS report provides information on total receipts, net income, and deficits. The Department calculated the ratio of net income (column (7)) less any deficit (column (8)) to total receipts (column (3)) for all firms by major industry categories. Costs and transfers as a percent of revenues were divided by the profit to receipts ratios to calculate the costs and transfers as a percent of profit.

[222] In particular, a basic model of competitive product markets would predict that highly competitive industries with lower rates of return would adjust to increases in the marginal cost of labor arising from the rule through an overall, industry-level increase in prices and a reduction in quantity demanded based on the relative elasticities of supply and demand. Alternatively, more concentrated markets with higher rates of return would be more likely to adjust through some combination of price increases and profit reductions based on elasticities as well as interfirm pricing responses.

TABLE 24—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, YEAR 1—Continued

Industry	Transfers (millions)	Direct costs (millions)	Costs and transfers		
			As percent of payroll	As percent of revenue	As percent of profit [a]
Public administration	10.2	10.6	0.002	0.001	[b]

Notes: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019. Payroll, revenue, costs, and transfers all exclude the federal government.

Sources: Private sector payroll and revenue data from 2012 Economic Census. State and local payroll and revenue data from State and Local Government Finances Summary: FY2016 are used for the Public Administration industry. Profit to revenue ratios calculated from 2012 Internal Revenue Service Corporation Income Tax Returns. Inflated to 2018$ using GDP deflator.

[a] Profit data based on corporations only.

[b] Profit is not applicable for public administration.

Although labor market conditions vary by Census Region and industry, the effects from updating the standard salary level and the HCE compensation level will not unduly affect any of the regions or industries. The proportion of total costs and transfers in each region will be fairly consistent with the proportion of total workers in each region. Additionally, although the shares will be larger for some firms and smaller for others, the average estimated costs and transfers from this final rule are very small relative to current payroll or current revenue—less than a tenth of a percent of payroll and less than one-hundredth of a percent of revenue in each region and in each industry.

vii. Regulatory Alternatives

As mentioned earlier, the Department considered a range of alternatives before selecting its methods for updating the standard salary level and the HCE compensation level (*see* § VI.C). As seen in Table 25, the Department has calculated the salary levels, the number of affected workers, and the associated costs and transfers for the alternative methods that the Department considered.

TABLE 25—UPDATED STANDARD SALARY AND HCE COMPENSATION LEVELS AND ALTERNATIVES, AFFECTED EAP WORKERS, COSTS, AND TRANSFERS, YEAR 1

Alternative	Salary level [a]	Affected EAP workers (1,000s)	Year 1 effects (millions)	
			Adj. & managerial costs [b]	Transfers
Standard Salary Level (Weekly)				
Alt. #1: No change	$455	0	.....	.....
Alt. #2: Maintain average minimum wage protection since 2004 [b]	502	218	27.1	29.6
Alt. #3: 2004 Method, South (excluding Washington D.C., MD & VA) or Retail [c]	673	1,043	169.4	276.7
Final rule: 2004 method [c]	684	1,156	184.1	296.1
Alt. #4: Kantor long test [d]	724	1,552	247.4	406.1
Alt. #5: 2016 method [e]	976	4,345	732.9	1,325.8
HCE Compensation Level (Annually)				
HCE alt. #1: No change	100,000	0	.....	.....
Final rule: 80th percentile of full-time salaried workers	107,432	102	18.4	100.3
HCE alt. #2: 90th percentile of full-time salaried workers	145,964	246	53.3	301.7

Note: Impacts estimated using pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Regulatory familiarization costs are excluded because they do not vary significantly based on the selected values of the salary levels.

[b] When the $455 weekly threshold was established in 2004, the federal minimum wage was $5.15, so the salary threshold equated to minimum wage and overtime pay at time-and-one-half for hours over 40 for an employee working no more than 72.2 hours. That amount fell with increases in the minimum wage and is now 55.2 hours. The weighted average across the 15 years since the overtime threshold was last changed is 59.5 hours, and a threshold that would provide 59.5 hours of $7.25 minimum wage and overtime pay would be $502.

[c] Full-time salaried workers with various industry/region exclusions (excludes workers not subject to the FLSA, not subject to the salary level test, and in some workers in agriculture or transportation). Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[d] 10th percentile of likely exempt workers. Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[e] 40th percentile earnings of nonhourly full-time workers in the South Census region, provided by BLS. The salary level reflects the first automatic update that would have taken place under the 2016 final rule.

viii. Projections

1. Methodology

The Department projected affected workers, costs, and transfers forward for ten years. This involved several steps.

First, the Department calculated workers' projected earnings in future years. The wage growth rate is calculated as the compound annual growth rate in median wages using the historical CPS MORG data for occupation-industry categories from 2007 to 2017.[223] This is the annual

[223] To increase the number of observations, three years of data were pooled for each of the endpoint years. Specifically, data from 2006, 2007, and 2008 (converted to 2007 dollars) were used to calculate the 2007 median wage and data from 2016, 2017, and 2018 (converted to 2017 dollars) were used to calculate the 2017 median wage.

growth rate that when compounded (applied to the first year's wage, then to the resulting second year's wage, etc.) yields the last historical year's wage. In occupation-industry categories where the CPS MORG data had an insufficient number of observations to reliably calculate median wages, the Department used the growth rate in median wages calculated from BLS' Occupational Employment Statistics (OES).[224] Any remaining occupation-industry combinations without estimated median growth rates were assigned the median of the growth rates in median wages from the CPS MORG data for all industries and occupations. For projecting costs, we similarly projected wage rates for the human resource and managerial workers whose time is spent on these tasks.

Second, the Department compared workers' counter-factual earnings (*i.e.,* absent this final rule) to the earnings levels. If the counter-factual earnings are below the relevant level (*i.e.,* standard or HCE) then the worker is considered affected. In other words, in each year affected EAP workers were identified as those who would be exempt in Year 1 absent any change to the current regulations but have projected earnings in the future year that are less than the relevant salary level.

Third, sampling weights were adjusted to reflect employment growth. The employment growth rate is the compound annual growth rate based on the ten-year employment projection from BLS' National Employment Matrix (NEM) for 2016 to 2026 within an occupation-industry category.

Adjusted hours for workers affected in Year 1 were re-estimated in Year 2 using a long-run elasticity of labor demand of -0.4.[225] For workers newly affected in Year 2 through Year 10, employers' wage and hour adjustments are estimated in that year, as described in section VI.D.iv, except the long-run elasticity of labor demand of -0.4 is used. Employer adjustments are made in the first year the worker is affected and then applied to all future years in which the worker continues to be affected (unless the worker switches to a Type 4 worker). Workers' earnings in predicted years are earnings post employer adjustments, with overtime pay, and with ongoing wage growth based on historical growth rates (as described above).

2. Estimated Projections

The Department estimated that the final rule will affect 1.3 million EAP workers in Year 1 and 0.9 million workers in Year 10 (Table 26). The projected number of affected workers includes workers who were not EAP exempt in the base year but would have become exempt in the absence of this final rule in Years 2 through 10. For example, a worker who passes the standard duties test may earn less than $455 in Year 1 but between $455 and the new salary level in subsequent years; such a worker will be counted as an affected worker.

The Department quantified three types of direct employer costs in the ten-year projections: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Regulatory familiarization costs only occur in Year 1. Although start-up firms must still become familiar with the FLSA following Year 1, the difference between the time necessary for familiarization with the current part 541 regulations and the regulations as modified by the final rule is essentially zero. Therefore, projected regulatory familiarization costs for new entrants over the next nine years are zero.

Adjustment costs will occur in any year in which workers are newly affected. After Year 1, these costs will be relatively small since the majority of workers will be affected in Year 1. Management costs will recur each year for all affected EAP workers whose hours are adjusted. However, managerial costs generally decrease over time as the number of affected EAP workers decreases. The Department estimated that Year 1 managerial costs will be $134.4 million; by Year 10 these costs decline to $94.5 million.

The Department projected two types of transfers from employers to employees associated with workers affected by the regulation. Transfers due to the minimum wage provision will be $75.4 million in Year 1 and will fall to $26.1 million in Year 10 as increased earnings over time move workers' implicit rate of pay above the minimum wage.[226] Transfers due to overtime pay also decrease because wage growth raises workers' earnings above the earnings thresholds over time thus decreasing the number of affected workers. Thus, transfers due to the overtime pay provision are estimated to decrease from $321.0 million in Year 1 to $221.3 million in Year 10. Projected costs and transfers were deflated to 2019 dollars using the Congressional Budget Office's projections for the CPI–U.[227]

TABLE 26—PROJECTED COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

Year (year #)	Affected EAP workers (millions)	Costs				Transfers		
		Reg. fam.	Adjustment [a]	Managerial	Total	Due to MW	Due to OT	Total
		(Millions 2019$)						
Year:								
Year 1	1.3	$340.4	$68.2	$134.4	$543.0	$75.4	$321.0	$396.4
Year 2	1.2	0.0	2.0	132.3	134.3	42.8	264.9	307.7
Year 3	1.1	0.0	1.9	126.7	128.5	37.4	266.5	303.9
Year 4	1.1	0.0	2.7	121.4	124.1	33.2	248.7	281.9
Year 5	1.1	0.0	3.1	116.8	119.9	31.2	269.0	300.1
Year 6	1.0	0.0	2.9	110.7	113.6	29.5	257.3	286.8
Year 7	1.0	0.0	3.2	103.9	107.1	29.5	236.9	266.5
Year 8	0.9	0.0	3.8	99.8	103.6	28.0	241.8	269.7
Year 9	0.9	0.0	4.1	95.3	99.4	26.4	235.0	261.4
Year 10	0.9	0.0	4.6	94.5	99.1	26.1	221.3	247.4
Annualized value:								

[224] To lessen small sample bias, this rate was only calculated using CPS MORG data when these data contained at least 30 observations in each period.

[225] This elasticity estimate is based on the Department's analysis of the following paper: Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[226] Increases in minimum wages were not projected. If state or federal minimum wages increase during the projected timeframe then projected minimum wage transfers may be underestimated.

[227] Congressional Budget Office. 2018. The Budget and Economic Outlook: 2018 To 2028. *See https://www.cbo.gov/publication/53651.*

TABLE 26—PROJECTED COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS—Continued

Year (year #)	Affected EAP workers (millions)	Costs				Transfers		
		Reg. fam.	Adjustment [a]	Managerial	Total	Due to MW	Due to OT	Total
		(Millions 2019$)						
3% real discount rate		38.7	10.5	114.8	164.0	36.9	258.1	295.0
7% real discount rate		45.3	11.7	116.3	173.3	38.1	260.6	298.8

[a] Adjustment costs occur in all years when there are newly affected workers.

Table 26 also summarizes annualized costs and transfers over the ten-year projection period, using 3 percent and 7 percent real discount rates. The Department estimated that total direct employer costs have an annualized value of $173.3 million per year over ten years when using a 7 percent real discount rate. The annualized value of total transfers was estimated to equal $298.8 million.

ix. Alternative Regulatory Baseline, Including Calculation of Cost Savings Under Executive Order 13771

Other portions of this regulatory impact analysis contain estimates of the impacts of this final rule relative to the 2004 final rule, which is the rule that the Department is currently enforcing. However, OMB Circular A–4 states that multiple regulatory baselines may be analytically relevant. In this case, a second informative baseline is the 2016 final rule, which is currently in the Code of Federal Regulations (CFR).[228] Moreover, for purposes of determining whether this rule is deregulatory under E.O. 13771, the economic impacts should be compared to what is currently published in the CFR. As such, most of this section presents an estimate of the cost savings of this final rule relative to the 2016 rule, and in addition to estimating annualized cost savings for the final rule using a 10-year time horizon, we also estimated annualized cost savings in perpetuity in accordance with E.O. 13771 accounting standards. This perpetual time horizon makes it especially important to avoid overemphasizing short-run compensation stickiness in the estimation approach; as such, the quantitative estimates will incorporate a relatively high compensation adjustment, the 80 percent derived from Barkume (2010), which assumes an initial overtime premium is paid, rather than the adjustment reflected in the estimates that are elsewhere identified as primary.[229] Later in this section, the Department presents transfer and benefits estimates from the analysis accompanying the 2016 final rule—values that are also relevant to this second regulatory baseline.

To ensure that the estimated costs of the 2016 final rule can be directly and appropriately compared with the costs estimated for this final rule, the Department started with the analytic model for this final rule and replaced this final rule's salary and compensation thresholds with the thresholds that would be required by the 2016 final rule, including that rule's provision to automatically update the salary level on a triennial basis. The Department assumed that initial regulatory familiarization costs would be identical under adoption of either this final rule or the 2016 final rule, because the same number of employers would be potentially affected in Year 1. In addition, implementation of the 2016 rule would have resulted in the first automatic update occurring in 2020, and therefore the Department used that value to represent Year 1 of the 2016 rule for 2020. Similarly, automatic updates in Years 7 and 10 from the 2016 final rule become the second and third automatic updates in the comparison. Finally, the Department projected earnings levels for year 13 of the 2016 rule to use as the final automatic update in the comparison. Therefore, the *only* differences in estimated costs presented here between the 2016 final rule and this final rule are attributable to the difference in earnings thresholds and the effects of the 2016 final rule's automatic updating mechanism.

TABLE 27—WEEKLY EARNINGS THRESHOLDS USED IN COMPARISON OF 2016 AND 2019 FINAL RULES

Year	2016 Final rule [a]		2019 Final rule	
	Standard salary threshold	HCE compensation threshold	Standard salary threshold	HCE compensation threshold
2020 [b]	$984	$2,837	$684	$2,066
2023	1,049	3,080	684	2,066
2026	1,118	3,345	684	2,066
2029	1,192	3,632	684	2,066

[a] Earnings levels in 2020, 2023, and 2026 are the projected salary levels as reported in the 2016 final rule. The 2029 levels were calculated using the same growth rate as was used in the 2016 final rule to estimate the projected levels in 2023 and 2026; the growth rate of the 40th percentile in the South from FY2005 to FY2015.

[b] Standard salary threshold reflects the 2016 final rule projection for 2020. If the earnings levels were recalculated using current data (2018Q3 through 2019Q2) they would be $976 and $2,888.

However, this approach means that the estimated costs presented here for the 2016 final rule are not directly comparable to those published in the **Federal Register** (81 FR 32391). The differences between the previously

[228] 29 CFR part 541.

[229] As noted previously, even Barkume's result was estimated for a population that included hourly workers. The fixed-job model is probably more likely to hold for salaried workers than for hourly workers because salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage; therefore, applying the partial adjustment to the fixed-job model as estimated by these studies may overestimate the transfers between employers and salaried workers and other associated impacts.

published 2016 cost estimates and those presented here are primarily due to: Earnings levels associated with 2020; an increase in the number of establishments that would incur regulatory familiarization costs to account for economic growth between 2012 (estimates for the 2016 final rule were based on 2012 SUSB data) and 2016 (estimates for this final rule are based on 2016 SUSB data); the use of more recent CPS MORG data (the 2016 final rule used pooled CPS data for 2013 through 2015 inflated to represent FY 2017); the use of the Barkume-derived 80 percent compensation adjustment estimate, rather than the estimate that averages Barkume's findings with Trejo's; an increase in the wage rates used to value staff time spent on regulatory familiarization, adjustment, and monitoring; an increase in the managerial time estimate from 5 to 10 minutes; incorporating a 17 percent overhead rate in those wage rates; and minor improvements to the model.[230]

The estimated total perpetual annualized costs of the 2016 rule are $676.9 million using a 7 percent discount rate. For purposes of this E.O. 13771 analysis, the estimated total perpetual annualized costs of this final rule are $142.0 million using a 7 percent discount rate. The Department then subtracted direct regulatory costs expected to have been incurred under the 2016 final rule from the direct costs estimated under this final rule. Direct employer costs of this final rule are estimated to be, on average, $534.8 million lower per year in perpetuity than the 2016 final rule (using a 7 percent discount rate).

The cost savings from this final rule are primarily attributable to two factors. First, a lower standard salary level will result in fewer affected workers in any given year. If fewer workers are affected, then management must consider and make earnings adjustments for fewer employees, and must monitor hours worked for fewer employees. Second, this analysis does not incorporate automatic updating whereas the 2016 final rule incorporated a triennial automatic updating mechanism. Therefore, regulatory familiarization costs are now only incurred in Year 1 and adjustment costs are primarily incurred in Year 1. Additionally, managerial costs now gradually decrease over time rather than increasing every three years.

In the 2016 final rule, the Department estimated average annualized transfers of $1,189.1 million over a ten-year period using a discount rate of 7 percent. The Department also estimated that avoided litigation costs resulting from the rule could total approximately $31.2 million per year.[231] The Department includes these values here for reference.

EPI compared the estimated number of affected workers under the 2016 final rule to the estimate in the proposed rule, and commented that the Department's estimate ''that 2.8 million fewer workers will be impacted under its proposal than under the 2016 rule . . . is a vast underestimate.'' The alleged underestimate of affected workers resulted in part from EPI comparing the estimated impacts of the 2016 final rule in 2020 (*i.e.,* Year 4 of the 2016 rule) with the 2020 impacts of this rule (*i.e.,* Year 1 of this final rule).[232] Thus, EPI used the earnings levels associated with the first automatic update (which it calculated to be $51,053 for the standard salary level) for the 2016 rule. The Department has adjusted the calculation to use the 2016 final rule's predicted salary levels for 2020 when calculating Year 1 impacts.[233]

EPI also contended that the Department underestimated the difference between the number of workers affected by the 2016 final rule and the number affected by the NPRM because the Department's analysis ''[left] out an entire group of workers who would be affected by the rule—those who will no longer get *strengthened* protections.'' The majority of the difference between EPI's estimate of the number of affected workers and the NPRM's estimate is due to EPI including workers whose overtime protections were strengthened in the estimate of affected workers. However, in both this rule and the 2016 final rule, workers with strengthened overtime protections—those who fail the standard duties test and earn at least $455 but below the new standard salary level—are included in the description of affected workers but not in the official calculation of affected workers. This is because workers with strengthened protections are not directly impacted by changes in the regulations; they only directly benefit from the rulemaking if they are currently misclassified as exempt. Even so, the Department notes that this final rule will strengthen overtime protections for 4.1 million workers who currently fail the standard duties test and now will also earn below the standard salary level.

VII. Final Regulatory Flexibility Analysis (FRFA)

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM.[234] The Chief Counsel for Advocacy of the Small Business Administration submitted public comments on the NPRM which are addressed below.

A. Objectives of, and Need for, the Final Rule

The FLSA requires covered employers to: (1) Pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity and for outside sales employees, as those terms are ''defined and delimited'' by the Department. 29 U.S.C. 213(a)(1). The Department's regulations implementing these ''white collar'' exemptions are codified at 29 CFR part 541.

For an employer to exclude an employee from minimum wage and overtime protection pursuant to the EAP exemption, the employee generally must

[230] As previously discussed, one such improvement is the Department's application of conditional probabilities to estimate the number of HCE workers. *See supra* note 160.

[231] In this final rule, the Department has revised (from the 2016 rule) how it calculates avoided litigation costs so the number referenced here for the 2016 final rule is not directly comparable to the calculation of reduced litigation costs for this final rule.

[232] *See https://www.epi.org/files/pdf/165984.pdf,* at 7.

[233] The Department also notes there are a variety of reasons for the discrepancy between the Department's and EPI's calculations, including use of different data and methodological differences.

[234] *See* 5 U.S.C. 604.

meet three criteria: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the ''salary basis test''); (2) the amount of salary paid must meet a minimum specified amount (the ''salary level test''); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the ''duties test''). The salary level requirement was created to identify the dividing line distinguishing workers who may be performing exempt duties from the nonexempt workers whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions.

The Department has periodically updated the regulations governing these tests since the FLSA's enactment in 1938. The Department is currently enforcing the 2004 final rule, which, among other revisions, created the standard duties test and paired it with a salary level test of $455 per week. The 2004 final rule also created a new ''highly compensated'' test for exemption. Under this test, employees who are paid total annual compensation of at least $100,000 (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the duties or responsibilities of an exempt EAP employee identified in the standard tests for exemption.[235]

The Department's primary objective in this rulemaking is to ensure that the revised salary levels will continue to provide a useful and effective test for exemption. The premise behind the standard salary level is to be an appropriate dividing line between employees who are nonexempt and employees who may be performing exempt duties. The threshold essentially screens out obviously nonexempt employees whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions. If left unchanged, the effectiveness of the salary level test as a means to help determine exempt status diminishes as nonexempt employee wages increase over time.

Employees who meet the requirements of part 541 are excluded from the Act's minimum wage and overtime pay protections. As a result, employees may work any number of hours in the workweek and not be subject to the FLSA's overtime pay requirements. Some state laws have stricter exemption standards than those described above. The FLSA does not preempt any such stricter state standards. If a state law establishes a higher standard than the provisions of the FLSA, the higher standard applies as a matter of state law in that specific state.[236]

To restore the function of the standard salary level and the HCE total compensation requirements as appropriate bright-line tests between overtime-protected employees and those who may be bona fide EAP employees, the Department is increasing the minimum salary level necessary for exemption from the FLSA's minimum wage and overtime requirements as an EAP employee from $455 to $684 a week for the standard salary test, and from $100,000 to $107,432 per year for the HCE test.

B. The Agency's Response to Public Comments

Small business commenters expressed concerns with the Department's estimates of the proposed rule's costs and other impacts. These concerns are acknowledged and addressed in sections VI.d.iii and VI.d.iv, which we incorporate herein.

C. Comment by the Chief Counsel for Advocacy of the Small Business Administration

SBA's Office of Advocacy (SBA Advocacy) generally supported the Department's proposal. SBA Advocacy's comment was based largely on feedback received from small businesses, many of whom told SBA Advocacy that the higher threshold in the 2016 final rule ($47,476) would have been disruptive and costly to small businesses. In its roundtables on the 2019 rulemaking, in contrast, SBA Advocacy heard that most small businesses would only have a few affected employees, and could absorb the costs from this rulemaking. SBA Advocacy listed a few recommendations for the Department to consider. Several of these recommendations (and related issues raised by other commenters) are also addressed elsewhere in this final rule.

SBA Advocacy recommended an adjustment to the calculation of the standard salary level. It indicated that some small businesses recommended that the Department ''adopt a narrower Census definition for areas with the lowest wages in the south when calculating and adjusting the new minimum salary threshold.'' SBA Advocacy, along with other commenters, specifically recommended that the Department ''focus on [a] more narrow geographic area like the East-South Central Census [Division] (which includes Alabama, Kentucky, Mississippi, and Tennessee) when adjusting the national wages; or provide more flexibility for these areas.'' The Department evaluated an alternative that eliminates higher-wage areas (District of Columbia, Maryland, and Virginia) from the data set used to determine the salary level (see Sections VI.D.vii and IV.A.v.). As previously discussed, the Department ultimately decided not to adopt this alternative, because it believes that using the entire South Census Region and the retail industry nationwide results in an appropriate nationwide salary level that is based on a low-wage region but can still serve as a meaningful dividing line in higher-wage regions. Using the entire South is also consistent with the methodology used in the 2004 final rule.

SBA Advocacy and a few other commenters also asserted that the Department underestimated small business compliance costs. SBA Advocacy stated that small businesses disagreed with the Department's estimate that, on average, establishments (including small businesses) will have a one-hour burden for rule familiarization, a 1.25-hour burden per affected worker in adjustment costs, and a 5-minute burden per worker per week for scheduling and monitoring. SBA Advocacy stated that small businesses have told them ''that it may take . . . many hours and several weeks to understand and implement this rule,'' and that ''[m]any small businesses spend a disproportionately higher amount of time and money on outside compliance staff.'' As discussed in more detail above, however, the Department believes that its estimates of time for rule familiarization and adjustment costs are appropriate, particularly given that the final rule is limited in scope and that most small businesses are already likely familiar with their responsibilities under the part 541 regulations. Additionally, these estimates represent an average of all establishments, some of which will spend little time on these activities and some of whom will spend more time than the average. However, the Department acknowledges that the prior 5 minutes per newly nonexempt overtime worker may be low and has doubled this estimate to 10 minutes.

Regarding the proposed transfer calculations, SBA Advocacy took issue with the Department's estimates that affected small business establishments would have, on average, $422 to $3,187

[235] § 541.601.

[236] *See* 29 U.S.C. 218(a).

in additional payroll costs in the first year (based on the proposed rule). Rather, SBA Advocacy stated that ''[s]mall businesses have told Advocacy that their payroll costs will be in the thousands of dollars.'' This comment, however, does not explain what methodological approach the Department should use to estimate transfers, or how much, if at all, the Department's approach underestimated such transfers. Therefore, the Department concludes that this comment does not provide a sufficient basis for changing its transfer calculation methodology.

D. Description of the Number of Small Entities to Which the Final Rule Will Apply

i. Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA, in effect as of October 1, 2017, to classify entities as small.[237] SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[238]

Parameters that are used in the small business cost analysis are provided in Table 28.

TABLE 28—OVERVIEW OF PARAMETERS USED FOR COSTS TO SMALL BUSINESSES

Small business costs	Cost
Direct and Payroll Costs	
Average total cost per affected entity [a]	$3,656.
Range of total costs per affected entity [a]	$1,678–$31,118.
Average percent of revenue per affected entity [a]	0.15%.
Average percent of payroll per affected entity [a]	0.81%.
Average percent of small business profit	0.05%.
Direct Costs	
Regulatory familiarization:	
Time (first year)	1 hour per establishment.
Hourly wage	$43.38.
Adjustment:	
Time (first year affected)	75 minutes per newly affected worker.
Hourly wage	$43.38.
Managerial:	
Time (weekly)	10 minutes per affected worker.
Hourly wage	$50.92.
Payroll Increases	
Average payroll increase per affected entity [a]	$2,393.
Range of payroll increases per affected entity [a]	$0–$26,943.

[a] Using the methodology where all employees at an affected small firm are affected. This assumption generates upper-end estimates. Lower-end cost estimates are significantly smaller.

ii. Data Sources and Methods

The Department obtained data from several sources to determine the number of small entities and employment in these entities for each industry. However, the Statistics of U.S. Businesses (SUSB) was used for most industries. Industries for which the Department used alternative sources include credit unions,[239] commercial banks and savings institutions,[240] agriculture,[241] and public administration.[242] Unless otherwise noted, the Department used the latest available data in each case, so data years differ between sources.

For each industry, the SUSB 2012 data tabulates total employment, establishment, and firm counts by both enterprise employment size (*e.g.,* 0–4 employees, 5–9 employees) and receipt size (*e.g.,* less than $100,000, $100,000–$499,999).[243] The Department combined these categories with the SBA size standards to estimate the proportion of establishments and employees in each industry that are considered small or employed by a small entity, respectively. The general

[237] *See https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf.*

[238] *See http://www.sba.gov/advocacy/regulatory-flexibility-act* for details.

[239] National Credit Union Association. (2012). 2012 Year End Statistics for Federally Insured Credit Unions. Available at: *https://www.cuna.org/uploadedFiles/Global/About_Credit_Unions/NationalProfile-M18-Bank.pdf.*

[240] Federal Depository Insurance Corporation. (2018). Statistics on Depository Institutions—Compare Banks. Available at: *https://www5.fdic.gov/SDI/index.asp.* Data are from 3/31/18 for employment and from 6/30/2017 for share of firms and establishments that are ''small.''

[241] United States Department of Agriculture. (2019). 2017 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[242] Census of Governments. 2017. Available at: *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[243] The SUSB defines employment as of March 12th.

methodological approach was to classify all establishments or employees in categories below the SBA cutoff as in ''small entity'' employment.[244] If a cutoff fell in the middle of a defined category, a uniform distribution of employees across that bracket was assumed to determine what proportion should be classified as small. The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions. The estimated share of employment in small entities was applied to the CPS data to estimate the number of affected workers in small entities. Similarly, the estimated share of establishments that are small was applied to the most recent SUSB data available (2016) to determine the number of small entities.

The Department also estimated the number of small establishments by employer type (nonprofit, for-profit, government). The calculation of the number of establishments by employer type is similar to the calculation of the number of establishments by industry. However, instead of using SUSB data by industry, the Department used SUSB data by Legal Form of Organization for nonprofit and for-profit establishments, and data from the 2012 Census of Governments for small governments. The 2012 Census of Governments report includes a breakdown of state and local governments by the population of their underlying jurisdiction, allowing us to estimate the number of governments that are small. The estimated share of establishments that are small was applied to the 2016 SUSB data available and the estimated share of governments that are small was applied to the 2017 Census of Governments.

iii. Number of Small Entities and Employees

Table 29 presents the estimated number of establishments and small establishments in the U.S. (hereafter, the terms ''establishment'' and ''entity'' are used interchangeably and are considered equivalent for the purposes of this FRFA).[245] Based on the methodology described above, the Department found that of the 7.8 million establishments relevant to this analysis, 81 percent (6.3 million) are small by SBA standards. These small establishments employ about 53.1 million workers, about 37 percent of workers employed by all establishments (excluding self-employed, unpaid workers, and members of the armed forces), and account for roughly 36 percent of total payroll ($2.9 trillion of $8.0 trillion).[246]

TABLE 29—NUMBER OF ESTABLISHMENTS AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE

Industry/employer type	Establishments (1,000s)		Workers (1,000s) [a]		Annual payroll (billions)	
	Total	Small	Total	Small business employed	Total	Small
Total	7,847.9	6,345.4	143,184.6	53,058.6	$7,976.2	$2,868.0
Industry [b]						
Agriculture	9.3	8.6	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	13.3	12.9	(c)	(c)	(c)	(c)
Mining	27.2	22.0	(c)	(c)	(c)	(c)
Construction	696.7	676.9	8,525.6	5,482.7	478.8	309.5
Nonmetallic mineral prod. manuf	15.0	11.5	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	59.4	55.8	1,652.6	1,004.7	91.6	54.7
Machinery manufacturing	23.5	21.5	1,240.7	673.2	79.9	44.0
Computer and elect. prod. manuf	12.4	11.0	1,173.5	552.2	109.9	53.5
Electrical equip., appliance manuf	5.7	4.9	(c)	(c)	(c)	(c)
Transportation equip. manuf	11.7	10.1	2,616.6	728.6	183.3	47.0
Wood products	14.3	13.1	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	15.0	14.6	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	26.0	25.1	1,512.1	888.6	92.9	53.8
Food manufacturing	27.1	23.9	1,809.0	829.3	81.2	35.9
Beverage and tobacco products	8.5	7.6	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	15.6	15.2	575.8	390.3	26.0	17.5
Paper and printing	29.6	27.6	871.7	464.6	49.5	25.3
Petroleum and coal prod. manuf	2.2	1.2	(c)	(c)	(c)	(c)
Chemical manufacturing	13.5	10.7	1,423.2	553.8	121.0	45.4
Plastics and rubber products	12.1	10.1	(c)	(c)	(c)	(c)
Wholesale trade	412.5	328.3	3,440.5	1,583.3	216.4	98.3
Retail trade	1,069.1	688.8	15,694.5	5,398.1	617.8	234.8
Transport. and warehousing	231.0	183.8	6,355.2	1,740.6	329.9	84.4
Utilities	18.2	7.8	1,391.6	264.2	110.6	20.3
Publishing ind. (ex. internet)	27.5	21.2	(c)	(c)	(c)	(c)
Motion picture and sound recording	25.5	22.3	(c)	(c)	(c)	(c)
Broadcasting (except internet)	8.3	4.6	554.0	129.4	39.2	8.6
Internet publishing and broadcasting	8.1	6.8	(c)	(c)	(c)	(c)
Telecommunications	59.2	13.3	(c)	(c)	(c)	(c)

[244] The Department's estimates of the numbers of affected small entities and affected workers who are employees of small entities are likely overestimates as the Department had no credible way to estimate which enterprises with annual revenues below $500,000 also did not engage in interstate commerce.

[245] SUSB reports data by ''enterprise'' size designations (a business organization consisting of one or more domestic establishments that were specified under common ownership or control). However, the number of enterprises is not reported for the size designations. Instead, SUSB reports the number of ''establishments'' (individual plants, regardless of ownership) and ''firms'' (a collection of establishments with a single owner within a given state and industry) associated with enterprises size categories. Therefore, numbers in this analysis are for the number of establishments associated with small enterprises, which may exceed the number of small enterprises. We based the analysis on the number of establishments rather than firms for a more conservative estimate (potential overestimate) of the number of small businesses.

[246] Since information is not available on employer size in the CPS MORG, respondents were randomly assigned as working in a small business based on the SUSB probability of employment in a small business by detailed Census industry. Annual payroll was estimated based on the CPS weekly earnings of workers by industry size.

TABLE 29—NUMBER OF ESTABLISHMENTS AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry/employer type	Establishments (1,000s)		Workers (1,000s) [a]		Annual payroll (billions)	
	Total	Small	Total	Small business employed	Total	Small
Internet serv. providers and data	13.6	9.0	(c)	(c)	(c)	(c)
Other information services	4.2	3.6	(c)	(c)	(c)	(c)
Finance	295.5	129.8	4,506.3	847.0	374.8	70.7
Insurance	181.5	141.7	2,746.7	722.0	197.0	51.8
Real estate	336.8	286.4	2,091.1	1,274.7	126.5	77.5
Rental and leasing services	53.7	26.7	(c)	(c)	(c)	(c)
Professional and technical services	903.5	819.1	10,196.2	4,770.7	897.3	414.2
Management of companies and enterprises	55.4	34.1	(c)	(c)	(c)	(c)
Admin. and support services	384.9	328.8	5,080.7	2,309.8	210.7	87.7
Waste manag. and remed. Services	24.6	18.4	(c)	(c)	(c)	(c)
Educational services	103.4	90.6	14,196.6	3,089.0	793.8	162.1
Hospitals	7.1	1.7	(c)	(c)	(c)	(c)
Health care services, except hospitals	700.5	575.8	10,074.6	4,787.1	496.9	236.3
Social assistance	182.9	149.0	3,040.0	1,703.7	113.2	60.5
Arts, entertainment, and recreation	137.2	126.3	2,760.6	1,394.5	108.9	54.4
Accommodation	66.8	55.8	1,475.8	566.4	55.6	21.1
Food services and drinking places	636.7	500.7	8,946.1	2,422.7	240.4	65.4
Repair and maintenance	214.8	199.8	1,614.1	1,214.7	72.9	53.9
Personal and laundry services	230.3	201.6	1,763.1	1,300.1	57.1	41.6
Membership associations & organizations	309.2	298.3	2,104.1	1,545.8	112.2	80.9
Private households	(d)	(d)	(c)	(c)	(c)	(c)
Public administration [e]	90.1	72.8	7,527.9	685.8	499.4	40.1
Employer Type						
Nonprofit, private	584.0	504.6	10,190.1	4,170.3	586.5	216.4
For profit, private	7,173.8	5,753.9	111,050.8	46,579.0	6,080.5	2,525.3
Government (state and local)	90.1	72.9	18,078.8	2,309.4	1,020.2	126.3

Note: Establishment data are from the Survey of U.S. Businesses 2016; worker and payroll data from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Excludes the self-employed and unpaid workers.

[b] Summation across industries may not add to the totals reported due to suppressed values and some establishments not reporting an industry.

[c] Data not displayed because sample size of affected workers in small establishments is less than 10 due to reliability concerns.

[d] SUSB does not provide information on private households.

[e] Establishment number represents the total number of governments, including state and local. Data from Census of Governments, 2017.

As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no data set that would adequately inform an estimate of the size of this worker population. Although not excluding such workers only affects a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for non-profits, because revenue from charitable activities is not included when determining enterprise coverage.

iv. Number of Affected Small Entities and Employees

To estimate the probability that an exempt EAP worker in the CPS data is employed by a small establishment, the Department assumed this probability is equal to the proportion of all workers employed by small establishments in the corresponding industry. That is, if 50 percent of workers in an industry are employed in small entities, then on average small entities are expected to employ 1 out of every 2 exempt EAP workers in this industry.[247] The Department applied these probabilities to the population of exempt EAP workers to find the number of workers (total exempt EAP workers and total affected by the rule) that small entities employ. No data are available to determine whether small businesses (or small businesses in specific industries) are more or less likely than non-small businesses to employ exempt EAP workers or affected EAP workers. Therefore, the best assumption available is to assign the same rates to all small and non-small businesses.[248] [249]

[247] The Department used CPS microdata to estimate the number of affected workers. This was done individually for each observation in the relevant sample by randomly assigning them a small business status based on the best available estimate of the probability of a worker to be employed in a small business in their respective industry (3-digit Census codes). While aggregation to the 262 3-digit Census codes is certainly possible, many of these industry codes contain too few observations to be reliable.

[248] There is a strand of literature that indicates that small establishments tend to pay lower wages than larger establishments. This may imply that workers in small businesses are more likely to be affected than workers in large businesses; however, the literature does not make clear what the appropriate alternative rate for small businesses should be.

[249] Workers are designated as employed in a small business based on their industry of employment. The share of workers considered small in nonprofit, for profit, and government entities is therefore the weighted average of the shares for the industries that compose these categories.

The Department estimated that small entities employ 480,900 of the 1.3 million affected workers (38.2 percent) (Table 30). This composes 0.9 percent of the 53.1 million workers that small entities employ. The sectors with the highest total number of affected workers employed by small establishments are: Professional and technical services (79,700); retail trade (47,500); and health care services, except hospitals (43,500). The sectors with the largest percent of small business workers who are affected include: broadcasting (except internet) (2.0 percent); arts, entertainment, and recreation (1.9 percent); and insurance (1.9 percent).

TABLE 30—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ESTABLISHMENTS, BY INDUSTRY AND EMPLOYER TYPE

Industry	Workers (1,000s)		Affected workers (1,000s) [a]	
	Total	Small business employed	Total	Small business employed
Total	143,184.6	53,058.6	1,257.3	480.9
Industry				
Agriculture	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	(c)	(c)	(c)	(c)
Mining	(c)	(c)	(c)	(c)
Construction	8,525.6	5,482.7	51.6	34.7
Nonmetallic mineral prod. manuf	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	1,652.6	1,004.7	7.8	3.9
Machinery manufacturing	1,240.7	673.2	7.1	4.1
Computer and elect. prod. manuf	1,173.5	552.2	8.4	3.9
Electrical equip., appliance manuf	(c)	(c)	(c)	(c)
Transportation equip. manuf	2,616.6	728.6	15.0	4.1
Wood products	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	1,512.1	888.6	7.9	4.4
Food manufacturing	1,809.0	829.3	5.5	3.1
Beverage and tobacco products	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	575.8	390.3	4.6	2.6
Paper and printing	871.7	464.6	7.2	4.5
Petroleum and coal prod. manuf	(c)	(c)	(c)	(c)
Chemical manufacturing	1,423.2	553.8	10.6	3.7
Plastics and rubber products	(c)	(c)	(c)	(c)
Wholesale trade	3,440.5	1,583.3	35.8	17.7
Retail trade	15,694.5	5,398.1	129.9	47.5
Transport. and warehousing	6,355.2	1,740.6	25.7	5.5
Utilities	1,391.6	264.2	12.4	3.8
Publishing ind. (ex. internet)	(c)	(c)	(c)	(c)
Motion picture and sound recording	(c)	(c)	(c)	(c)
Broadcasting (except internet)	554.0	129.4	8.2	2.5
Internet publishing and broadcasting	(c)	(c)	(c)	(c)
Telecommunications	(c)	(c)	(c)	(c)
Internet serv. providers and data	(c)	(c)	(c)	(c)
Other information services	(c)	(c)	(c)	(c)
Finance	4,506.3	847.0	76.8	15.2
Insurance	2,746.7	722.0	60.2	13.7
Real estate	2,091.1	1,274.7	25.4	17.3
Rental and leasing services	(c)	(c)	(c)	(c)
Professional and technical services	10,196.2	4,770.7	173.1	79.7
Management of companies & enterprises	(c)	(c)	(c)	(c)
Admin. and support services	5,080.7	2,309.8	33.5	13.5
Waste manag. and remed. services	(c)	(c)	(c)	(c)
Educational services	14,196.6	3,089.0	74.5	12.3
Hospitals	(c)	(c)	(c)	(c)
Health care services, except hospitals	10,074.6	4,787.1	91.0	43.5
Social assistance	3,040.0	1,703.7	52.8	28.3
Arts, entertainment, and recreation	2,760.6	1,394.5	53.0	26.7
Accommodation	1,475.8	566.4	9.8	4.0
Food services and drinking places	8,946.1	2,422.7	27.1	8.1
Repair and maintenance	1,614.1	1,214.7	11.4	8.2
Personal and laundry services	1,763.1	1,300.1	6.8	5.8
Membership associations & organizations	2,104.1	1,545.8	35.3	25.3
Private households	(c)	(c)	(c)	(c)
Public administration [b]	7,527.9	685.8	50.9	5.2
Employer Type				
Nonprofit, private	10,190.1	4,170.3	125.0	58.4

TABLE 30—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ESTABLISHMENTS, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Workers (1,000s)		Affected workers (1,000s) [a]	
	Total	Small business employed	Total	Small business employed
For profit, private	111,050.8	46,579.0	1,000.5	410.5
Government (state and local)	18,078.8	2,309.4	131.9	11.9

Note: Worker data are from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Estimation of affected workers employed by small establishments was done at the Census 4-digit occupational code and industry level. Therefore, at the more aggregated 51 industry level shown in this table, the ratio of small business employed to total employed does not equal the ratio of affected small business employed to total affected for each industry, nor does it equal the ratio for the national total because relative industry size, employment, and small business employment differs from industry to industry.
[b] Establishment number represents the total number of state and local governments. Data from Census of Governments, 2017.
[c] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

Because no information is available on how affected workers are distributed among small establishments that employ affected workers, the Department estimated a range for effects. At one end of this range, the Department assumed that each small establishment employs no more than one affected worker, meaning that at most 480,900 of the 6.3 million small establishments will employ an affected worker. Thus, these assumptions provide an upper bound estimate of the number of affected small establishments (although it provides a lower bound estimate of the effect per small establishment because costs are spread over a larger number of establishments). The impacts experienced by an establishment would increase as the share of its workers that are affected increases. Establishments that employ only affected workers are most likely to experience the most severe effects. Therefore, to estimate a lower-end estimate for the number of affected establishments (which generates an upper-end estimate for impacts per establishment) the Department assumed that all workers employed by an affected establishment are affected.

For the purposes of estimating this lower-range number of affected small establishments, the Department used the average size of a small establishment as the typical size of an affected small establishment.[250] The average number of employees in a small establishment is the number of workers that small establishments employ divided by the total number of small establishments in that industry (SUSB 2012). Thus, the number of affected small establishments in an industry, if all employees of an affected establishment are affected, equals the number of affected small establishment employees divided by the average number of employees per small establishment.

Table 31 summarizes the estimated number of affected workers that small establishments employ and the expected range for the number of affected small establishments by industry. The Department estimated that the rule will affect 480,900 workers who are employed by somewhere between 63,400 and 480,900 small establishments; this composes from 1.0 percent to 7.6 percent of all small establishments. It also means that from 5.9 million to 6.3 million small establishments incur no more than minimal regulatory familiarization costs (*i.e.,* 6.3 million minus 480,900 equals 5.9 million; 6.3 million minus 63,400 equals 6.3 million, using rounded values). The table also presents the average number of affected employees per establishment using the method in which all employees at the establishment are affected. For the other method, by definition, there is always one affected employee per establishment. Also displayed is the average payroll per small establishment by industry (based on both affected and non-affected small establishments), calculated by dividing total payroll of small businesses by the number of small businesses (Table 29) (applicable to both methods).

TABLE 31—NUMBER OF SMALL AFFECTED ESTABLISHMENTS AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE

Industry	Affected workers in small entities (1,000s)	Number of small affected establishments (1,000s) [a]		Per establishment	
		One affected employee per estab. [b]	All employees at estab. affected [c]	Affected employees [a]	Average annual payroll ($1,000s)
Total	480.9	480.9	63.4	7.6	$452.0
Industry					
Agriculture	[d]	[d]	[d]	[d]	[d]

[250] This is not the true lower bound estimate of the number of affected establishments. Strictly speaking, a true lower bound estimate of the number of affected small establishments would be calculated by assuming all employees in the largest small establishments are affected. For example, if the SBA standard is that establishments with 500 employees are ''small,'' and 1,350 affected workers are employed by small establishments in that industry, then the smallest number of establishments that could be affected in that industry (the true lower bound) would be three. However, because such an outcome appears implausible, the Department determined a more reasonable lower estimate would be based on average establishment size.

TABLE 31—NUMBER OF SMALL AFFECTED ESTABLISHMENTS AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Affected workers in small entities (1,000s)	Number of small affected establishments (1,000s) [a]		Per establishment	
		One affected employee per estab. [b]	All employees at estab. affected [c]	Affected employees [a]	Average annual payroll ($1,000s)
Forest., log., fish., hunt., and trap	[d]	[d]	[d]	[d]	[d]
Mining	[d]	[d]	[d]	[d]	[d]
Construction	34.7	34.7	4.3	8.1	457.2
Nonmetallic mineral prod. manuf	[d]	[d]	[d]	[d]	[d]
Prim. metals and fab. metal prod	3.9	3.9	0.2	18.0	980.4
Machinery manufacturing	4.1	4.1	0.1	31.4	2,048.1
Computer and elect. prod. manuf	3.9	3.9	0.1	50.1	4,856.7
Electrical equip., appliance manuf	[d]	[d]	[d]	[d]	[d]
Transportation equip. manuf	4.1	4.1	0.1	72.5	4,677.3
Wood products	[d]	[d]	[d]	[d]	[d]
Furniture and fixtures manuf	[d]	[d]	[d]	[d]	[d]
Misc. and not spec. manuf	4.4	4.4	0.1	35.5	2,146.1
Food manufacturing	3.1	3.1	0.1	34.7	1,504.7
Beverage and tobacco products	[d]	[d]	[d]	[d]	[d]
Textile, app., and leather manuf.	2.6	2.6	0.1	25.6	1,151.1
Paper and printing	4.5	4.5	0.3	16.9	918.3
Petroleum and coal prod. manuf.	[d]	[d]	[d]	[d]	[d]
Chemical manufacturing	3.7	3.7	0.1	51.8	4,246.9
Plastics and rubber products	[d]	[d]	[d]	[d]	[d]
Wholesale trade	17.7	17.7	3.7	4.8	299.5
Retail trade	47.5	47.5	6.1	7.8	340.9
Transport. and warehousing	5.5	5.5	0.6	9.5	459.4
Utilities	3.8	3.8	0.1	34.0	2,612.6
Publishing ind. (ex. internet)	[d]	[d]	[d]	[d]	[d]
Motion picture and sound recording	[d]	[d]	[d]	[d]	[d]
Broadcasting (except internet)	2.5	2.5	0.1	28.0	1,851.5
Internet publishing and broadcasting	[d]	[d]	[d]	[d]	[d]
Telecommunications	[d]	[d]	[d]	[d]	[d]
Internet serv. providers and data	[d]	[d]	[d]	[d]	[d]
Other information services	[d]	[d]	[d]	[d]	[d]
Finance	15.2	15.2	2.3	6.5	545.0
Insurance	13.7	13.7	2.7	5.1	365.7
Real estate	17.3	17.3	3.9	4.5	270.4
Rental and leasing services	[d]	[d]	[d]	[d]	[d]
Professional and technical services	79.7	79.7	13.7	5.8	505.6
Management of companies and enterprises	[d]	[d]	[d]	[d]	[d]
Admin. and support services	13.5	13.5	1.9	7.0	266.8
Waste manag. and remed. services	[d]	[d]	[d]	[d]	[d]
Educational services	12.3	12.3	0.4	34.1	1,790.4
Hospitals	[d]	[d]	[d]	[d]	[d]
Health care services, except hospitals	43.5	43.5	5.2	8.3	410.4
Social assistance	28.3	28.3	2.5	11.4	405.9
Arts, entertainment, and recreation	26.7	26.7	2.4	11.0	430.7
Accommodation	4.0	4.0	0.4	10.1	378.3
Food services and drinking places	8.1	8.1	1.7	4.8	130.7
Repair and maintenance	8.2	8.2	1.4	6.1	269.9
Personal and laundry services	5.8	5.8	0.9	6.4	206.4
Membership associations & organizations	25.3	25.3	4.9	5.2	271.4
Private households	[d]	[d]	[d]	[d]	[d]
Public administration [f]	5.2	5.2	0.6	9.4	550.3
Employer Type					
Nonprofit, private	58.4	58.4	7.1	8.3	428.8
For profit, private	410.5	410.5	50.7	8.1	438.9
Government (state and local)	11.9	11.9	0.4	31.7	1,734.0

Note: Establishment data are from the Survey of U.S. Businesses 2016; worker and payroll data from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Estimation of both affected small establishment employees and affected small establishments was done at the most detailed industry level available. Therefore, the ratio of affected small establishment employees to total small establishment employees for each industry may not match the ratio of small affected establishments to total small establishments at the more aggregated industry level presented in the table, nor will it equal the ratio at the national level because relative industry size, employment, and small business employment differs from industry to industry.

[b] This method may overestimate the number of affected establishments and therefore the ratio of affected workers to affected establishments may be greater than 1-to-1. However, we addressed this issue by also calculating effects based on the assumption that 100 percent of workers at an establishment are affected.

[c] For example, on average, a small establishment in the construction industry employs 8.1 workers (5.5 million employees divided by 676,900 small establishments). This method assumes if an establishment is affected then all 8.1 workers are affected. Therefore, in the construction industry this method estimates there are 4,300 small affected establishments (34,700 affected small workers divided by 8.1).
[d] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.
[e] Number of establishments is smaller than number of affected employees; thus, total number of establishments reported.
[f] Establishment number represents the total number of state and local governments.

v. Projected Impacts to Affected Small Entities

For small entities, the Department projected various types of effects, including regulatory familiarization costs, adjustment costs, managerial costs, and payroll increases to employees. The Department estimated a range for the number of small affected establishments and the impacts they incur. However, few establishments are likely to incur the effects at the upper end of this range because it seems unlikely that the final rule would affect all employees at a small firm. While the upper and lower bounds are likely over- and under-estimates, respectively, of effects per small establishment, the Department believes that this range of costs and payroll increases provides the most accurate characterization of the effects of the rule on small employers.[251] Furthermore, the smaller estimate of the number of affected establishments (*i.e.,* where all employees are assumed to be affected) will result in the largest costs and payroll increases per entity as a percent of establishment payroll and revenue, and the Department expects that many, if not most, entities will incur smaller costs, payroll increases, and effects relative to establishment size.

The Department expects total direct employer costs will range from $80.1 million to $97.1 million for affected small establishments (Table 32) in the first year. Small establishments that do not employ affected workers will incur an additional $254.4 million to $272.5 million in regulatory familiarization costs. The three industries with the highest costs (professional and technical services; retail trade; and health care services, except hospitals) account for about 36 percent of the costs. The transportation equipment manufacturing industry is expected to incur the largest cost per establishment ($11,700 using the method where all employees are affected), although the costs are not expected to exceed 0.25 percent of payroll. The food services and drinking places industry is expected to experience the largest effect as a share of payroll (estimated direct costs compose 0.63 percent of average entity payroll).

TABLE 32—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [b]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Total	$97.1	$202	0.04%	$80.1	$1,263	0.28
Industry						
Agriculture	(c)	(c)	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	(c)	(c)	(c)	(c)	(c)	(c)
Mining	(c)	(c)	(c)	(c)	(c)	(c)
Construction	7.1	204	0.04	5.8	1,348	0.29
Nonmetallic mineral prod. manuf	(c)	(c)	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	0.8	204	0.02	0.6	2,943	0.30
Machinery manufacturing	0.8	204	0.01	0.7	5,094	0.249
Computer and elect. prod. manuf	0.8	204	0.00	0.6	8,116	0.17
Electrical equip., appliance manuf	(c)	(c)	(c)	(c)	(c)	(c)
Transportation equip. manuf	0.8	204	0.00	0.7	11,720	0.25
Wood products	(c)	(c)	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	(c)	(c)	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	0.9	204	0.01	0.7	5,758	0.27
Food manufacturing	0.6	204	0.01	0.5	5,639	0.37
Beverage and tobacco products	(c)	(c)	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	0.5	204	0.02	0.4	4,175	0.36
Paper and printing	0.9	204	0.02	0.7	2,759	0.30
Petroleum and coal prod. manuf	(c)	(c)	(c)	(c)	(c)	(c)
Chemical manufacturing	0.8	204	0.00	0.6	8,382	0.20
Plastics and rubber products	(c)	(c)	(c)	(c)	(c)	(c)
Wholesale trade	3.6	204	0.07	3.0	820	0.27
Retail trade	9.7	204	0.06	7.9	1,306	0.38
Transport. and warehousing	1.1	204	0.04	0.9	1,569	0.34
Utilities	0.8	204	0.01	0.6	5,527	0.21
Publishing ind. (ex. internet)	(c)	(c)	(c)	(c)	(c)	(c)
Motion picture and sound recording	(c)	(c)	(c)	(c)	(c)	(c)
Broadcasting (except internet)	0.5	204	0.01	0.4	4,556	0.25
Internet publishing and broadcasting	(c)	(c)	(c)	(c)	(c)	(c)
Telecommunications	(c)	(c)	(c)	(c)	(c)	(c)
Internet serv. providers and data	(c)	(c)	(c)	(c)	(c)	(c)
Other information services	(c)	(c)	(c)	(c)	(c)	(c)
Finance	3.1	204	0.04	2.5	1,095	0.20
Insurance	2.8	204	0.06	2.3	864	0.24
Real estate	3.5	204	0.08	3.0	760	0.28

[251] As noted previously, these are not the true lower and upper bounds. The values presented are the highest and lowest estimates the Department believes are plausible.

TABLE 32—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [b]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Rental and leasing services	(c)	(c)	(c)	(c)	(c)	(c)
Professional and technical services	16.3	204	0.04	13.4	982	0.19
Management of companies and enterprises	(c)	(c)	(c)	(c)	(c)	(c)
Admin. and support services	2.8	204	0.08	2.3	1,175	0.44
Waste manag. and remed. services	(c)	(c)	(c)	(c)	(c)	(c)
Educational services	2.5	204	0.01	2.0	5,539	0.31
Hospitals	(c)	(c)	(c)	(c)	(c)	(c)
Health care services, except hospitals	8.9	204	0.05	7.2	1,383	0.34
Social assistance	5.8	204	0.05	4.7	1,885	0.46
Arts, entertainment, and recreation	5.4	204	0.05	4.4	1,822	0.42
Accommodation	0.8	204	0.05	0.7	1,678	0.44
Food services and drinking places	1.7	204	0.16	1.4	823	0.63
Repair and maintenance	1.7	204	0.08	1.4	1,023	0.38
Personal and laundry services	1.2	204	0.10	1.0	1,082	0.52
Membership associations & organizations	5.2	204	0.08	4.3	878	0.32
Private households	(c)	(c)	(c)	(c)	(c)	(c)
Public administration	1.1	204	0.04	0.9	1,561	0.28
Employer Type						
Nonprofit, private	11.6	199	0.05	9.4	1,330	0.31
For profit, private	86.6	211	0.05	71.0	1,400	0.32
Government (state and local)	2.4	201	0.01	1.9	5,055	0.29

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Direct costs include regulatory familiarization, adjustment, and managerial costs.
[b] The range of costs per establishment depends on the number of affected establishments. The minimum assumes that each affected establishment has one affected worker (therefore, the number of affected establishments is equal to the number of affected workers). The maximum assumes the share of workers in small entities who are affected is also the share of small entity establishments that are affected.
[c] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

It is possible that the costs of the final rule may be disproportionately large for small entities, especially because small entities often have limited or no human resources personnel on staff. However, the Department expects that small entities will rely upon compliance assistance materials provided by the Department or industry associations to become familiar with the final rule. Additionally, the Department notes that the final rule is quite limited in scope as it primarily makes changes to the salary component of the part 541 regulations. Finally, the Department believes that most entities have at least some nonexempt employees and, therefore, already have policies and systems in place for monitoring and recording their hours. The Department believes that applying those same policies and systems to the workers whose exemption status changes will not be an unreasonable burden on small businesses. Average weekly earnings for affected EAP workers in small establishments are expected to increase by about $6.07 per week per affected worker, using the incomplete fixed-job model [252] described in section VI.D.iv.3.[253] This will lead to $151.8 million in additional annual wage payments to employees in small entities (less than 0.6 percent of aggregate affected establishment payroll; Table 33). The largest payroll increases per establishment are expected in the sectors of textile, apparel, and leather manufacturing (up to $27,000 per entity); transportation equipment manufacturing (up to $14,600 per entity); and food manufacturing (up to $14,500 per entity). However, average payroll increases per establishment exceed 2 percent of average annual payroll in only two sectors: Food services and drinking places (3.0 percent) and textile, apparel, and leather manufacturing (2.3 percent).

[252] As explained in section VI.D.iv.3, the incomplete fixed-job model reflects the Department's determination that an appropriate estimate of the impact on the implicit hourly rate of pay for regular overtime workers should be determined using the average of Barkume's and Trejo's two estimates of the incomplete fixed-job model adjustments: A wage change that is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and a wage change that is 80 percent of the adjustment assuming an initial 28 percent overtime pay premium.

[253] This is an average increase for all affected workers (both EAP and HCE), and reconciles to the weighted average of individual salary changes discussed in the Transfers section.

TABLE 33—YEAR 1 SMALL ESTABLISHMENT PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Increased payroll for small entities in year 1 [a]				
	Total (millions)	One affected employee		All employees affected	
		Per estab.	Percent of annual payroll	Per estab.	Percent of annual payroll
Total	$151.8	$316	0.07	$2,393	0.53
Industry					
Agriculture	[b]	[b]	[b]	[b]	[b]
Forest., log., fish., hunt., and trap.	[b]	[b]	[b]	[b]	[b]
Mining	[b]	[b]	[b]	[b]	[b]
Construction	9.2	265	0.06	2,147	0.47
Nonmetallic mineral prod. manuf.	[b]	[b]	[b]	[b]	[b]
Prim. metals and fab. metal prod.	1.0	257	0.03	4,622	0.47
Machinery manufacturing	1.7	405	0.02	12,710	0.62
Computer and elect. prod. manuf.	0.3	80	0.00	4,004	0.08
Electrical equip., appliance manuf.	[b]	[b]	[b]	[b]	[b]
Transportation equip. manuf.	0.8	200	0.00	14,528	0.31
Wood products	[b]	[b]	[b]	[b]	[b]
Furniture and fixtures manuf.	[b]	[b]	[b]	[b]	[b]
Misc. and not spec. manuf.	1.7	389	0.02	13,794	0.64
Food manufacturing	1.3	417	0.03	14,476	0.96
Beverage and tobacco products	[b]	[b]	[b]	[b]	[b]
Textile, app., and leather manuf.	2.7	1,051	0.09	26,943	2.34
Paper and printing	1.1	233	0.03	3,931	0.43
Petroleum and coal prod. manuf.	[b]	[b]	[b]	[b]	[b]
Chemical manufacturing	0.9	236	0.01	12,236	0.29
Plastics and rubber products	[b]	[b]	[b]	[b]	[b]
Wholesale trade	4.7	263	0.09	1,270	0.42
Retail trade	17.1	360	0.11	2,818	0.83
Transport. and warehousing	1.8	321	0.07	3,039	0.66
Utilities	.....	0	.....	0	.....
Publishing ind. (ex. internet)	[b]	[b]	[b]	[b]	[b]
Motion picture and sound recording	[b]	[b]	[b]	[b]	[b]
Broadcasting (except internet)	1.1	451	0.02	12,620	0.68
Internet publishing and broadcasting	[b]	[b]	[b]	[b]	[b]
Telecommunications	[b]	[b]	[b]	[b]	[b]
Internet serv. providers and data	[b]	[b]	[b]	[b]	[b]
Other information services	[b]	[b]	[b]	[b]	[b]
Finance	3.6	239	0.04	1,557	0.29
Insurance	2.3	169	0.05	862	0.24
Real estate	8.5	489	0.18	2,175	0.80
Rental and leasing services	[b]	[b]	[b]	[b]	[b]
Professional and technical services	32.2	404	0.08	2,351	0.47
Management of companies and enterprises	[b]	[b]	[b]	[b]	[b]
Admin. and support services	3.6	265	0.10	1,859	0.70
Waste manag. and remed. services	[b]	[b]	[b]	[b]	[b]
Educational services	4.6	373	0.02	12,716	0.71
Hospitals	[b]	[b]	[b]	[b]	[b]
Health care services, except hospitals	5.8	134	0.03	1,114	0.27
Social assistance	4.2	148	0.04	1,690	0.42
Arts, entertainment, and recreation	15.1	567	0.13	6,260	1.45
Accommodation	.....	0	.....	0	.....
Food services and drinking places	6.6	818	0.63	3,960	3.03
Repair and maintenance	3.8	466	0.17	2,832	1.05
Personal and laundry services	0.6	110	0.05	709	0.34
Membership associations & organizations	4.1	160	0.06	831	0.31
Private households	[b]	[b]	[b]	[b]	[b]
Public administration	0.9	165	0.03	1,553	0.28
Employer Type					
Nonprofit, private	26.2	448	0.10	3,702	0.86
For profit, private	124.4	303	0.07	2,452	0.56
Government (state and local)	1.3	108	0.01	3,422	0.20

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Aggregate change in total annual payroll experienced by small entities under the updated salary levels after labor market adjustments. This amount represents the total amount of (wage) transfers from employers to employees.

[b] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

Table 34 presents estimated first year direct costs and payroll increases combined per establishment and the costs and payroll increases as a percent of average establishment payroll. The Department presents only the results for the upper bound scenario where all workers employed by the establishment are affected. Combined costs and payroll increases per establishment range from $1,700 in the accommodations industry to $31,100 in textile, apparel, and leather manufacturing. Combined costs and payroll increases compose more than 2 percent of average annual establishment payroll in two sectors: Food services and drinking places (3.7 percent) and textile, apparel, and leather manufacturing (2.7 percent). In all other sectors, they range from 0.2 percent to 1.9 percent of payroll.

However, comparing costs and payroll increases to payrolls overstates the effects on establishments because payroll represents only a fraction of the financial resources available to an establishment. The Department approximated revenue per small affected establishment by calculating the ratio of small business revenues to payroll by industry from the 2012 SUSB data then multiplying that ratio by average small entity payroll.[254] Using this approximation of annual revenues as a benchmark, only one sector has costs and payroll increases amounting to more than one percent of revenues, food services and drinking places (1.1 percent).

TABLE 34—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD

Industry	Costs and payroll increases for small affected establishments, all employees affected			
	Total (millions)	Per estab. [a]	Percent of annual payroll	Percent of estimated revenues [b]
Total	$231.9	$3,656	0.81	0.15
Industry				
Agriculture	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	(c)	(c)	(c)	(c)
Mining	(c)	(c)	(c)	(c)
Construction	15.0	3,495	0.76	0.17
Nonmetallic mineral prod. manuf	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	1.6	7,565	0.77	0.15
Machinery manufacturing	2.3	17,804	0.87	0.18
Computer and elect. prod. manuf	0.9	12,119	0.25	0.05
Electrical equip., appliance manuf	(c)	(c)	(c)	(c)
Transportation equip. manuf	1.5	26,248	0.56	0.08
Wood products	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	2.4	19,552	0.91	0.21
Food manufacturing	1.8	20,115	1.34	0.12
Beverage and tobacco products	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	3.2	31,118	2.70	0.50
Paper and printing	1.8	6,690	0.73	0.15
Petroleum and coal prod. manuf	(c)	(c)	(c)	(c)
Chemical manufacturing	1.5	20,618	0.49	0.04
Plastics and rubber products	(c)	(c)	(c)	(c)
Wholesale trade	7.7	2,090	0.70	0.04
Retail trade	25.0	4,123	1.21	0.12
Transport. and warehousing	2.7	4,608	1.00	0.23
Utilities	0.6	5,527	0.21	0.02
Publishing ind. (ex. internet)	(c)	(c)	(c)	(c)
Motion picture and sound recording	(c)	(c)	(c)	(c)
Broadcasting (except internet)	1.6	17,176	0.93	0.33
Internet publishing and broadcasting	(c)	(c)	(c)	(c)
Telecommunications	(c)	(c)	(c)	(c)
Internet serv. providers and data	(c)	(c)	(c)	(c)
Other information services	(c)	(c)	(c)	(c)
Finance	6.2	2,652	0.49	0.17
Insurance	4.6	1,727	0.47	0.11
Real estate	11.4	2,936	1.09	0.24
Rental and leasing services	(c)	(c)	(c)	(c)
Professional and technical services	45.6	3,333	0.66	0.26
Management of companies and enterprises	(c)	(c)	(c)	(c)
Admin. and support services	5.8	3,034	1.14	0.51
Waste manag. and remed. services	(c)	(c)	(c)	(c)
Educational services	6.6	18,255	1.02	0.39
Hospitals	(c)	(c)	(c)	(c)
Health care services, except hospitals	13.1	2,497	0.61	0.26
Social assistance	8.8	3,575	0.88	0.41

[254] The ratio of revenues to payroll for small businesses ranged from 2.15 (social assistance) to 43.40 (petroleum and coal products manufacturing), with an average over all sectors of 5.35. The Department used this estimate of revenue, instead of small business revenue reported directly from the 2012 SUSB so revenue aligned with payrolls in 2018.

TABLE 34—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD—Continued

Industry	Costs and payroll increases for small affected establishments, all employees affected			
	Total (millions)	Per estab. [a]	Percent of annual payroll	Percent of estimated revenues [b]
Arts, entertainment, and recreation	19.5	8,082	1.88	0.62
Accommodation	0.7	1,678	0.44	0.11
Food services and drinking places	8.0	4,783	3.66	1.09
Repair and maintenance	5.2	3,855	1.43	0.40
Personal and laundry services	1.6	1,791	0.87	0.30
Membership associations & organizations	8.4	1,710	0.63	0.16
Private households	[c]	[c]	[c]	[c]
Public administration	1.7	3,114	0.57	0.15
Employer Type				
Nonprofit, private	94.40	3,570	1.00	0.30
For profit, private	585.30	3,532	1.00	0.20
Government (state and local)	12.20	9,264	0.60	0.20

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Total direct costs and transfers for small establishments in which all employees are affected. Impacts to small establishments in which one employee is affected will be a fraction of the impacts presented in this table.

[b] Revenues estimated by calculating the ratio of estimated small business revenues to payroll from the 2012 SUSB, and multiplying by payroll per small entity. For the public administration sector, the ratio was calculated using revenues and payroll from the 2017 Census of Governments.

[c] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

vi. Projected Effects to Affected Small Entities in Year 2 Through Year 10

To determine how small businesses will be affected in future years, the Department projected costs to small businesses for nine years after Year 1 of the rule. Projected employment and earnings were calculated using the same methodology described in section VI.B.iii. Affected employees in small firms follow a similar pattern to affected workers in all establishments: the number decreases gradually in projected years. There are 480,900 affected workers in small establishments in Year 1 and 337,700 in Year 10. Table 35 reports affected workers in selected years only.

TABLE 35—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ESTABLISHMENTS, BY INDUSTRY

Industry	Affected workers in small establishments (1,000s)	
	Year 1	Year 10
Total	480.9	337.7
Agriculture	[a]	[a]
Forest., log., fish., hunt., and trap	[a]	[a]
Mining	[a]	[a]
Construction	34.7	20.7
Nonmetallic mineral prod. manuf	[a]	[a]
Prim. metals and fab. metal prod	3.9	[a]
Machinery manufacturing	4.1	4.4
Computer and elect. prod. manuf	3.9	[a]
Electrical equip., appliance manuf	[a]	[a]
Transportation equip. manuf	4.1	[a]
Wood products	[a]	[a]
Furniture and fixtures manuf	[a]	[a]
Misc. and not spec. manuf	4.4	3.8
Food manufacturing	3.1	[a]
Beverage and tobacco products	[a]	[a]
Textile, app., and leather manuf	2.6	[a]
Paper and printing	4.5	[a]
Petroleum and coal prod. manuf	[a]	[a]
Chemical manufacturing	3.7	[a]
Plastics and rubber products	[a]	[a]
Wholesale trade	17.7	12.7
Retail trade	47.5	26.9
Transport. and warehousing	5.5	3.8
Utilities	3.8	[a]
Publishing ind. (ex. internet)	[a]	[a]
Motion picture and sound recording	[a]	[a]
Broadcasting (except internet)	2.5	[a]

TABLE 35—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ESTABLISHMENTS, BY INDUSTRY—Continued

Industry	Affected workers in small establishments (1,000s)	
	Year 1	Year 10
Internet publishing and broadcasting	[a]	[a]
Telecommunications	[a]	[a]
Internet serv. providers and data	[a]	[a]
Other information services	[a]	[a]
Finance	15.2	12.1
Insurance	13.7	13.0
Real estate	17.3	12.1
Rental and leasing services	[a]	[a]
Professional and technical services	79.7	55.7
Management of companies and enterprises	[a]	[a]
Admin. and support services	13.5	9.3
Waste manag. and remed. services	[a]	[a]
Educational services	12.3	11.1
Hospitals	[a]	[a]
Health care services, except hospitals	43.5	35.3
Social assistance	28.3	25.7
Arts, entertainment, and recreation	26.7	17.6
Accommodation	4.0	[a]
Food services and drinking places	8.1	6.2
Repair and maintenance	8.2	7.6
Personal and laundry services	5.8	3.9
Membership associations & organizations	25.3	18.2
Private households	[a]	[a]
Public administration	5.2	2.7

Note: Worker data are from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Data not displayed because sample size of affected workers in small establishments is less than 10.

Costs to small establishments vary by year but generally decrease from Year 1 mostly because regulatory familiarization costs are zero in all projected years, and adjustment costs are relatively small. By Year 10, additional costs and payroll for small businesses have decreased from $231.9 million in Year 1 to $118.5 million (Table 36). The Department notes that, due to relatively small sample sizes, the estimates by detailed industry are not precise. This can cause some numbers in the data to vary across years by a greater amount than they will in the future.

TABLE 36—PROJECTED DIRECT COSTS AND PAYROLL INCREASES FOR AFFECTED SMALL ESTABLISHMENTS, BY INDUSTRY, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD

Industry	Costs and payroll increases for small affected establishments, all employees affected (millions 2019)	
	Year 1	Year 10
Total	$231.9	$118.5
Agriculture	[a]	[a]
Forest., log., fish., hunt., and trap	[a]	[a]
Mining	[a]	[a]
Construction	15.0	6.1
Nonmetallic mineral prod. manuf	[a]	[a]
Prim. metals and fab. metal prod	1.6	[a]
Machinery manufacturing	2.3	2.6
Computer and elect. prod. manuf	0.9	[a]
Electrical equip., appliance manuf	[a]	[a]
Transportation equip. manuf	1.5	[a]
Wood products	[a]	[a]
Furniture and fixtures manuf	[a]	[a]
Misc. and not spec. manuf	2.4	1.1
Food manufacturing	1.8	[a]
Beverage and tobacco products	[a]	[a]
Textile, app., and leather manuf	3.2	[a]
Paper and printing	1.8	[a]
Petroleum and coal prod. manuf	[a]	[a]
Chemical manufacturing	1.5	[a]
Plastics and rubber products	[a]	[a]
Wholesale trade	7.7	7.0

TABLE 36—PROJECTED DIRECT COSTS AND PAYROLL INCREASES FOR AFFECTED SMALL ESTABLISHMENTS, BY INDUSTRY, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD—Continued

Industry	Costs and payroll increases for small affected establishments, all employees affected (millions 2019)	
	Year 1	Year 10
Retail trade	25.0	14.7
Transport. and warehousing	2.7	0.5
Utilities	0.6	[a]
Publishing ind. (ex. internet)	[a]	[a]
Motion picture and sound recording	[a]	[a]
Broadcasting (except internet)	1.6	[a]
Internet publishing and broadcasting	[a]	[a]
Telecommunications	[a]	[a]
Internet serv. providers and data	[a]	[a]
Other information services	[a]	[a]
Finance	6.2	2.1
Insurance	4.6	2.6
Real estate	11.4	4.7
Rental and leasing services	[a]	[a]
Professional and technical services	45.6	21.8
Management of companies and enterprises	[a]	[a]
Admin. and support services	5.8	2.3
Waste manag. and remed. services	[a]	[a]
Educational services	6.6	3.9
Hospitals	[a]	[a]
Health care services, except hospitals	13.1	6.4
Social assistance	8.8	4.9
Arts, entertainment, and recreation	19.5	6.0
Accommodation	0.7	[a]
Food services and drinking places	8.0	3.7
Repair and maintenance	5.2	3.2
Personal and laundry services	1.6	0.8
Membership associations & organizations	8.4	5.9
Private households	[a]	[a]
Public administration	1.7	0.3

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Data not displayed because sample size of affected workers in small establishments is less than 10.

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

The FLSA sets minimum wage, overtime pay, and recordkeeping requirements for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Every covered employer must keep certain records for each nonexempt worker. The regulations at part 516 require employers to maintain records for employees subject to the minimum wage and overtime pay provisions of the FLSA. The recordkeeping requirements are not new requirements; however, employers will need to keep some additional records for affected employees who become nonexempt. As indicated in this analysis, this final rule expands minimum wage and overtime pay coverage to 1.2 million affected EAP workers. This will result in an increase in employer burden and was estimated in the PRA portion (section V) of this final rule. Note that the burdens reported for the PRA section of this rule include the entire information collection and not merely the additional burden estimated as a result of this final rule.

F. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

This section discusses the description of the steps the agency has taken to minimize the economic impact on small entities, consistent with the stated objectives of the FLSA. It includes a statement of the factual, policy, and legal reasons for the selected standard and HCE levels adopted in the final rule and why alternatives were rejected.

In this final rule, the Department sets the standard salary level equal to the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and/or the retail industry. Based on 2018/19 data, this results in a salary level of 684 per week, or 35,568 annually for a full-year worker. The Department believes that a standard salary level set at the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region and/or retail industry will accomplish the goal of setting a salary threshold that adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating the reintroduction of a limit on nonexempt work as existed under the long duties test. The Department sets the HCE total annual compensation level equal to the 80th percentile of earnings of full-time salaried workers nationally (107,432 annually based on 2018/19 data).[255] The Department believes that this level avoids unduly burdensome costs associated with evaluating, under the

[255] The Department estimated this value using CPS data for earnings of full-time (defined as at least 35 hours per week) nonhourly paid employees. For the purpose of this rulemaking, the Department considers data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers.

standard duties test, the exemption statuses of large numbers of highly-paid white collar employees, many of whom would have remained exempt even under that test, while providing a meaningful and appropriate complement to the more lenient HCE duties test. The Department further believes that nearly all of the highly-paid white collar workers earning above this threshold ''would satisfy any duties test.'' [256]

The Department is also revising the regulations to permit employers to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the required salary level for the standard exemption, so long as employers pay those amounts on an annually or more frequent basis.

i. Differing Compliance and Reporting Requirements for Small Entities

This final rule provides no differing compliance requirements and reporting requirements for small entities. The Department has strived to minimize respondent recordkeeping burden by requiring no specific form or order of records under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

ii. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that updates and clarifies the rule and which results in the least burden. Among the options considered by the Department, the least restrictive option was taking no regulatory action. Taking no regulatory action does not address the Department's concerns discussed above under Objectives of, and Need for, the Final Rule. Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

Differing compliance or reporting requirements that take into account the resources available to small entities. The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA and appears unnecessary given the small annualized cost of the rule. The Year 1 cost of the proposed rule for the average employer that qualifies as small was estimated to range from a minimum of 1,700 (accommodation industry) to a maximum of 31,100 (textile, apparel, and leather manufacturing), using the upper-bound estimates. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department has not proposed differing compliance or reporting requirements for small businesses.

The clarification, consolidation, or simplification of compliance and reporting requirements for small entities. This final rule imposes no new reporting requirements. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

The use of performance rather than design standards. Under this final rule, employers may achieve compliance through a variety of means. Employers may elect to continue to claim the EAP exemption for affected employees by adjusting salary levels, hire additional workers or spread overtime hours to other employees, or compensate employees for overtime hours worked. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

An exemption from coverage of the rule, or any part thereof, for such small entities. Creating an exemption from coverage of this rule for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, is inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ individually covered employees, regardless of employer size.[257]

G. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rule

The Department is not aware of any federal rules that duplicate, overlap, or conflict with this final rule.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA),[258] requires agencies to prepare a written statement for rules for which a final rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation to 2018) or more in at least one year. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This final rule is issued pursuant to section 13(a)(1) of the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime pay requirements ''any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .).'' [259] The requirements of the exemption are contained in part 541 of the Department's regulations. Section 3(e) of the FLSA [260] defines ''employee'' to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the FLSA [261] also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

B. Assessment of Costs and Benefits

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than $165 million in at least one year, but the rule will not result in increased expenditures by state, local and tribal governments, in the aggregate, of $165 million or more in any one year.

Costs to state and local governments: Based on the economic impact analysis of this final rule, the Department determined that the final rule will result in Year 1 costs for state and local governments totaling $52.1 million, of which $21.7 million are direct employer costs and $30.4 million are payroll increases (Table 37). In subsequent years, the Department estimated that state and local governments may experience payroll increases of as much as $49.0 million per year.

[256] 84 FR 10914 (internal citation omitted).

[257] *See* 29 U.S.C. 203(s).

[258] 2 U.S.C. 1501 *et seq.*

[259] 29 U.S.C. 213(a)(1).

[260] 29 U.S.C. 203(e).

[261] 29 U.S.C. 203(x).

Costs to the private sector: The Department determined that the final rule will result in Year 1 costs to the private sector of approximately $887.0 million, of which $521.0 million are direct employer costs and $366.0 million are payroll increases. In subsequent years, the Department estimated that the private sector may experience a payroll increase of as much as $284.2 million per year.

TABLE 37—SUMMARY OF YEAR 1 AFFECTED EAP WORKERS, REGULATORY COSTS, AND TRANSFERS BY TYPE OF EMPLOYER

	Total	Private	Government [a]
Affected EAP Workers (1,000s)			
Number	1,257	1,125	128
Direct Employer Costs (Millions)			
Regulatory familiarization	$340.4	$336.5	$3.9
Adjustment	68.2	61.0	7.0
Managerial	134.4	123.5	10.9
Total direct costs	543.0	521.0	21.7
Payroll Increases (Millions)			
From employers to workers	$396.4	$366.0	$30.4
Direct Employer Costs & Transfers (Millions)			
From employers	$939.4	$887.0	$52.1

[a] Includes only state, local, and tribal governments.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.[262] However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $51.2 billion to $102.5 billion (using 2018 GDP). A regulation with a smaller aggregate effect is not likely to have a measurable effect in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this final rule.

The Department's RIA estimates that the total first-year costs (direct employer costs and payroll increases from employers to workers) of the final rule will be approximately $887.0 million for private employers and $52.1 million for state and local governments. Given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable effect on the economy. Therefore, these costs are compared to payroll costs and revenue to demonstrate the feasibility of adapting to these new rules.

Total first-year private sector costs compose 0.013 percent of private sector payrolls nationwide.[263] Total private sector first-year costs compose 0.002 percent of national private sector revenues (revenues in 2018 are projected to be $40.9 trillion).[264] The Department concludes that effects of this magnitude are affordable and will not result in significant disruptions to typical firms in any of the major industry categories.

Total first-year state and local government costs compose less than 0.01 percent of state and local government payrolls.[265] First-year state and local government costs compose 0.001 percent of state and local government revenues (projected 2018 revenues were estimated to be $3.7 trillion).[266] Effects of this magnitude will not result in significant disruptions to typical state and local governments. The $52.1 million in state and local government costs constitutes an average of approximately $578 for each of the approximately 90,126 state and local entities. The Department considers effects of this magnitude to be quite small both in absolute terms and in relation to payrolls and revenue.

C. Response to Comments

i. Consultation Prior to Issuance of the NPRM

On July 26, 2017, the Department published an RFI to gather information to aid in formulating a proposal to revise the part 541 regulations. Later, between September 7 and October 17, 2018, the Department held listening sessions in all five Wage and Hour regions throughout the country, and in Washington, DC, to supplement feedback received as part of the RFI. A wide variety of state and local government entities filed comments in response to the 2017 RFI and/or participated in the 2018 listening sessions, and the Department took their views into consideration in drafting the NPRM published earlier this year. Although several tribal governments submitted comments in response to the Department's 2015 NPRM, *see* 81 FR 32547–48, no tribal governments participated in response to the 2017 RFI or 2018 listening sessions.

[262] 2 U.S.C. 1532(a)(4).

[263] Private sector payroll costs nationwide are projected to be $6.8 trillion in 2018. This projection is based on private sector payroll costs in 2012, which were $5.3 trillion using the 2012 Economic Census of the United States. This was inflated to 2018 dollars using the GDP deflator.

[264] Private sector revenues in 2012 were $32.3 trillion using the 2012 Economic Census of the United States. This was inflated to 2018 dollars using the GDP deflator.

[265] State and local payrolls in 2016 were reported as $927.9 billion. This was inflated to 2018 payroll costs of $1,016.5 billion using the CPI–U. State and Local Government Finances Summary: FY2016. Available at *https://www.census.gov/govs/local/*.

[266] State and local revenues in 2016 were reported as $3.4 trillion. This was inflated to 2018 dollars using the CPI–U. State and Local Government Finances Summary: FY2016. Available at *https://www.census.gov/govs/local/*.

ii. Comments Received in Response to the NPRM

The Department received comments from a variety of commenters representing state and local governments, including from some elected officials.[267] These comments presented a range of views on the proposed rule, particularly the proposed increase to the standard salary level threshold. Some commenters, like the Public Housing Authorities Directors Association (PHADA), supported the proposed rule, agreeing that an update to the standard salary level is ''long overdue'' and finding the proposed increase preferable to the higher threshold adopted in the 2016 final rule. *See also* Joint Comment of the International Public Management Association for Human Resources (IPMA–HR), the International City/County Management Association (ICMA), and the Government Finance Officers Association (GFOA). Other commenters, like the Idaho Division of Human Resources (IDHR), the National Association of Counties (NACo), and the South Butler Community Library, expressed concern about the impact of any increase to the standard salary level, including from the proposed increase. While IDHR and NACo agreed that the proposed rule would be preferable to the 2016 final rule, each criticized the Department's preference for a uniform standard salary level that, they stated, would disproportionately impact employers operating in lower-income states and counties. Others representing certain state governments, however, opposed the proposed rule on the grounds that they would prefer a significantly higher standard salary level, such as the one adopted under the 2016 final rule. *See* House and Senate Democratic Caucuses of the Michigan Legislature; Michigan Governor Gretchen Whitmer; Pennsylvania Department of Labor & Industry; State AGs; Washington Governor Jay Inslee; Wisconsin Department of Workforce Development. These comments echoed many of the same criticisms of the proposed salary level levied by employee advocates discussed earlier in section IV.A.v, but the State AGs made an additional point (relevant for UMRA purposes) that a low federal threshold burdens state governments with expensive law enforcement responsibilities to protect workers in their states from unlawful misclassification. The State AGs asserted that state governments are reluctant to set their own higher exemption thresholds for fear of ''creating uneven standards for employment and [risking] competition with neighboring states.''

As explained earlier in section IV.A, the Department agrees with the overwhelming majority of commenters that an increase to the $455 per week standard salary level currently being enforced is both necessary and overdue. While the adoption of any nationwide earning threshold has a disproportionate impact on employers operating in lower-income regions and industries, the Department believes that adopting multiple salary levels that vary by region would introduce confusion and compliance costs for employers (or employees) operating across different jurisdictions. By contrast, the Department concludes that reapplying the 2004 final rule's methodology to set the standard salary level appropriately accommodates employers operating in low-wage regions.[268]

Some state and local government commenters opined on other aspects of the proposed rule. For example, NACo endorsed the Department's proposal to permit nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test; this proposal has been finalized as proposed. The joint comment submitted by IPMA–HR, ICMA, and the GFOA objected to the NPRM's proposed increase to the total annual compensation threshold for highly compensated employees, asserting that the proposed threshold of $147,414 per year ''would render the highly compensated employee exemption almost meaningless, especially for smaller governmental organizations in certain parts of the country.'' As explained in section IV.D, the Department has finalized a lower increase to the HCE threshold, to $107,432 per year, which addresses such concerns.

State and local government commenters disagreed over how the Department should update the earnings thresholds going forward. Some commenters urged the Department to adopt a mechanism to automatically update the standard salary level and HCE total compensation levels, which they viewed as critical for ensuring that the effectiveness of the earnings thresholds does not erode over time. *See* House and Senate Democratic Caucuses of the Michigan Legislature; Michigan Governor Gretchen Whitmer; State AGs; Washington Governor Jay Insee; Wisconsin Department of Workforce Development. By contrast, NACo, PHADA, and the joint comment submitted by IPMA–HR, ICMA, and the GFOA supported the Department's proposed commitment to update the earnings thresholds using notice-and-comment rulemaking every four years. As explained in section IV.E, in this final rule the Department reaffirms its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking.

Finally, IDHR requested a delayed effective date of at least 18 months, asserting that ''[p]ublic entities, like the State [of Idaho], require sufficient time in the [budgeting] and legislative processes to address appropriations or to make statutory changes to existing state law affected by a federal law amendment.'' As explained in section II.E, the Department has set an effective date of January 1, 2020, for the final rule. The time between this rule's publication and effective date exceeds the 30-day minimum required under the Administrative Procedure Act (APA), 5 U.S.C. 553(d), and the 60 days mandated for a ''major rule'' under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A). Given that the Department is currently enforcing the 2004 standard salary level, which an overwhelming majority of commenters agreed needs to be updated, the Department concludes that a lengthier delayed effective date would be imprudent.

D. Least Burdensome Option or Explanation Required

This final rule has described the Department's consideration of various options throughout the preamble and economic impact analysis (*see* section VI.C). The Department believes that it has chosen the least burdensome but still cost-effective methodology to update the salary level consistent with the Department's statutory obligation. Although some alternative options considered would have set the standard salary level at a rate lower than the updated salary level, that outcome would not necessarily be the most cost-effective or least-burdensome alternative for employers. A lower or outdated salary level would result in a less effective bright-line test for separating workers who may be exempt from those nonexempt workers intended to be

[267] As in response to the RFI, the Department did not receive any comments from tribal governments or affiliated stakeholders in response to the NPRM.

[268] IDHR and the joint comment submitted by IPMA–HR, ICMA, and the GFOA requested that the Department permit employers to prorate the salary level for part-time employees. As explained earlier, *see supra* n.72, the Department declines this request, emphasizing that the standard salary level is not an annual earnings threshold and that ''[e]xempt employees need not be paid for any workweek in which they perform no work.'' 29 CFR 541.602(a)(1).

within the Act's protection. A low salary level would also increase the burden on the employer to apply the duties test to more employees in determining whether an employee is exempt, which would inherently increase the likelihood of misclassification and, in turn, increase the risk that employees who should receive overtime and minimum wage protections under the FLSA are denied those protections.

Selecting a standard salary level inevitably affects both the risk and cost of misclassification of overtime-eligible employees earning above the salary level, as well as the risk and cost of providing overtime protection to employees performing bona fide EAP duties who are paid below the salary level. An unduly low level risks increasing employer liability from unintentionally misclassifying workers as exempt; but an unduly high standard salary level increases labor costs to employers precluded from claiming the exemption for employees performing bona fide EAP duties. Thus, the ultimate cost of the regulation is increased if the standard salary level is set either too low or too high. The Department determined that setting the standard salary level equivalent to the earnings of the 20th percentile of full-time salaried workers in the South and/or in the retail industry balances the risks and costs of misclassification of exempt status.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this final rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications.

X. Executive Order 13175, Indian Tribal Governments

This final rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Signed at Washington, DC, this 16th day of September, 2019.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor amends title 29 of the Code of Federal Regulations part 541 as follows:

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

■ 1. The authority citation for part 541 continues to read as follows:

Authority: 29 U.S.C. 213; Pub. L. 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945–53 Comp., p. 1004); Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. In § 541.100, revise paragraph (a)(1) to read as follows:

§ 541.100 General rule for executive employees.

(a) * * *

(1) Compensated on a salary basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities;

* * * * *

■ 3. In § 541.200, revise paragraph (a)(1) to read as follows:

§ 541.200 General rule for administrative employees.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities;

* * * * *

■ 4. In § 541.204, revise paragraph (a)(1) to read as follows:

§ 541.204 Educational establishments.

(a) * * *

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

* * * * *

■ 5. In § 541.300, revise paragraph (a)(1) to read as follows:

§ 541.300 General rule for professional employees.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities; and

* * * * *

■ 6. Amend § 541.400 by removing the first two sentences of paragraph (b) and adding one sentence in their place to read as follows:

§ 541.400 General rule for computer employees.

* * * * *

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities. * * *

* * * * *

■ 7. Amend § 541.600 by:

■ a. Removing the first three sentences of paragraph (a) and adding one sentence in their place; and

■ b. Revising paragraph (b).

The revisions and additions read as follows:

§ 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government, or $380 per week if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. * * *

(b) The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. For example, the $684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than $1,368, semimonthly on a salary basis of not less than $1,482, or monthly on a salary basis of not less than $2,964. However, the shortest period of payment that will meet this compensation requirement is one week.

* * * * *

■ 8. Amend § 541.601 by revising paragraphs (a) and (b) to read as follows:

§ 541.601 Highly compensated employees.

(a)(1) Beginning on January 1, 2020, an employee with total annual compensation of at least $107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.

(2) Where the annual period covers periods both prior to and after January 1, 2020, the amount of total annual compensation due will be determined on a proportional basis.

(b)(1) ''Total annual compensation'' must include at least $684 per week paid on a salary or fee basis as set forth in §§ 541.602 and 541.605, except that § 541.602(a)(3) shall not apply to highly compensated employees. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the amount specified in the applicable subsection of paragraph (a) by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, for a 52-week period beginning January 1, 2020, an employee may earn $90,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $17,432 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $12,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $5,432 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C, or D of this part.

* * * * *

■ 9. In § 541.602, revise paragraph (a)(3) to read as follows:

§ 541.602 Salary basis.

(a) * * *

(3) Up to ten percent of the salary amount required by § 541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. This provision does not apply to highly compensated employees under § 541.601.

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by § 541.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

(ii) An employee who does not work a full 52-week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment.

* * * * *

■ 10. Revise § 541.604 to read as follows:

§ 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $684 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $684 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $684 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.,* flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $210 per shift without violating the $684-per-week salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much

as, or even more than, the guaranteed salary.

■ 11. In § 541.605, revise paragraph (b) to read as follows:

§ 541.605 Fee basis.

* * * * *

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by §§ 541.600(a) and 541.602(a), if the employee worked 40 hours. Thus, an artist paid $350 for a picture that took 20 hours to complete meets the $684 minimum salary requirement for exemption since earnings at this rate would yield the artist $700 if 40 hours were worked.

■ 12. Amend § 541.709 by revising the first sentence to read as follows:

§ 541.709 Motion picture producing industry.

The requirement that the employee be paid ''on a salary basis'' does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $1,043 per week (exclusive of board, lodging, or other facilities). * * *

* * * * *

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Part III

Environmental Protection Agency

40 CFR Parts 85 and 86

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533
The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 85 and 86

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533

[NHTSA–2018–0067; EPA–HQ–OAR–2018–0283; FRL 10000–45–OAR]

RIN 2127–AL76; 2060–AU09

The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program

AGENCY: Environmental Protection Agency and National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Withdrawal of waiver; final rule.

SUMMARY: On August 24, 2018, the Environmental Protection Agency (EPA) and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) jointly published in the **Federal Register** a notice of proposed rulemaking entitled, ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks.'' In the NPRM, the agencies proposed new and amended greenhouse gas (GHG) and Corporate Average Fuel Economy (CAFE) standards for model year 2021 to 2026 light duty vehicles. EPA also proposed to withdraw the waiver it had previously provided to California for that State's GHG and ZEV programs under section 209 of the Clean Air Act. NHTSA also proposed regulatory text implementing its statutory authority to set nationally applicable fuel economy standards that made explicit that those State programs would also be preempted under NHTSA's authorities. In this action, the agencies finalize the two actions related to the waiver and preemption. Accordingly, in this document: EPA announces its decision to withdraw the waiver; and NHTSA finalizes regulatory text related to preemption. The agencies anticipate issuing a final rule on standards proposed in the NPRM in the near future.

DATES: This joint action is effective November 26, 2019.

Judicial Review: Pursuant to Clean Air Act section 307(b), any petitions for judicial review of this action must be filed in the United States Court of Appeals for the D.C. Circuit by November 26, 2019. Given the inherent relationship between the agencies' actions, any challenges to NHTSA's regulation should also be filed in the United States Court of Appeals for the D.C. Circuit. *See also* Sections III.G and IV.Q of this preamble.

ADDRESSES: EPA and NHTSA have established dockets for this action under Docket ID No. EPA–HQ–OAR–2018–0283 and NHTSA 2018–0067, respectively. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available in hard copy in EPA's docket, and electronically in NHTSA's online docket. Publicly available docket materials can be found either electronically in *www.regulations.gov* by searching for the dockets using the Docket ID numbers above, or in hard copy at the following locations: EPA: EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744. NHTSA: Docket Management Facility, M–30, U.S. Department of Transportation (DOT), West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The DOT Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

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NHTSA: James Tamm, Office of Rulemaking, Fuel Economy Division, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone number: (202) 493–0515.

SUPPLEMENTARY INFORMATION:

I. Overview
II. Preemption Under the Energy Policy and Conservation Act
III. EPA's Withdrawal of Aspects of the January 2013 Waiver of CAA section 209(b) Preemption of the State of California's Advanced Clean Car Program
IV. Regulatory Notices and Analyses

I. Overview

On August 24, 2018, the Environmental Protection Agency (EPA) and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) (collectively, ''the agencies'') jointly published in the **Federal Register** a notice of proposed rulemaking entitled, ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks'' (the SAFE Vehicles rule).[1] In the NPRM, EPA proposed new greenhouse gas (GHG) standards and NHTSA proposed new Corporate Average Fuel Economy (CAFE) standards for model years (MY) 2021 to 2026 light duty vehicles. The agencies also proposed to take two actions, separate from the proposed standards, needed to ensure the existence of one Federal program for light vehicles. First, EPA proposed to withdraw the waiver it had previously provided to California for that State's GHG program and Zero Emissions Vehicle (ZEV) mandate. Second, NHTSA proposed regulatory text that made explicit that State programs to limit or prohibit tailpipe GHG emissions or establish ZEV mandates are preempted, to carry out its statutory authority to set nationally applicable fuel economy standards and consistent with the express preemption provisions of the Energy Policy and Conservation Act (EPCA).

The SAFE Vehicles Rule received several hundred thousand public comments, which discussed in great detail all aspects of the proposal. The nature of the comments received related to the proposed standards and the proposed actions on preemption, though, were considerably different. That is, the vast majority of comments, whether one considers the number of commenters, the number of issues raised by commenters, or the length and level of detail of those comments, focused primarily on the agencies' proposed standards. In contrast, the comments to the preemption issues, though substantive and thorough, were fewer in number and length, and raised primarily legal issues, rather than the technical or economic issues that were the focus of many comments to the standards. Both the proposed waiver withdrawal and discussion of EPCA

[1] 83 FR 42986.

preemption are legal matters that are independent of the technical details of the proposed standards and, as such, took up a relatively small part of the NPRM.

Recent actions by the State of California taken after the publication of the NPRM have confirmed the need for final decision from the agencies that States do not have the authority to set GHG standards or establish ZEV mandates. First, on December 12, 2018, California unilaterally amended its ''deemed to comply'' provision, such that CARB's GHG standards can be satisfied only by complying with EPA's standards as those standards were promulgated in 2012.[2] More recently, on July 25, 2019, California announced a so-called ''voluntary framework'' with four automakers, which purported, without analysis of the terms of the existing waiver, California law, or how this ''framework'' is permissible under Federal law, to allow those automakers to meet reduced standards on a national basis if they promise not to challenge California's authority to establish GHG standards or the ZEV mandate.[3] These two actions, both of which conflict with the maintenance of a harmonized national fuel economy and tailpipe GHG emissions program and the terms of the agreement reached in 2012 and 2013, confirm that the only way to create one actual, durable national program is for GHG and fuel economy standards to be set by the Federal government, as was intended by Congress in including express preemption provisions in both the Clean Air Act (for new motor vehicle emissions standards) and EPCA (for fuel economy).[4]

In light of the divergence in the type of comments received to the proposal (*i.e.,* between the standards-related proposal and the waiver and preemption proposals), and in light of the recent actions taken by California, the agencies have determined it is appropriate to move forward with the two actions related to preemption now, while continuing work on a final rule to establish the CAFE and GHG standards that were within the scope of the NPRM. This decision is appropriate, as agencies have authority to finalize different parts of proposed actions at different times. Further, the agencies previewed this possibility in the NPRM by emphasizing the severability of the standards from the actions being finalized in this document. EPA's action in this document does not add or amend regulatory text pursuant to the Clean Air Act and, thus, issuing this decision on the waiver and the later rulemaking on the standard makes clear the difference between EPA's two actions and their independence from one another. NHTSA's action in this document is not to set standards for particular model years, but rather is an exercise of its authority under 49 U.S.C. 32901 through 32903, necessary to maintain the integrity of the corporate average fuel economy program and compliance regime established by Congress as a nationwide program, and consistent with Congress' statement of express preemption in 49 U.S.C. 32919. These two general aspects of the SAFE Vehicles Rule are independent of the CAFE and GHG standards for Model Years 2021–2026.[5] For that reason, the decision in this document to finalize the waiver and preemption issues does not require the agencies to reopen the comment period for the standards, as it does not have any effect on either agency's standards.

The agencies note that several comments claimed that the comment period of 63 days was inadequate or that the agencies did not hold a sufficient number of public meetings. Although the agencies will address this comment more directly in the forthcoming final rulemaking to establish standards, for purposes of this action, it is clear to the agencies that commenters had adequate time to respond to the issue of the waiver and EPCA preemption. Courts give broad discretion to agencies in determining whether the length of a comment period is reasonable and, in assessing the sufficiency of a comment period, look to whether the public had a meaningful opportunity to comment on a proposed action. *See, e.g., Rural Cellular Ass'n* v. *FCC,* 588 F.3d 1095, 1101 (D.C. Cir. 2009); *Connecticut Light & Power Co.* v. *Nuclear Regulatory Comm'n,* 673 F.2d 525, 534 (D.C. Cir. 1982). There was unquestionably a meaningful opportunity to comment here. The agencies received several hundred thousand comments, which included highly detailed and technical comments on all aspects of the proposal from seemingly all relevant stakeholders, including numerous comments related to EPA's action on the waiver and NHTSA's proposal on preemption. The agencies also note that the NPRM was initially issued and made public on August 2, 2018, over three weeks prior to publication in the **Federal Register**, and received extensive media coverage immediately thereafter, and giving a total of 86 days to review and comment. Furthermore, the agencies held three public hearings during the comment period, including one in Fresno, California on September 24, 2018, where the agencies heard from several hundred commenters in person.

II. Preemption Under the Energy Policy and Conservation Act

A. NHTSA Is Finalizing Its Preemption Proposal

NHTSA is finalizing its proposal concerning preemption of State and local laws and regulations related to fuel economy standards. Congress passed EPCA to help achieve the important national objective of protecting the United States against petroleum price shocks through improvements in fuel efficiency for the light duty vehicle fleet. But Congress did not seek to do so at any cost—instead directing the Secretary of Transportation to balance statutory factors, such as the need of the nation to conserve energy, technological feasibility, and economic practicability, to arrive at stringent, but feasible, standards on a Federal basis.

Increasing fuel economy is an expensive undertaking for automakers, the costs of which are necessarily passed on to consumers, thereby discouraging new vehicle purchases and slowing the renewal of the nation's light duty fleet. That is why fuel economy standards must be set considering other critical factors.

This is also why the notion of national applicability and preemption of State or local laws or regulations related to fuel economy standards is so critical. Allowing State or local governments to establish their own fuel economy standards, or standards related to fuel

[2] *See In re: Air Resources Board,* Notice of Approval of Regulatory Action, No. 2018–1114–03 (State of California, Office of Administrative Law Dec. 12, 2018), *available at https://ww3.arb.ca.gov/regact/2018/leviii2018/form400dtc.pdf?_ga=2.183723951.866759811.1568583699–1441462912.1552677736* (last visited Sept. 15, 2019).

[3] *See* California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards, Office of Gov. Gavin Newsome (July 25, 2019), *available at https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/* (last visited Sept. 14, 2019); Terms for Light-Duty Greenhouse Gas Emissions Standards, *available at https://ww2.arb.ca.gov/sites/default/files/2019–07/Auto%20Terms%20Signed.pdf* (last visited Sept. 14, 2019).

[4] At the time this joint action was signed, California had not submitted or demonstrated any intention to submit an application for a waiver for either its December 2018 amendment to its regulations or its July 2019 ''framework.''

[5] The agencies note that the South Coast Air Quality Management District commented that EPA should not take an action on the waiver in the same notice as a rule that would change EPA's GHG standards. *See* South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. Although the agencies do not acknowledge the validity of this argument, any such concern is rendered moot by this action.

economy, would provide for a universe in which automakers are placed in the untenable situation of having to expend resources to comply not only with Federal standards, but also meet separate State requirements. If State or local governments are allowed to require—directly or indirectly—automakers to develop and implement additional technologies to improve fuel economy (or reduce or eliminate tailpipe greenhouse gas emissions for all or a portion of a fleet), the fuel economy-related expenses of automakers increase beyond those considered in establishing federal standards. This would render the critical balancing required by EPCA devoid of meaning.

Uniform national fuel economy standards are essential to accomplishing the goals of EPCA. To ensure that the fuel economy standards NHTSA adopts constitute the uniform national requirements that Congress intended, NHTSA must address the extent to which State and local laws and regulations are preempted by EPCA.

Furthermore, EPCA states: ''When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.'' 49 U.S.C. 32919(a). As a limited exception, a State or local government ''may prescribe requirements for fuel economy for automobiles obtained for its own use.'' 49 U.S.C. 32919(c). In addition, when a Federal fuel economy labeling or information requirement is in effect, pursuant to 49 U.S.C. 32908, a State or local government may adopt or enforce an identical requirement on ''disclosure of fuel economy or fuel operating costs.'' 49 U.S.C. 32919(b). Absent this limited circumstance, a State or local government cannot even have laws in place that are identical to the Federal standards.

NHTSA will first summarize its discussion of preemption in the proposal before turning to discussion of issues raised by the comments. In this final rule, NHTSA fully reaffirms the discussion of preemption set forth in the proposal, which provides additional detail regarding NHTSA's views.[6]

In the proposal, NHTSA described its preemption discussions in prior rulemakings, which are consistent with the views on preemption that NHTSA is finalizing in this document.[7] NHTSA has asserted preemption of certain State emissions standards under EPCA on multiple occasions since 2002. The United States explained in a 2002 amicus brief that EPCA preempted California's then-existing zero-emissions vehicle (ZEV) regulations.[8] NHTSA continued the discussion of preemption later that year in a notice of proposed rulemaking setting CAFE standards for model year 2005 through 2007 light trucks, and reiterated its position in the 2003 final rule.[9] NHTSA's 2005 notice of proposed rulemaking setting standards for model year 2008 through 2011 light trucks also discussed preemption and the 2006 final rule elaborated on the issue at length, including in a specific discussion finding California's then-existing tailpipe greenhouse gas emissions regulations were preempted.[10] NHTSA's 2008 proposed rule for model year 2011 through 2015 passenger cars and light trucks also addressed preemption and proposed adding a summary of NHTSA's position on the issue to the Code of Federal Regulations.[11] That proposed rule also addressed recent developments, specifically the Supreme Court's decision in *Massachusetts* v. *EPA,* the enactment of EISA, and two district court decisions finding that State tailpipe greenhouse gas emissions standards were not preempted by EPCA.[12] NHTSA explained that those developments did not change its view of preemption and it reaffirmed the detailed analysis and conclusions from the 2006 final rule.[13] Subsequent CAFE rulemaking documents, prior to the August 2018 proposal, did not discuss EPCA preemption.[14] Thus, this final rule is consistent with NHTSA's longstanding position on EPCA preemption over the course of nearly two decades.

In the proposal, NHTSA also described certain developments, including the Supreme Court's decision in *Massachusetts* v. *EPA,* that preceded EPA's regulation of tailpipe greenhouse gas emissions through joint rulemaking with NHTSA.[15] In addition, NHTSA described the Obama Administration's creation of a framework that was intended to allow a manufacturer to ''meet all standards with a single national fleet.'' [16] Appeals of the two district court decisions holding that the California regulation and Federal regulation could co-exist were withdrawn as part of the negotiated agreement for the National Program.[17] The announcement of the framework was followed by EPA's decision less than two months later to grant a waiver to California for its own greenhouse gas emissions standards, without taking any substantive position on EPCA preemption.[18] The national framework was a negotiated agreement between the Federal government, California, and the automotive industry.[19]

NHTSA confirms its view, stated in the proposal on preemption, that the agencies' consideration in 2012 of California's ''deemed to comply''

[6] *See* 83 FR 42986, 43232–39 (Aug. 24, 2018).

[7] *Id.* at 43232. As NHTSA noted in the proposal, it had not previously directly addressed preemption of California's ZEV program. *Id.* at 43233.

[8] Brief for the United States as Amicus Curiae in Support of Affirmance, *Cent. Valley Chrysler-Plymouth Inc., et al,* v. *Kenny,* No. 02–16395 (9th Cir. 2002).

[9] 68 FR 16868, 16895 (Apr. 7, 2003); 67 FR 77015, 77025 (Dec. 16, 2002). In the notice of proposed rulemaking, NHTSA specifically rejected the argument made by California in litigation that NHTSA had not treated EPCA as preempting State efforts to engage in CAFE-related regulation, explaining that States may not ''issue a regulation that relates to fuel economy and which addresses the same public policy concern as the CAFE statute. Our statute contains a broad preemption provision making clear the need for a uniform, federal system. . . . The fact that NHTSA had not expressly addressed this particular aspect of California's requirements should not have been interpreted as tacit acceptance.'' 67 FR 77015, 77025 (Dec. 16, 2002).

[10] 71 FR 17566, 17654–70 (Apr. 6, 2006); 70 FR 51414, 51457 (Aug. 30, 2005).

[11] 73 FR 24352, 24478–79 (May 2, 2008). NHTSA finalized only standards for model year 2011 through that rulemaking action, and subsequently began a new rulemaking for model year 2012 and later passenger cars and light trucks. In the final rule for model year 2011, NHTSA stated: ''NHTSA has decided not to include any provisions addressing preemption in the Code of Federal Regulations at this time. The agency will re-examine the issue of preemption in the content of its forthcoming rulemaking to establish Corporate Average Fuel Economy standards for 2012 and later model years.'' 74 FR 14196, 14200 (Mar. 30, 2009).

[12] 73 FR 24352, 24478 (May 2, 2008).

[13] *Id.*

[14] As noted above, in NHTSA's final rule for model year 2011, it stated that ''[t]he agency will re-examine the issue of preemption in the content of its forthcoming rulemaking to establish Corporate Average Fuel Economy standards for 2012 and later model years.'' 74 FR 14196, 14200 (Mar. 30, 2009). However, in the NHTSA's 2009 proposal and 2010 final rule setting standards for model year 2012 through 2016 automobiles, NHTSA stated that is was ''deferring further consideration of the preemption issue.'' 75 FR 25324, 25546 (May 7, 2010); 74 FR 49454, 49635 (Sept. 28, 2009).

[15] 83 FR 42986, 43232–33 (Aug. 24, 2018).

[16] *Id.* at 43233; 76 FR 74854, 74863 (Dec. 1, 2011).

[17] *See* 83 FR 42986, 43233 (Aug. 24, 2018); Association of Global Automakers, Docket No. NHTSA–2018–0067–12032.

[18] In other words, the National Program included State requirements not nationally applicable. 83 FR 42986, 43233 (Aug. 24, 2018); *see also* 74 FR 32744, 32783 (July 8, 2009) (''EPA takes no position regarding whether or not California's GHG standards are preempted under EPCA.'').

[19] After President Obama announced the agreement, NHTSA and EPA subsequently adopted CAFE and greenhouse gas emissions standards through rulemaking. *See* 75 FR 25324 (May 7, 2010).

regulatory provision as obviating NHTSA's consideration of preemption was erroneous.[20] This, too, was part of the negotiated agreement described above.[21] Under California's regulatory provision, California deemed manufacturers to be in compliance with certain of California's requirements if they complied with EPA's standards.[22] However, EPCA explicitly provides that all State requirements ''related to'' fuel economy standards, even those that may be identical or equivalent to Federal requirements are preempted by EPCA.[23] Moreover, as discussed in additional detail below, California recently changed its regulations so that it has no such ''deemed to comply'' provision should the forthcoming SAFE final rule adopt any regulatory alternative other than the no action alternative.[24] This change sets up a direct conflict between Federal and State requirements, exacerbating the conflict that exists even now.

Congress's intent to provide for uniform national fuel economy standards is frustrated when State and local actors regulate in this area. In the proposal, NHTSA explained that the need for regulatory certainty, along with the clear prospect of disharmony, required it to address preemption.[25] NHTSA also explained its desire to seek comments on this important issue from State and local officials, along with other interested members of the public.[26] NHTSA in fact received many comments from State and local governments, NGOs, industry, and others concerning preemption.[27] This comment process helped ensure that the agency considered all facets of this significant issue before reaching a final determination in this rule.

NHTSA also discussed the broad and clear text of EPCA's express preemption provision.[28] As NHTSA explained in the proposal, unlike the Clean Air Act, there is no set of circumstances under EPCA in which it would be appropriate or permissible for NHTSA to waive preemption or allow States or local governments to adopt or enforce identical or equivalent requirements.[29] EPCA does not provide NHTSA with any waiver authority whatsoever. To ensure Federal primacy over this area, EPCA broadly preempts all State and local laws ''related to'' fuel economy standards or average fuel economy standards.[30] NHTSA reiterates, consistent with the proposal, that in this rulemaking NHTSA is concluding that State and local requirements that relate to fuel economy standards by directly or substantially affecting corporate average fuel economy levels are preempted.[31]

NHTSA also described Supreme Court precedent interpreting the meaning of ''related to.'' [32] In addition to the plain language of the statute, NHTSA applied to EPCA the guidance from Supreme Court case law to consider both the objectives of the statute and the effect of the State laws on the Federal standards.[33] As NHTSA explained, the primacy of a single national fuel economy standard, set by the Federal government, was an important objective of Congress in enacting EPCA.

In adopting EISA, Congress did not repeal or amend EPCA's express preemption provision.[34] While Congress included in EISA a savings provision preventing EISA from limiting preexisting authority or responsibility conferred by any law, or from authorizing violation of any law,[35] the savings clause did not purport to expand either EPA's or NHTSA's preexisting authority or responsibility.[36] NHTSA recognized that during debate on the floor, some Members of Congress made statements about the savings provision's impact on California's ability to set tailpipe greenhouse gas emissions standards.[37] NHTSA affirms its view, consistent with Supreme Court precedent, that such legislative history does not alter the plain text of the statute.[38] In the end, Congress did not change EPCA's preemption provision when it adopted EISA, despite clearly having the opportunity to do so.[39] Because States lacked preexisting authority to set tailpipe greenhouse gas emissions standards, as a result of EPCA's preemption provision, EISA's savings clause did not give them that authority.

In the proposal, NHTSA also described in detail the reasons that tailpipe carbon dioxide emissions regulations or prohibitions are ''related to'' fuel economy standards.[40] NHTSA explained that carbon dioxide emissions are a necessary and inevitable byproduct of burning gasoline: The more fuel a vehicle burns or consumes, the more carbon dioxide it emits.[41] Based on the physical and mathematically measurable relationship between carbon dioxide emissions and fuel economy, EPCA has always specified that compliance with fuel economy standards is determined through tests and calculation procedures established by EPA.[42] Specifically, compliance with fuel economy standards is based almost entirely on carbon dioxide emission rates.[43] As NHTSA noted, it is significant that in enacting EPCA, Congress both adopted test procedures reliant on the direct relationship between carbon dioxide emissions and fuel economy, and preempted State and local governments from adopting requirements related to fuel economy standards in the same law.[44]

NHTSA affirms in this final rule that a State or local requirement limiting tailpipe carbon dioxide emissions from automobiles has the direct and substantial effect of regulating fuel consumption and, thus, is ''related to'' fuel economy standards. Likewise, since carbon dioxide emissions constitute the overwhelming majority of tailpipe carbon emissions, a State regulation of all tailpipe greenhouse gas emissions from automobiles or prohibiting all tailpipe emissions is also ''related to'' fuel economy standards and preempted by EPCA.

NHTSA is also finalizing its conclusion that EPCA does not preempt all potential State or local regulation of greenhouse gas emissions from vehicles. As NHTSA explained in the proposal,

[20] *See id.;* 77 FR 62624, 62637 (Oct. 15, 2012).

[21] *See* 75 FR 25324, 25328 (May 7, 2010).

[22] 83 FR 42986, 43233 (Aug. 24, 2018).

[23] *See id.* at 43233–34.

[24] *See* 83 FR 42986, 42990 tbl. I–4 (Aug. 24, 2018); Cal. Code Regs. tit. 13, sec. 1961.3(c). California changed its regulation following issuance of NHTSA and EPA's proposed rule. *See* State of Cal., Office of Admin. Law, Notice of Approval of Regulatory Action (Dec. 12, 2018), *https://www.arb.ca.gov/regact/2018/leviii2018/form400dtc.pdf.* NHTSA recognized the potential for such a change in the proposal. 83 FR 42986, 43233 n.495 (Aug. 24, 2018).

[25] 83 FR 42986, 43233 (Aug. 24, 2018).

[26] *Id.*

[27] *See, e.g.,* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[28] 83 FR 42986, 43233–34 (Aug. 24, 2018).

[29] *Id.* at 43233.

[30] 49 U.S.C. 32919(a).

[31] 83 FR 42986, 43233 (Aug. 24, 2018).

[32] *Id.*

[33] *Id.* at 43233–34.

[34] *See* EISA, Public Law 110–140 (2007).

[35] 42 U.S.C. 17002.

[36] *See id.*

[37] 83 FR 42986, 43234 (Aug. 24, 2018).

[38] *See Food Mktg. Inst.* v. *Argus Leader Media,* 139 S. Ct. 2356, 2364 (2019) (''In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.' '') (internal citations omitted).

[39] *See* EISA, Public Law 110–140 (2007); 83 FR 42986, 43234 (Aug. 24, 2018).

[40] 83 FR 42986, 43234 (Aug. 24, 2018).

[41] *Id.*

[42] 49 U.S.C. 32904(c).

[43] *See* 83 FR 42986, 43234 (Aug. 24, 2018).

[44] *Id.*

some greenhouse gas emissions from vehicles are not related to fuel economy because they have either no effect on fuel economy, or only an insignificant effect on fuel economy.[45] NHTSA provided an example of a requirement with no bearing on fuel economy: a State regulation of vehicular refrigerant leakage.[46] NHTSA also explained that State safety requirements that have only an incidental impact on fuel economy, such as a requirement to use child seats, is not preempted because it does not sufficiently relate to fuel economy standards.[47] NHTSA also confirms its view that, if preempted requirements are combined with requirements not related to fuel economy, ECPA would void only the preempted portion of the law.

In addition, NHTSA and EPA are confirming their determination, in this joint final action, that a Clean Air Act waiver does not waive EPCA preemption. As explained in the proposal, a State or local law or regulation related to automobile fuel economy standards is void *ab initio* under the preemptive force of EPCA.[48] As support, the proposal cited longstanding Supreme Court case law concerning the Supremacy Clause and action in violation of a statutory prohibition.[49] In sum, ''[i]t is basic to this constitutional command [in the Supremacy Clause] that all conflicting state provisions be without effect.'' [50]

As explained in the proposal, avoiding preemption under one Federal law has no necessary bearing on another Federal law's preemptive effect.[51] For purposes of the present rule, this conclusion is confirmed by Section 209 of the Clean Air Act, which explicitly states that a waiver of preemption pursuant to that provision of the Clean Air Act only relieves ''application of this section.'' [52] NHTSA also confirms its view that a Clean Air Act waiver does not ''federalize'' State or local requirements preempted by EPCA.

NHTSA and EPA also explained in the proposal their disagreement with decisions from district courts in California and Vermont that held that EPCA did not preempt State tailpipe greenhouse gas emissions standards.[53] The agencies particularly disagree with those district courts' characterization of the ''related to'' language in EPCA's preemption provision as narrow, their reliance on California's application for a Clean Air Act waiver, and the courts' implied preemption analyses.[54] As the proposal explained, these decisions are legally flawed, and NHTSA is not barred from proceeding with its preemption determination here.[55]

NHTSA also reaffirms its views on implied preemption, as described in the proposal.[56] State or local limitations or prohibitions on tailpipe carbon dioxide emissions from automobiles directly conflict with the objectives of EPCA. NHTSA balances statutory factors in setting CAFE standards at ''the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year'' (49 U.S.C. 32902(a)).[57] State requirements, made based on State-specific determinations unbound by the considerations in EPCA, frustrate NHTSA's statutory role. If one or more States may issue competing or overlapping requirements affecting fuel economy standards, industry must also apply resources and effort at meeting standards applicable only to discrete parts of the country in addition to those spent to comply with the Federal standards. In accordance with EPCA, manufacturers' ''average fuel economy'' is calculated based on specific statutory requirements. 49 U.S.C. 32901(a)(5), 32904. Manufacturers earn credits for exceeding average fuel economy standards. 49 U.S.C. 32903. This statutory compliance structure is impeded when States or local governments attempt to set or enforce their own requirements, which necessarily apply to manufacturers at a State or local level. This interferes with the national ''average fuel economy'' program. The broad preemption provision adopted by Congress in EPCA clearly demonstrates the intention for a single national set of standards that consider, among other things, economic feasibility and consumer choice. Indeed, the entire purpose of a balanced standard is defeated if a State can place its thumb on the scale. Likewise, separate State or local requirements interfere with the compliance regime under EPCA of performance determined based on nationwide fleet averages, which determine manufacturers' credits or shortfalls. *See* 49 U.S.C. 32903.

NHTSA also finalizes the view, as discussed in the proposal, that ZEV mandates are preempted by EPCA.[58] Such laws, which require that a certain number or percentage of vehicles sold or delivered in a State by a manufacturer meet ZEV requirements, directly and substantially affect fuel economy standards by requiring manufacturers to eliminate fossil fuel use in a portion of their fleet. Like State or local tailpipe GHG emissions standards, ZEV mandates require the application of additional efforts and resources beyond those needed to comply with Federal standards. ZEV mandates also directly conflict with the goals of EPCA as they apply irrespective of the Federal statutory factors the Secretary of Transportation (through NHTSA) is required to consider in setting fuel economy standards, including technological feasibility and economic practicability. In the proposal, NHTSA described, as an example, California's ZEV mandate, which manufacturers must comply with individually for each State adopting California's mandate.[59] This regime of State mandates forces manufacturers to expend scarce resources on specific technology regardless of consumer demand, and regardless of what the Secretary has determined in her judgment to be the appropriate expenditure of resources necessary to comply with fuel economy standards set in accordance with the balancing required by EPCA.

NHTSA also confirms its view that the preemption portion of this joint final action is a statement of what Federal law requires and is effective without regard to any particular model year of vehicles and without regard to the details of the fuel economy and greenhouse gas emissions standards the agencies have set previously or set in the future.[60] In other words, NHTSA's regulation concerning EPCA preemption is independent of and severable from the specific standards it ultimately adopts for model year 2021 through 2026 automobiles. Given the need for clarity on this issue, NHTSA has decided to issue this as a separate final rule and will later finalize the standards for model year 2021 through 2026 automobiles. NHTSA's preemption regulation formalizes its longstanding position on preemption and incorporates that position into the Code of Federal Regulations provisions concerning passenger automobile

[45] *Id.* at 43234–35.

[46] *Id.* at 43235.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Maryland* v. *Louisiana,* 451 U.S. 725, 746 (1981) (citing *McCulloch* v. *Maryland,* 4 Wheat. 316, 427 (1819)).

[51] 83 FR 42986, 43235 (Aug. 24, 2018).

[52] 42 U.S.C. 7543(b)(1).

[53] 83 FR 42986, 43232–38 (Aug. 24, 2018); *see Green Mountain Chrysler* v. *Crombie,* 508 F. Supp. 2d 295 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep, Inc.* v. *Goldstene,* 529 F. Supp. 2d 1151 (E.D. Cal. 2007), as corrected (Mar. 26, 2008).

[54] 83 FR 42986, 43232–38 (Aug. 24, 2018).

[55] *See id.* at 43235.

[56] *See id.* at 43237–38.

[57] 49 U.S.C. 32902(f).

[58] *See id.* at 43238–39.

[59] *Id.*

[60] *See id.* at 43239.

average fuel economy standards at 49 CFR 531.7 and 49 CFR part 531, appendix B, and light truck fuel economy standards at 49 CFR 533.7 and 49 CFR part 533, appendix B. These portions of the regulations are operable without regard to any specific Federal standards and requirements in 49 CFR parts 531 and 533 or other parts of the Code of Federal Regulations. Likewise, NHTSA's determination that a State or local law or regulation of tailpipe greenhouse gas emissions from automobiles is related to fuel economy standards is severable from NHTSA's determination that State or local ZEV mandates are related to fuel economy standards.

B. Scientific Relationship Between Tailpipe Carbon Dioxide Emissions and Fuel Economy Standards

NHTSA is finalizing its conclusion that State requirements regulating tailpipe carbon dioxide emissions from automobiles are related to fuel economy standards. The relationship between fuel economy standards and regulations that limit or prohibit tailpipe carbon dioxide emissions from automobiles is a matter of science and mathematics. Commenters did not and cannot dispute the direct scientific link between tailpipe carbon dioxide emissions from automobiles and fuel economy. Thus, State and local laws and regulations that regulate such tailpipe emissions are preempted under EPCA.

The relationship between carbon dioxide and fuel economy is described in several statements in an appendix to parts 531 and 533 that NHTSA is finalizing in this document.

First, ''[a]utomobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide.'' 49 CFR part 531, appx. B, section (a)(1)(A); 49 CFR part 533, appx. B, section (a)(1)(A).[61] No commenters disputed or otherwise specifically commented on this statement.

Second, ''[c]arbon dioxide is the natural byproduct of automobile fuel consumption.'' 49 CFR part 531, appx. B, section (a)(1)(B); 49 CFR part 533, appx. B, section (a)(1)(B).[62] One comment identified this as a correct statement,[63] and another highlighted this fact in noting NHTSA's longstanding and consistent view on preemption.[64] No commenters disagreed with this factual statement.

Third, ''[t]he most significant and controlling factor in making the measurements necessary to determine the compliance of automobiles with the fuel economy standards in this part [531 and 533] is their rate of tailpipe carbon dioxide emissions.'' 49 CFR part 531, appx. B, section (a)(1)(C); 49 CFR part 533, appx. B, section (a)(1)(C).[65] The Alliance of Automobile Manufacturers similarly stated that the measurements for CAFE compliance involved ''the same tests, vehicles, sales data, and emissions measurements that the EPA uses to measure carbon dioxide and tailpipe GHG emissions.'' [66] Fiat Chrysler Automobiles (FCA) also reiterated this point from the Alliance's comments,[67] and the Competitive Enterprise Institute highlighted NHTSA's discussion of compliance measurement in agreeing that fuel economy standards and greenhouse gas emissions standards are inherently related.[68] CARB did not dispute this factual statement, but pointed out that carbon dioxide emissions are only one part of the compliance testing regime Congress approved—a fact that NHTSA had already recognized in its proposal.[69] As NHTSA explained in the proposal, as specified by EPCA, compliance with the CAFE standards is and has always been based on the rates of emission of carbon dioxide, carbon monoxide, and hydrocarbons from covered vehicles, but primarily on the emission rates of carbon dioxide.[70] The role of carbon dioxide is approximately 100 times greater than the combined role of the other two relevant carbon exhaust gases.[71]

Fourth, ''[a]lmost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide.'' 49 CFR part 531, appx. B, section (a)(1)(D); 49 CFR part 533, appx. B, section (a)(1)(D).[72] The South Coast Air Quality Management District (South Coast) commented that NHTSA previously proposed, in 2008, adopting similar regulatory text that used the word ''most'' instead of ''almost all.'' [73] South Coast asserts that the 2008 proposal shows that NHTSA ''strains to exaggerate'' the overlap between greenhouse gas emissions standards and fuel economy standards.[74] NHTSA disagrees. While South Coast points to hybrid electric vehicles and ZEVs, it offers no evidence to refute the fact that almost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving the fuel economy levels of the vehicles in question.

Fifth, ''as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy.'' 49 CFR part 531, appx. B, section (a)(1)(E); 49 CFR part 533, appx. B, section (a)(1)(E).[75] No commenter disputed this statement. The National Automobile Dealers Association agreed, putting it this way: ''the physics and chemistry involved with fuel economy and GHG emissions standards are such that controlling fuel economy controls GHGs and controlling GHGs controls fuel economy.'' [76] It is also worth noting that technology cannot reduce the amount of carbon dioxide produced by combusting one gallon of gas. Instead, only technology that reduces the amount of gas needed to drive one mile (fuel economy) will reduce the amount of carbon dioxide generated per mile.

These statements in the regulatory appendix concerning the scientific relationship between automobile carbon dioxide emissions and fuel economy provide the foundation for NHTSA's preemption analysis. Due to this scientific relationship, which no commenter refuted, a regulation of tailpipe carbon dioxide emissions from automobiles that does not explicitly state that it is regulating fuel economy nevertheless has the effect of doing so. The label a State chooses to put on its regulations certainly is not dispositive in a preemption analysis. *See, e.g., Nat'l Meat Ass'n.* v. *Harris,* 565 U.S. 452, 464 (2012). One comment, from the Northeast States for Coordinated Air Use Management (NESCAUM), asserted that ''California's GHG standards do not mention fuel economy or attempt to

[61] 83 FR 42986, 43489 (Aug. 24, 2018).

[62] *Id.*

[63] Walter Kreucher, Docket No. NHTSA–2018–0067–0444.

[64] Association of Global Automakers, Docket No. NHTSA–2018–0067–12032.

[65] 83 FR 42986, 43489 (Aug. 24, 2018).

[66] Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073.

[67] Fiat Chrysler Automobiles (FCA), Docket No. NHTSA–2018–0067–11943.

[68] Competitive Enterprise Institute, Docket No. NHTSA–2018–0067–12015.

[69] *See* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; 83 FR 42986, 43234 (Aug. 24, 2018).

[70] *See* 83 FR 42986, 43234 (Aug. 24, 2018).

[71] 71 FR 17566, 17655–56 (Apr. 6, 2006); 83 FR 42986, 43234 (Aug. 24, 2018).

[72] 83 FR 42986, 43489 (Aug. 24, 2018).

[73] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[74] *Id.*

[75] 83 FR 42986, 43489 (Aug. 24, 2018).

[76] National Automobile Dealers Association, Docket No. NHTSA–2018–0067–12064.

regulate fuel economy.'' [77] To such comments, the agencies must ask ourselves the age-old question: ''What's in a name?'' and conclude ''[t]hat which we call a rose by any other name would smell as sweet.'' [78] Arguments focused on form, or worse—labels—over substance are not persuasive. Moreover, it is indisputable that EPCA preemption reaches beyond explicit regulations of fuel economy and into regulations ''related to'' fuel economy. The words ''related to'' cannot be read out of the statute or narrowed in a way that undermines Congress's broad preemption intent.

It is a matter of undisputed fact that the more fuel a vehicle burns or consumes, the more carbon dioxide it emits. There is a necessary relation between the regulation of one side of this equation and the regulation of the other. In other words, improving fuel economy has two inherently related benefits: Reducing fuel consumption and reducing carbon dioxide emissions. State and local governments cannot evade the preemptive sweep of EPCA by emphasizing only one side of these benefits and downplaying or ignoring the other when describing their regulations.

To further illustrate the situation, consider types of regulations for a swimming pool. If the pool has a hose on one side that is filling the pool and a hose on the other side that is draining the pool, you can regulate the water level in the pool by controlling either hose. Limiting the amount of water released by the inflow hose, is not itself a regulation of the outflow hose. But it is nonsensical to say that regulating the pool's inflow is not related to regulating its outflow. A regulation of either hose necessarily affects the level of water in the same pool. The Supreme Court has recognized preemption should appropriately apply in such contexts. *See Rowe* v. *N.H. Motor Transp. Ass'n,* 552 U.S. 364, 368, 72 (2008) (looking at effect of regulation to determine it was preempted even though ''it tells *shippers* what to choose rather than *carriers* what to do'' where Federal law preempted State laws ''related to a price, route, or service of any motor carrier . . . with respect to the transportation of property''); *Engine Mfrs. Ass'n.* v. *South Coast Air Quality Mgmt. Dist.,* 541 U.S. 246, 255 (2004) (explaining that it ''would make no sense'' to allow a State regulation to evade preemption simply because it addressed the purchase, rather than manufacture, of a federally regulated product).

C. Importance of One National Standard

To ensure uniform national fuel economy standards, Congress determined that it was appropriate to preempt States and local governments from adopting or enforcing laws or regulations related to the Federal standards. Effectuating Congress's goal requires NHTSA to address preemption. Preemption is necessary to the effectiveness of NHTSA's existing and forthcoming fuel economy standards and regulatory certainty into the future, specifically, one set of national standards. Congress made clear, through the required comprehensive balancing of factors and underlined by its inclusion of an express preemption provision, that State and local requirements impede the national fuel economy program. Thus, NHTSA is exercising its authority in this document, under 49 U.S.C. 32901 through 32903, to promulgate regulations to protect the integrity of the national program. This confirms the clear preemptive nature of NHTSA's standards, as stated in 49 U.S.C. 329219 and provides additional clarity on the scope of preemption, to carry out NHTSA's statutory authority to set nationally applicable standards.

A consistent refrain throughout many of the comments NHTSA received on its preemption proposal was the need for one national standard.[79] Preemption provides for just that uniformity. Indeed, that was the very purpose for Congress's including the express preemption provision in EPCA.

In enacting EPCA's preemption provision, Congress explicitly recognized the need to avoid a patchwork of requirements related to fuel economy standards, and gave NHTSA the exclusive authority to set and enforce fuel economy standards with discrete and limited exceptions as set forth in 49 U.S.C. 32919. NHTSA's exclusive authority is exercised through joint rulemaking with EPA for the very reason that tailpipe carbon dioxide emissions standards are directly and substantially related to fuel economy standards and apply concurrently to the same fleet of vehicles. This joint action enables the Federal government to administer its overlapping obligations while avoiding inconsistency. *See Massachusetts* v. *EPA,* 549 U.S. 497, 532 (2007).

Recent developments in California provide good examples of the need for a national standard and the problem that Congress sought to address in enacting EPCA's preemption provision. After the agencies published the proposal, California amended its regulations such that manufacturers are bound to comply with requirements consistent with the no action alternative for model years 2021 through 2026,[80] regardless of what the Federal standards are ultimately adopted. Moreover, even as to the existing Federal standard, California's regulations are impermissible under EPCA because only a Federal standard can apply nationally. State or local standards necessarily apply at the State and local level, and therefore are inherently inconsistent with the nationwide average standards pursuant to EPCA. *See* 49 U.S.C. 32901(a)(5)–(6), (13). Likewise, State and local compliance regimes interfere with the national program of credits and shortfalls for nationwide fleet performance by making compliance across the country inordinately complicated, inefficient, and expensive. *See id.* 32903.

Despite a widespread shared belief in the importance of one national standard, NHTSA's proposal on preemption received a mix of support and opposition in comments. Some commenters weighed in on preemption largely only to emphasize the importance of having a national standard.[81] Other commenters that supported the substance of the proposal agreed with NHTSA's analysis of both express and implied preemption, as well as the conclusion that both State laws that limit and State laws that prohibit carbon dioxide tailpipe emissions from automobiles, or have the direct or substantial effect of doing so, are preempted.[82] On the other hand, those commenters that opposed the substance of the proposal asked NHTSA to withdraw and not finalize any regulatory text concerning preemption.[83] Doing so would ignore the very purpose of EPCA's fuel economy provisions and NHTSA's statutory obligation under EPCA: To balance statutory factors in order to

[77] Northeast States for Coordinated Air Use Management (NESCAUM), Docket No. NHTSA–2018–0067–11691.

[78] W. Shakespeare, Romeo & Juliet, II, ii (47–48) (1597).

[79] *See, e.g.,* Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073; Association of Global Automakers, Docket No. NHTSA–2018–0067–12032.

[80] 83 FR 42986, 42990 tbl. I–4 (Aug. 24, 2018).

[81] *See, e.g.,* Toyota Motor North America, Docket No. NHTSA–2018–0067–12150.

[82] *See, e.g.,* Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073; Competitive Enterprise Institute, Docket No. NHTSA–2018–0067–12015.

[83] *See, e.g.,* Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

establish standards that are ''the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.'' [84] NHTSA disagrees with the comments that ask it to withdraw its proposal and not finalize any regulatory text on preemption. Given the present circumstances, failing to address this issue amounts to ignoring the existence of EPCA's preemption provision, and allowing for State and local requirements that interfere with NHTSA's statutory duty to set nationally consistent fuel economy standards.

The rule NHTSA is adopting in this document, under its authority to implement a national automobile fuel economy program in 49 U.S.C. 32901 through 32903, will ultimately provide needed certainty concerning preemption into the future. While EPCA's preemption provision has been in place for decades, the present circumstances demonstrate the need for greater clarity on this issue.

NHTSA's statutory role is to set nationwide standards based on a reasoned balancing of statutory factors. State and local requirements—unbound by these considerations—undermine NHTSA's ability to set standards applicable across the entire country. NHTSA is obliged to set standards at ''the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.'' 49 U.S.C. 32902(a). The regulation NHTSA is finalizing in this document implements that authority in 49 U.S.C. 32902 by clarifying the State requirements that impermissibly interfere with its statutory role to set nationally applicable standards. As explained in the proposal, as a practical matter, State and local actors would generally only set requirements that have the effect of requiring a *higher* level of average fuel economy (lest their standards lack impact).[85] That supposition has now been demonstrated by California's preemptive action to effectively set higher standards than the Federal standards, should the forthcoming final SAFE rule finalize anything lower than the no action alternative described in the NPRM for model years 2021 through 2026. This state of regulatory inconsistency—and even the potential for such inconsistency—is anathema to the express terms and purposes of EPCA, which does not even permit States to set fuel economy standards identical to those set by NHTSA in accordance with the statutory requirements.[86] Even identical standards interfere with the national program by imposing requirements not applicable to nationwide fleets and impose compliance regimes inconsistent with EPCA. *See, e.g.,* 49 U.S.C. 32903 (establishing specific requirements for earning and using credits based on nationwide average fuel economy performance).

California's recent action also demonstrates disregard for NHTSA's mandate to set standards in no more than 5 model year increments.[87] To avoid inconsistent State standards, California's regulatory change would require NHTSA to adopt the most stringent of nine regulatory alternatives it considered in the proposal.[88] NHTSA did not bind itself in any way to that regulatory alternative in its 2012 final rule, and to do so would have been contrary to law.[89]

Automakers must comply with the Federal fuel economy and GHG emissions requirements, and do so at significant cost. States like California that do not abide by the constraints of Federal law, and instead set inconsistent or even duplicative requirements related to fuel economy standards unjustifiably increase manufacturers' compliance costs, which must be either passed along to consumers or absorbed by the industry. Clarity on preemption is therefore essential to ensure the industry has the ability to efficiently expend its resources to comply with the nationally applicable standards determined by the Federal government in light of the Federal statutory factors that must be balanced, without the need to separately account for or comply with State or local requirements.

While it is of course ideal for States to independently abide by the constraints of Federal law, this does not reflect the current state of affairs. NHTSA's awareness of laws and regulations already in place, as well as the public comments it received in response to its proposal, confirm the need for additional clarity on the boundaries of EPCA preemption. Wrongly decided decisions by district courts in California and Vermont (appeals of which were abandoned as a condition of the negotiated agreement prior to the 2012 rulemaking), as well as NHTSA's own silence on this issue in recent years, are sowing confusion, emphasizing the need for the clarity provided by this final rule affirmatively establishing One National Program.[90]

D. NHTSA's Final Rule Provides Clarity and Certainty on EPCA Preemption

This final rule provides needed clarity on the scope of EPCA preemption. NHTSA is adopting regulatory text, including a detailed appendix, in addition to discussing this issue in the preamble to the rule, specifically to provide clarity on EPCA's preemption provision.

NHTSA rejects the assertion advanced in one comment that NHTSA did not provide notice and a fair opportunity to comment on its interpretation of EPCA preemption.[91] Any such suggestion is negated by the host of commenters that addressed the issue of preemption in response to the proposal. NHTSA proposed codifying its preemption interpretation in parts 531 and 533, and all commenters were explicitly asked to comment on the specific proposed regulatory text as well as on the explanation of NHTSA's interpretation set out in the preamble to the NPRM.

NHTSA also disagrees with a comment from the California Air Resources Board (CARB) that asserted the proposal was not clear on the scope of preemption.[92] The regulatory text articulates the boundaries of both express and implied preemption, with appropriate limitation to State or local laws or regulations that: (1) Regulate or prohibit tailpipe carbon dioxide emissions from automobiles, or (2) have the direct or substantial effect of regulating or prohibiting tailpipe carbon

[84] 49 U.S.C. 32902(a), (f).

[85] 83 FR 42986, 43238 (Aug. 24, 2018).

[86] *See* 49 U.S.C. 32902(a), 32919(a).

[87] *See id.* 32902(a), (b)(3)(B).

[88] *See* Cal. Code Regs. tit. 13, section 1961.3(c); *see* 83 FR 42986, 42990 tbl. I–4 (Aug. 24, 2018) (listing augural standards as baseline/no action alternative, and eight other alternatives under consideration).

[89] *See* 49 U.S.C. 32902(b)(3)(B); 77 FR 62624, 62627 (Oct. 15, 2012).

[90] As described in the proposal, NHTSA's views on preemption are longstanding. However, NHTSA has not directly addressed preemption in its most recent CAFE rulemakings. South Coast disputes that NHTSA's views on preemption are longstanding, pointing to legal and factual developments since. South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. That NHTSA has not opined on developments does not mean that its views have changed. South Coast also points to some wording changes to argue that NHTSA has shifted positions. NHTSA disagrees. It has consistently held the position that State regulation of tailpipe greenhouse gas emissions from automobiles is preempted, and South Coast has not identified any statements to the contrary. In any event, the fact that NHTSA has not addressed EPCA preemption in its most recent rulemakings highlights the need to address the issue without further delay.

[91] Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[92] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

dioxide emissions from automobiles or automobile fuel economy. In the proposal, NHTSA provided examples of laws that would not be preempted.[93] CARB did not identify any examples of laws where additional clarity was needed.

It should not be difficult for States or local governments to ascertain whether their laws or regulations regulate or prohibit tailpipe carbon dioxide emissions. As NHTSA explained in the proposal and reiterates in this document, both requirements specific to tailpipe carbon dioxide emissions from automobiles and those that address all tailpipe greenhouse gas emissions from automobiles are preempted, given that carbon dioxide emissions constitute the overwhelming majority of those emissions.[94] Likewise, ZEV mandates are also preempted.[95]

NHTSA also does not believe it should be difficult for States or local governments to determine if their laws or regulations have the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy.[96] To aid in this effort, in the proposal, NHTSA described requirements that would not be preempted because they have only incidental impact on fuel economy or carbon dioxide emissions.[97] The examples NHTSA provided were child seat mandates and laws governing vehicular refrigerant leakage.[98]

Moreover, contrary to assertions in some comments, NHTSA's adoption of regulatory text does provide a limiting principle[99] and is not overbroad.[100] Congress set the extraordinarily broad boundaries of preemption in EPCA, where it specified that State and local laws ''related to fuel economy standards'' are preempted. The words ''related to'' have meaning and cannot be read out of the statute. To the extent that questions of interpretation remain about the scope of preemption, that is a consequence of the statute, and is far from unique—particularly with respect to the ''related to'' language, which Congress has used in multiple contexts.[101] The Supreme Court has opined on the meaning of similar terms. However, NHTSA recognizes the concerns about the appropriate limitations of preemption. Notwithstanding the broad sweep of EPCA preemption, NHTSA intends to assert preemption only over State or local requirements that directly or substantially affect corporate average fuel economy standards.

Through its adoption of specific regulatory text in this document, NHTSA is providing guidance on the boundary set by Congress, as well as under principles of implied preemption. Notably, NHTSA has not concluded that implied preemption broadens the scope of preemption established by Congress. As NHTSA recognized in its proposal, some greenhouse gas emissions from automobiles have no relation to fuel economy and therefore may be regulated by States or local governments without running afoul of EPCA preemption. NHTSA provided examples of State or local requirements that are not preempted. It also specifically invited comment on the extent to which State or local requirements can have some incidental impact on fuel economy or carbon dioxide emissions without being related to fuel economy standards, and thus are not preempted. NHTSA did not receive any directly responsive comments regarding this issue, including from State and local government commenters, suggesting that they do not currently have questions about how preemption would apply to their laws or regulations.[102]

As an additional limiting principle, NHTSA reiterates the statement in its proposal that only a portion of a law or regulation would be preempted, where possible. This would be the case if the law or regulation combined multiple severable elements that were allowable and not allowable, such as with a regulation of both vehicular refrigerant leakage and tailpipe carbon dioxide emissions—refrigerant leakage requirements could remain in place while tailpipe carbon dioxide emissions regulations would necessarily be preempted.

NHTSA rejects the argument made by certain commenters that the presumption against preemption applies in this context.[103] The presumption is not appropriate given EPCA's express statutory preemption provision. *See Puerto Rico* v. *Franklin Cal. Tax-Free Trust,* 136 S. Ct. 1938, 1946 (2016) (explaining that ''because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.' '') (quoting *Chamber of Commerce of United States of Am.* v. *Whiting,* 563 U.S. 582, 594 (2011)).

NHTSA reaffirms the view that EPCA's express preemption provision is broad and clear. NHTSA's review and assessment of comments has not changed its view. Some comments noted that the statute specifically preempts laws or regulations related to fuel economy *standards.*[104] They assert that States and local governments are unconstrained by EPCA preemption in regulating future model year vehicles, before they are covered by a fuel economy standard issued by NHTSA. NHTSA disagrees.

EPCA preempts State and local laws and regulations that relate to: (1) Fuel economy standards, *or* (2) average fuel economy standards for automobiles covered by an average fuel economy standard under 49 U.S.C. Chapter 329. Currently, automobiles through model year 2021 are covered by an average fuel economy standard under Chapter 329.[105] NHTSA will continue setting standards for future model years, pursuant to the mandate in 49 U.S.C. 32902(a) that ''[a]t least 18 months

[93] 83 FR 42986, 43235 (Aug. 24, 2018).

[94] *Id.* at 43234.

[95] *See id.* at 43238–39.

[96] South Coast argued that EPCA preemption would not reach possible State and local requirements concerning lease arrangements or requirements for used vehicles. South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. NHTSA does not agree. EPCA preempts requirements related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under EPCA. If a State requirement falls within this scope, it is preempted. For example, a State could not prohibit dealers from leasing automobiles or selling used automobiles unless they meet a fuel economy standard.

[97] 83 FR 42986, 43235 (Aug. 24, 2018).

[98] *Id.*

[99] Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[100] *Id.;* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[101] *See Rowe* v. *N.H. Motor Transp. Ass'n,* 552 U.S. 364, 370–73 (2008); *Am. Airlines* v. *Wolens,* 513 U.S. 219, 226–27 (1995); *Shaw* v. *Delta Airlines, Inc.,* 463 U.S. 85, 97 (1983).

[102] Some commenters did assert that California's greenhouse gas emissions standards or ZEV mandates have only an incidental impact on fuel economy, or that NHTSA was not clear why those requirements have more than an incidental impact on fuel economy. California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Northeast States for Coordinated Air Use Management (NESCAUM), Docket No. NHTSA–2018–0067–11691; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. NHTSA disagrees. It discussed these issues in detail in parts b, f, and g of the preemption discussion of the proposed rule and incorporates those discussions here. 83 FR 42986, 43234, 37–39 (Aug. 24, 2018).

[103] *See* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Center for Biological Diversity et al., Docket No. NHTSA–2018–0067–12000; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[104] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813; *see also* Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[105] *See* 77 FR 62624, 62637 (Oct. 15, 2012).

before the beginning of *each* model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year.'' [106] NHTSA prescribes ''average fuel economy standards for at least 1, but not more than 5, model years.'' 49 U.S.C. 32902(b)(3)(B). State and local requirements that address automobiles beyond model year 2026 are therefore preempted if they relate to ''fuel economy standards'' that NHTSA is required to establish in the future. To conclude otherwise would be to make the impermissible assumption that NHTSA will not carry out Congress's command.

The regulation NHTSA is finalizing in this document implements that authority in 49 U.S.C. 32902 by making clear that State and local requirements that relate to fuel economy standards for future model year vehicles conflict with NHTSA's ability to set nationally applicable standards for those vehicles in the future and thus are impliedly preempted. Manufacturers make design decisions well in advance of production, as Congress recognized by adding ''lead time'' provisions to the statute. State and local requirements for automobiles not yet covered by a NHTSA standard could force manufacturers into plans that are not economically practical or otherwise inconsistent with EPCA's statutory factors—since States and local governments are not bound by those considerations. By the time future model year vehicles are produced, they will be covered by a NHTSA standard. If States or local governments were permitted to issue regulations related to fuel economy for future model year vehicles, manufacturers would at least act at risk of running afoul of those non-Federal regulations. At least some manufacturers would undoubtedly feel compelled to conform with such non-Federal regulations until the Federal government sets its own standards. Even if non-Federal regulations are not ultimately enforceable as to produced vehicles (since a Federal fuel economy standard will be adopted, in time), they clearly conflict with the congressionally imposed constraint of issuing standards for not more than 5 model years. Such far-reaching regulations are based on predictions about the future that are inevitably less reliable the further in time they reach. Manufacturers are therefore put in an untenable position of either planning towards State and local regulations based on potentially outdated or unrealistic expectations about the future, or ignoring them before knowing the Federal standards that will eventually apply and acting at risk of enforcement by non-Federal actors. Moreover, different States could impose different and conflicting fuel economy requirements on manufacturers for future model years, a result directly at odds with the single national standard established by EPCA. Any of these scenarios demonstrates that the position that EPCA preemption does not reach regulation of model year vehicles not currently covered by a NHTSA standard is flawed. State or local requirements related to fuel economy standards for any model year automobiles are preempted.

The regulatory text and preamble discussion clearly articulates NHTSA's views on the meaning of ''related to'' in EPCA's express preemption provision, which are confirmed following NHTSA's review and assessment of comments. As discussed in the proposal, EPCA is not unique in using the phrase ''related to'' to set the scope of preemption.[107] NHTSA described prior Supreme Court case law interpreting this phrase as broad and including such conceptual relationships as having an ''association with'' or ''connection to.'' In its comments, South Coast asserted that NHTSA's discussion was ''legally erroneous'' because it did not include ''discussion and analysis'' of a line of Supreme Court cases that began with *New York State Conference of Blue Cross* v. *Travelers Ins. Co.,* 514 U.S. 645 (1995).[108] South Coast's criticism is unfounded; NHTSA directly recognized the *Travelers* line of cases which look to the objectives of the statute as a guide to the scope of preemption. *See Travelers,* 514 U.S. at 656. In the proposal, NHTSA specifically applied this analysis to the CAFE context and cited a 1997 case quoting *Travelers.*[109] The *Travelers* line of cases supports NHTSA's position on preemption. As NHTSA explained in the proposal, EPCA's preemption provision demonstrates that one of Congress's objectives was to create a single set of national fuel economy standards. The language Congress enacted preempts all State and local laws and regulations that relate to fuel economy standards, and does not exempt even State requirements that are identical to Federal requirements. Moreover, NHTSA's proposal was not intended as a comprehensive recitation of all case law addressing the use of ''related to'' in statutory preemption provisions. There are many Supreme Court decisions that support the breadth of that language beyond those specifically cited in the proposal.[110] For example, in *Rowe,* the Court recognized that a State statute that forbid certain retailers from employing a delivery service unless it followed certain delivery procedures was preempted by the Federal Aviation Administration Authorization Act, which preempted States from enacting or enforcing laws ''related to a price, route, or service of any motor carrier.'' *Rowe,* 552 U.S. at 368, 71–73. The Court recognized that the State law was directed at shippers rather than carriers, but found that the *effect* of the requirements impacted carriers. *Id.* at 372. The Court explained that State laws ''whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes or services.'' *Id.* at 375 (emphasis in original). Likewise, here, regulation of tailpipe carbon dioxide emissions has a direct and undeniably substantial effect on fuel economy.

However, NHTSA, of course, agrees that ''related to'' is not unlimited.[111] NHTSA specifically discussed the limitations of preemption in its proposal, which only seeks to preempt State or local requirements that directly or substantially affect corporate average fuel economy. NHTSA also provided specific examples of State laws and regulations that would not be preempted, as well as clearly articulating some that are preempted. As discussed above, the regulatory text NHTSA is adopting in this document is appropriately limited and consistent with the scope of preemption established by Congress.

With respect to implied preemption, NHTSA agrees with comments that assert it is a fact-driven analysis.[112] However, NHTSA disagrees that there was an insufficient factual record for it to evaluate the conflict either at the time of the proposal or now.[113] NHTSA is well aware of State regulations of tailpipe greenhouse gas emissions (including carbon dioxide) and ZEV mandates, and described several of these in the proposal. The foundational

[106] 49 U.S.C. 32902(a) (emphasis added).

[107] 83 FR 42986, 43233 (Aug. 24, 2018).

[108] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[109] 83 FR 42986, 43233 (Aug. 24, 2018).

[110] *See, e.g., Rowe* v. *N.H. Motor Transp. Ass'n,* 552 U.S. 364, 367–72 (2008).

[111] As the Supreme Court has stated, ''the breadth of the words 'related to' does not mean the sky is the limit.'' *Dan's City Used Cars, Inc.* v. *Pelkey,* 569 U.S. 251, 260 (2013).

[112] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[113] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

factual analysis involves the scientific relationship between automobile fuel economy and automobile tailpipe emissions of carbon dioxide. NHTSA discussed this scientific relationship in detail. No commenter contested the scientific and mathematical relationship between them.

Contrary to CARB's contention in its comments, the fact that NHTSA acknowledged that some State requirements that incidentally affect greenhouse gas emissions are not preempted does not demonstrate that there is an insufficient record for finding that other laws do pose a conflict to NHTSA's statutory role to set nationwide fuel economy standards for automobiles.[114] To the contrary, NHTSA carefully considered and acknowledged the limitations of EPCA preemption by discussing a variety of types of laws, and providing specific examples.

NHTSA also disagrees with the claim made in some comments that it does not have delegated authority to issue a regulation on this topic, and is not owed deference or weight for its regulation implementing EPCA's express preemption provision or the conflict resulting from State or local laws or regulations.[115] Congress gave the Secretary of Transportation express authorization to prescribe regulations to carry out her duties and powers. 49 U.S.C. 322(a).[116] NHTSA has delegated authority to carry out the Secretary's authority under Chapter 329 of Title 49, which encompasses EPCA's preemption provision, as well as EISA.[117] NHTSA therefore has clear authority to issue this regulation under 49 U.S.C. 32901 through 32903 to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements. As explained here, the statute is clear on the question of preemption, and NHTSA must carry it out. *See Coventry Health Care of Missouri, Inc.* v. *Nevils,* 137 S. Ct. 1190, 1193 n.3 (2017) (holding that preemption applies and ''the statute alone resolves this dispute''). However, to the extent there is any ambiguity, NHTSA is the expert agency and its regulation adopted in this document is entitled to deference.[118] As explained in the proposal, NHTSA is the expert agency given authority to administer the Federal fuel economy program and has expert authority to interpret and apply the requirements of EPCA, including preemption. *See Medtronic, Inc.* v. *Lohr,* 518 U.S. 470 (1996) (''Because the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act, the agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941), and, therefore, whether it should be pre-empted.''); *see also Nat'l Rifle Ass'n* v. *Reno,* 216 F.3d 122 (D.C. Cir. 2000) (rejecting argument that Attorney General lacked authority to issue regulation that she described as clarifying that certain State requirements were not preempted by Federal law). This is particularly true given the scientific nature of the relationship between fuel economy and greenhouse gas emissions. *See Geier* v. *Am. Honda Motor Co., Inc.,* 529 U.S. 861 (2000) (''Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements.'').

NHTSA is also finalizing its view that its regulation concerning EPCA preemption is independent and severable from any particular CAFE standards adopted by NHTSA. NHTSA's implementation of its authority to set nationally applicable fuel economy standards under 49 U.S.C. 32902, by clarifying the scope of preemption, is separate from its decision on the appropriate standards for any given model years. No commenter disagreed that this portion of the proposed rule is severable. The Alliance of Automobile Manufacturers agreed, noting case law stating that whether a regulation is severable depends on the agency's intent and whether the remainder of the regulation may still function sensibly.[119] Both these considerations support severability here. Given the lack of any comments to the contrary, NHTSA is finalizing its conclusion that the standards for model year 2021 through 2026 automobiles are independent of and severable from the decision NHTSA is finalizing in this document on EPCA preemption. Moreover, given the need for clarity on preemption, and in order to give effect to existing standards established pursuant to 49 U.S.C. 32902, NHTSA is issuing this final rule now before making a final determination on the standards portion of the proposal.

E. Direct and Substantial Relationship Between ZEV Mandates and Fuel Economy Standards

NHTSA is also finalizing its conclusion that a State law or regulation that either explicitly prohibits tailpipe carbon dioxide emissions from automobiles or has the direct or substantial effect of doing so is preempted, both pursuant to the express preemption provision in 49 U.S.C. 32919 and implied preemption, as an obstacle to NHTSA's national program pursuant to 49 U.S.C. 32901–32903.

As explained in greater detail in the proposal, carbon dioxide emissions constitute the overwhelming majority of tailpipe carbon emissions.[120] The only feasible way of eliminating tailpipe carbon dioxide emissions altogether is to eliminate the use of fossil fuel. Thus, regulations that require a certain number or percentage of a manufacturer's fleet of vehicles sold in a State to be ZEVs that produce no carbon dioxide tailpipe emissions necessarily affect the fuel economy achieved by the manufacturer's fleet as well as the manufacturer's strategy to comply with applicable standards, and are therefore preempted under EPCA. These regulations therefore have just as a direct and substantial impact on corporate average fuel economy as regulations that explicitly eliminate carbon dioxide emissions, and are therefore preempted. NHTSA described types of ZEV mandates in detail in its proposal, including California's ZEV mandate, which has been adopted by ten other States.[121]

ZEV mandates force the development and commercial deployment of ZEVs, irrespective of the technological feasibility or economic practicability of doing so. The Alliance of Automobile Manufacturers commented that this interference with NHTSA's balancing of

[114] *Id.*

[115] *Id.; Center for Biological Diversity et al.,* Docket No. NHTSA–2018–0067–12000; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[116] 49 U.S.C. 322(a) specifically states: ''The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.''

[117] 49 CFR 1.95(a), (j).

[118] *See, e.g., Chevron USA, Inc.* v. *Nat'l Res. Defense Council, Inc.,* 467 U.S. 837, 843–45 (1984).

[119] Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073.

[120] 83 FR 42986, 43234 (Aug. 24, 2018).

[121] *See id.* at 43239. At the time of the proposal, nine States had adopted California's ZEV mandate. Since that time, a tenth State—Colorado—has also done so. *https://www.colorado.gov/pacific/cdphe/aqcc* (indicating that ZEV standards were adopted on August 16, 2019).

statutory factors and forced adoption of specific design approaches are grounds for finding ZEV mandates preempted.[122] NHTSA agrees.

In setting fuel economy standards, among the factors that NHTSA must consider are technological feasibility and economic practicability. 49 U.S.C. 32902(f). NHTSA is also required to set performance-based standards, and not design mandates.[123] *See* 49 U.S.C. 32902(b)(2). These considerations are at odds with ZEV mandates.

NHTSA disagrees with comments that expressed the view that ZEV mandates are not related to fuel economy standards because ZEVs emit no criteria pollutants or greenhouse gases.[124] Just as a State may not require a specific level of tailpipe carbon dioxide emissions from automobiles, since doing so effectively sets a specific level of fuel economy, a State may not prohibit tailpipe carbon dioxide emissions from automobiles. That is the equivalent of setting a specific emissions level—zero, which also prohibits the use of fossil fuel. In fuel economy terms, that is akin to requiring a vehicle to having the maximum conceivable level of fuel economy. A prohibition on ozone-forming emissions has the same effect, since the only vehicles capable of emitting no ozone-forming emissions are vehicles that do not use fossil fuels. As NHTSA explained, this type of regulation poses a direct conflict with EPCA, particularly as it relates to requiring a percentage of technological fleet penetration—represented by credits or actual vehicles—that an automaker must distribute into a State. ZEV mandates force investment in specific technology (battery electric and fuel cell technology) rather than allowing manufacturers to improve fuel economy by whatever technological path they choose, allowing them to pursue more cost-effective technologies that better reflect consumer demand, as is the case under the CAFE program. ZEV mandates also create an even more fractured regulatory regime. As NHTSA explained in the proposal, manufacturers must satisfy ZEV mandates in *each* State individually.[125]

NHTSA also disagrees with a comment that argued ZEV mandates are not preempted because the definition of fuel economy in EPCA is in reference to gasoline or equivalent fuel.[126] EPCA preempts State and local requirements related to fuel economy standards. That ZEV mandates are not themselves expressed as mile-per-gallon standards for fossil-fuel powered vehicles is not dispositive. NHTSA explained the relationship between ZEV mandates and fuel economy standards in detail in the proposal and reiterates that discussion here.[127]

Many commenters expressed support for ZEV mandates as matter of policy.[128] NHTSA does not take issue with those policy objectives to the extent they do not conflict with EPCA or otherwise impermissibly interfere with the Federal regulation of fuel economy. NHTSA notes that States and local governments are able to continue to encourage ZEVs in many different ways, such as through investments in infrastructure and appropriately tailored incentives.[129] States and local governments cannot adopt or enforce regulations related to fuel economy standards, which include ZEV mandates, but they are able to pursue their policy preferences, as long as the manner in which they do so does not conflict with Federal law.

F. EISA Did Not Narrow or Otherwise Alter EPCA Preemption

NHTSA reiterates, as it discussed in the proposal, that EISA did not narrow the express preemption clause in 49 U.S.C. 32919. In fact, EISA did not alter EPCA's express preemption clause in any way. As a factual matter, Congress neither amended or nor repealed EPCA's preemption clause with the enactment of EISA. EISA's savings clause did not amend EPCA. The savings clause, codified at 42 U.S.C. 17002, states: ''Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.'' [130]

As described in the proposal, EISA's savings clause does not expand any pre-existing authority. Instead, the clause expressly states that it did not impose a new limitation on such authority. By its plain text, EISA also does not authorize any violation of any provision of law. This includes EPCA's express preemption clause. Thus, activities prohibited by the express preemption clause before EISA, such as State laws related to fuel economy standards, continued to be prohibited after EISA.

The text of the savings clause is what controls its meaning, not statements by individual Members of Congress. South Coast claims that NHTSA did not discuss such statements in detail, including statements by Senator Feinstein.[131] NHTSA did recognize in the proposal that the Congressional Record contains statements by certain Members of Congress about their individual views, but explained that such statements lack authority. As NHTSA explained in the proposal, such statements cannot expand the scope of the savings clause or clarify it. Individual Members, even those who may have played a lead role in drafting a particular bill, cannot speak for the body of Congress as a whole.[132] NHTSA interprets the statutory language based on the words actually adopted by both Houses and signed by the President.

NHTSA likewise does not find persuasive the argument that Congress did not enact additional statutory language in EISA preempting California from regulating tailpipe greenhouse gas

[122] Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073.

[123] South Coast asserts that ZEV mandates are performance based because any vehicle meeting the requirements can be certified as a ZEV. South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. But, it is inherent that the requirements—ZEV means zero-emissions vehicle—dictate a particular design. In any event, for the reasons described above, ZEV mandates are related to fuel economy standards however framed.

[124] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[125] 83 FR 42986, 43239 (Aug. 24, 2018); *see* Competitive Enterprise Institute, Docket No. NHTSA–2018–0067–12015.

[126] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

[127] *See* 83 FR 42986, 43238–39 (Aug. 24, 2018).

[128] National Coalition for Advanced Transportation (NCAT), Docket No. NHTSA–2018–0067–11969; Union of Concerned Scientists, Docket No. NHTSA–2018–0067–12039.

[129] Certain incentives are preempted by EPCA. *See Metro. Taxicab Bd. of Trade* v. *City of New York,* 615 F.3d 152 (2d Cir. 2010) (holding that New York City rule that incentivized hybrid taxis by allowing taxi owners to charge more for the lease of hybrid vehicles were ''based expressly on the fuel economy of a leased vehicle, [and] plainly fall within the scope of the EPCA preemption provision.'').

[130] One commenter pointed out that the proposal did not include the clause before the first comma when it quoted the language of the savings provision. South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. However, NHTSA disagrees with the commenter that the introductory clause has a substantive impact on this issue. That clause states: ''Except to the extent expressly provided in this Act or an amendment made by this Act . . .'' But, EISA did not expressly authorize States to regulate or prohibit tailpipe greenhouse gas emissions from automobiles.

[131] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[132] *N.L.R.B.* v. *SW Gen., Inc.,* 137 S. Ct. 929, 942–43 (2017) (''Passing a law often requires compromise, where even the most firm public demands bend to competing interests. What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators. . . .[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.'' (citations omitted)).

emissions from automobiles. A comment from three Senators provides documents related to potential proposals to do so.[133] There are many reasons for Congress not to adopt proposals set forward by one interest group or another, including, of course, because they were unnecessary. That is the case here where EPCA's preemption provision already prevented States from adopting and enforcing requirements related to fuel economy standards.

Given the words of the savings clause, NHTSA rejects the argument made by South Coast that the ''EISA saving provision designedly narrows EPCA's express preemption provision, and Congress intended this result.'' [134] The savings clause did not amend the preemption provision in EPCA. Moreover, what the savings clause actually says is that it does *not* limit authority. If a regulation is preempted by EPCA, a State has no authority to enforce it, and EISA did not change that status quo. If Congress wanted to amend the broad and clear express preemption provision in EPCA, it could have and would have done so. It did not.

Because NHTSA disagrees that States could permissibly regulate tailpipe greenhouse gas emissions from automobiles prior to EISA, it also disagrees with comments that argue that Congress ''preserved'' the ability of States to do so through the savings clause (or, alternatively, that efforts to ''revoke'' such preexisting authority failed).[135]

NHTSA also disagrees with a comment by South Coast that argues that EISA's savings provision forecloses implied preemption.[136] The specific words that South Coast points to are the opening clause: ''Except to the extent expressly provided in this Act or an amendment made by this Act.'' This language does not address preemption under EPCA. That introductory clause merely modifies the remainder of the savings provision, which goes on to say that ''nothing in this Act or an amendment made by this Act . . . limits the authority provided . . . or authorizes any violation of any provision of law . . . .'' This statutory language prevents EISA from limiting preexisting authority or responsibility conferred by any law or from authorizing violation of any law. States and local governments had no preexisting authority or responsibility to set requirements related to fuel economy standards. Such requirements are void *ab initio.* The savings provision also does not purport to expand pre-existing authority or responsibility, nor did Congress amend in any way the broad express preemption provision in EPCA when it enacted EISA. Moreover, implied preemption as applied here is not a limitation based in EISA or the Clean Air Act. Implied preemption is instead based on the Secretary of Transportation's preexisting responsibility under EPCA to balance statutory factors in setting nationwide fuel economy standards for automobiles.

The provision in EISA concerning minimum requirements for Federal government vehicles also does not change NHTSA's view. Several comments referenced this provision, which states that the EPA ''Administrator shall take into account the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States'' in identifying vehicles for the Federal government fleet. 42 U.S.C. 13212(f)(3)(B).[137] Commenters argued that the phrase ''the most stringent standards'' would be superfluous if only EPA were allowed to set standards and, in addition, if EPA had not set any such standards at the time EISA was enacted. On the contrary, this provision is fully consistent with NHTSA's view of preemption, based on the plain text of EPCA's express preemption provision. The language in the EISA provision specifically indicates that it applies only to ''the most stringent standards . . . *enforceable* against motor vehicle manufacturers.'' [138] This means that EPA could consider only otherwise lawful standards. States and local governments are not permitted to enforce standards preempted by EPCA. 49 U.S.C. 32919(a).

However, EPCA *does* specifically permit a State or local government to ''prescribe requirements for fuel economy for automobiles obtained for its own use.'' 49 U.S.C. 32919(c). It is logical that the Federal government would consider the requirements for States and local government vehicle fleets in evaluating vehicles for its own Federal government fleet. Such requirements would be applicable to and could be enforced against manufacturers in contractual procurement relationships with States or local governments. In any event, this provision concerning a limited set of vehicles (Federal government vehicles) is not grounds for undoing the uniform national fuel economy standards applicable to all light vehicles as prescribed by Congress in EPCA.

In enacting this provision in EISA, Congress required the EPA Administrator to ''issue guidance identifying the makes and model number of vehicles that are low greenhouse gas emitting vehicles'' to aid in identifying vehicles for the Federal government's own fleet. 42 U.S.C. 13212(f)(3)(A). The provision requiring the Administrator to ''take into account the most stringent standards for vehicles greenhouse gas emissions'' provides a consideration for that guidance. *Id.* 13212(f)(3)(B). It is not plausible that Congress intended this limited provision concerning guidance on Federal government procurement to disrupt the longstanding express preemption provision in EPCA.

Further, to read this procurement-related provision as somehow showing that Congress intended to allow California to establish laws related to fuel economy standards is unreasonable, as doing so would put California in an unequal setting vis-a-vis other states, and that would not make sense in this context. ''The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.' '' *Northwest Austin Municipal Utility District Number One* v. *Holder,* 557 U.S. 193, 203 (2009). A ''departure from the fundamental principal of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'' *Id.* Congress rejected any such prospect in the area of fuel economy by adding an unwaivable preemption clause in EPCA. NHTSA does not presume that Congress, when adopting EISA, impliedly discarded the equal application of EPCA to the States without a clear statement of intent to do so and a recitation of the ''extraordinary conditions'' permitting California special authority related to fuel economy. *Id.* at 211. ''Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'' [139]

[133] U.S. Senators Tom Carper, Diane Feinstein and Edward J. Markey, Docket No. NHTSA–2018–0067–11938

[134] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[135] Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[136] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[137] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[138] 42 U.S.C. 13212(f)(3)(B) (emphasis added).

[139] *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001).

G. Prior Case Law Does Not Preclude Preemption

Certain comments opposed to NHTSA's proposal rely upon the Supreme Court's decision in *Massachusetts* v. *EPA* to argue that regulation of tailpipe emissions is separate and distinct from regulation of fuel economy.[140] NHTSA disagrees with attempts to stretch the holding of this decision well beyond the issues addressed by the Court. The Court did not address EPCA preemption in *Massachusetts* v. *EPA,* or State regulations pursuant to a Clean Air Act waiver. The Court addressed only EPA's own statutory obligations, which have no bearing on EPCA preemption.

Moreover, as discussed above, NHTSA and EPA conduct joint rulemaking consistent with the Supreme Court's decision. The Court acknowledged that NHTSA and EPA's statutory obligations may overlap, but that the agencies may both administer those obligations while avoiding inconsistency.[141] NHTSA therefore disagrees with the comment's assertion that regulations of tailpipe greenhouse gas emissions and fuel economy are truly separate and distinct. The agencies issue joint rules precisely because of the unavoidable scientific relationship between the two.

A number of comments also rely on the prior district court decisions in California and Vermont in opposing NHTSA's proposal on preemption.[142] As NHTSA discussed in the proposal, those courts previously concluded that State tailpipe greenhouse gas emissions standards were not preempted by EPCA.[143] NHTSA continues to disagree with both of these district court decisions, as described in detail in the proposal.[144] This includes the California district court's erroneous view of the requirement in EPCA for NHTSA to consider ''other standards'' in setting fuel economy standards.[145] In reaching its conclusion, the court misconstrued a separate provision of EPCA that, by its explicit terms, has had no effect for decades. Importantly, neither district court considered NHTSA's views on preemption in construing the statute NHTSA administers.[146] Although the United States filed an amicus brief opposing the Vermont court's decision in the Second Circuit, that appeal was not decided on the merits due to the automotive industry's withdrawal of the appeal as a part of a negotiated agreement connected to the national framework. In its brief, the United States specifically raised the district court's failure to consider NHTSA's views concerning preemption, let alone give them weight.[147] Withdrawal of appeals was expressly part of the agreement to establish the national framework.

The Vermont district court also attempted to reconcile EPCA and the Clean Air Act by asserting that a Clean Air Act waiver converts State requirements to ''other motor vehicle standards'' that NHTSA must consider in setting fuel economy standards. As NHTSA noted in the proposal, even the California district court found that there was no legal foundation for the view that a State regulation pursuant to a Clean Air Act waiver becomes the equivalent of a Federal regulation.[148] This is an erroneous finding not based on precedent and is unsupported by applicable law.

As described in the proposal, NHTSA also disagrees with the California and Vermont district courts' implied preemption analyses.[149] NHTSA does not believe those courts fully considered the conflict posed by State regulations and, in one case, even went so far as to assert erroneously that NHTSA could simply defer to California in revising its standards.[150] Those decisions are not binding on NHTSA.

Given NHTSA's previously stated views on those decisions, arguments that rely on the decisions are not persuasive. Commenters did not provide any new information or analysis of those district court decisions that caused the agency to change its view on the decisions.[151] NHTSA incorporates the prior discussion of those decisions from the proposal here.

While NHTSA need not belabor its views again here, it is worth emphasizing, as did commenters, that both district courts ignored NHTSA's published prior statements on preemption in rendering their decisions.[152] Some comments seem to suggest that this failure to address NHTSA's views represents a substantive rejection of those views.[153] NHTSA disagrees. The district courts simply entirely failed to consider the agency's views; they did not consider and reject them or even find that they were not due any weight. This is among the reasons that NHTSA is formalizing its views in a regulation. As the expert agency charged with administering EPCA, NHTSA is tasked with balancing the four statutory factors in determining the ''maximum feasible average fuel economy standards'' for each model year.[154] In doing so, NHTSA has the unique ability to determine whether State or local regulations would undermine this balancing.[155] NHTSA's views on preemption certainly should be considered by any court evaluating this issue. This is particularly true given that the relationship between fuel economy standards and greenhouse gas emissions is a matter of science.

One commenter also erroneously asserts that collateral estoppel will bar the Department of Justice from defending a final rule that asserts State greenhouse gas emissions regulations are preempted by EPCA.[156] Nonmutual offensive collateral estoppel does not apply to the United States. *United States* v. *Mendoza,* 464 U.S. 154, 162 (1984). Moreover, the Federal government was not even a party to the prior litigation involving EPCA preemption. The assertion that the Department of Justice would be barred from defending this final rule lacks merit.

[140] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; *see* Northeast States for Coordinated Air Use Management (NESCAUM), Docket No. NHTSA–2018–0067–11691.

[141] *Massachusetts* v. *EPA,* 549 U.S. 497, 532 (2007).

[142] Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[143] 83 FR 42986, 43235 (Aug. 24, 2018).

[144] *Id.* at 43235–38.

[145] *Id.* at 43236–37.

[146] *Id.* at 43236; Proof Brief for the United States as Amicus Curiae, 07–4342–cv (2d Cir. filed Apr. 16, 2008).

[147] *See* Proof Brief for the United States as Amicus Curiae, 07–4342–cv (2d Cir. filed Apr. 16, 2008). NHTSA also was not a litigant in the district court cases and, therefore, did not have a full opportunity to raise its views.

[148] 83 FR 42986, 43236 (Aug. 24, 2018).

[149] *Id.* at 43238.

[150] *Cent. Valley Chrysler-Jeep, Inc.,* 529 F. Supp. 2d at 1179. NHTSA has a statutory obligation to set standards at ''the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year,'' in accordance with the statutory considerations. 49 U.S.C. 32902(a), (f). Thus, NHTSA cannot simply defer to a State. For example, the only standards that California would permit to satisfy California requirements for model years 2021 through 2025 are the augural standards. *See* Cal. Code Regs. tit. 13, § 1961.3(c). If NHTSA finalizes a determination that the augural standards are not ''maximum feasible,'' as discussed in the proposal, then it would be contrary to law for NHTSA to nevertheless adopt them in deference to California.

[151] As noted by a commenter, the appeals were dismissed before decision as a practical matter, and despite strong arguments on the merits. Fiat Chrysler Automobiles (FCA), Docket No. NHTSA–2018–0067–11943.

[152] 83 FR 42986, 43236 (Aug. 24, 2018).

[153] *See* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

[154] 49 U.S.C. 32902(f).

[155] *See id.*

[156] *See* South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

H. A Clean Air Act Waiver and SIP Approvals Do Not Foreclose EPCA Preemption

Both agencies are finalizing their tentative conclusion from the proposal that a Clean Air Act waiver does not also foreclose EPCA preemption. EPCA does not provide for a waiver of preemption, either by NHTSA or by another Federal agency. EPA, like NHTSA, does not have the authority to waive EPCA preemption. Therefore, its grant of a Clean Air Act waiver cannot operate to waive EPCA preemption. NHTSA discussed the basis for its view that a Clean Air Act waiver does not ''federalize'' EPCA-preempted State requirements in detail in its proposal. NHTSA reaffirms that discussion.

Several comments recited the district court's holding in *Green Mountain Chrysler* that it need not consider EPCA preemption due to the EPA waiver.[157] NHTSA discussed in detail in the proposal its reasons for disagreeing with that decision and commenters did not identify any new information that caused NHTSA to change its view. NHTSA agrees with commenters that reject the flawed reasoning of the district court.[158] As one commenter explained, the argument that an EPA waiver federalizes State requirements renders the EPCA preemption provision a nullity.[159] As the commenter noted, this incorrect interpretation would enable States to even issue explicit fuel economy requirements so long as they were under cover of a waiver from EPA. EPA does not have authority to waive any aspect of EPCA preemption, nor does NHTSA.

NHTSA also finalizes its view that preempted standards are void *ab initio.* No commenters presented information that altered NHTSA's view, which is based on longstanding Supreme Court case law, as cited by the proposal.

NHTSA agrees with South Coast, which suggested in its comments that EPCA does not outweigh the Clean Air Act.[160] Likewise, the Clean Air Act does not outweigh EPCA. Just as manufacturers must comply with requirements under both statutes, both statutes apply to State and local governments as well. Moreover, EPCA's preemption provision is fully consistent with the Clean Air Act. EPCA's preemption provision does not implicitly repeal parts of Section 209(b), contrary to the assertion in one comment.[161] States must simply act in accordance with both statutes. *Cf. Massachusetts* v. *EPA,* 549 U.S. 497, 532 (2007) (finding no inconsistency between obligations of EPA under Clean Air Act and NHTSA under EPCA).

NHTSA has rejected the argument that a Clean Air Act waiver renders EPCA preemption inapplicable, and likewise rejects the even more attenuated argument concerning EPA's approval of preempted State requirements as a part of a State Implementation Plan (SIP) submission for areas that do not meet National Ambient Air Quality Standards (NAAQS). A State has no authority to adopt or enforce a requirement that falls within the scope of EPCA preemption. 49 U.S.C. 32919(a). This is true even if adopting the unlawfully enacted requirement would assist the State in coming into compliance with the NAAQS. The inclusion of an invalid fuel economy requirement in an air quality SIP does not render the requirement suddenly valid.[162] NHTSA therefore disagrees with comments that suggest that EPCA preemption no longer applies simply because an unauthorized requirement is included in a SIP that is subsequently approved.[163] It is inappropriate for a State to take action unauthorized and rendered void by one statutory scheme to meet the requirements of a different statutory scheme.

Moreover, EPCA preemption applies directly to States and local governments which are obliged to adhere to the constraints of the Supremacy Clause. EPCA explicitly prohibits States and local governments from adopting or enforcing a law or regulation related to fuel economy standards. It is unreasonable for States to expect a Federal agency (EPA) acting under one statutory scheme (the Clean Air Act) to analyze whether the State has adopted preempted regulations in contravention of an entirely separate statute (EPCA) administered by a different Federal agency (NHTSA). In fact, as noted above, historically EPA has declined to address questions unrelated to CAA section 209, such as preemption analysis, in its waiver decisions. NHTSA strongly disagrees with the assertion that EPA's approval of a SIP silently acts as an implied waiver of EPCA preemption. This suggestion is particularly hollow given that neither EPA nor NHTSA has the authority to waive EPCA preemption.

NHTSA agrees with the general principle that an approved SIP is enforceable as a matter of Federal law.[164] However, the case law does not support the argument made by CARB and South Coast's comments. The case law explains that a SIP approved by EPA creates binding obligations, pursuant to the Clean Air Act.[165] There is no indication that Congress intended to permit one agency to legitimize an otherwise EPCA-preempted State provision by ''federalizing'' it. As an analogy, the IRS requires individuals to report and pay taxes on money earned from illegal activity, such as dealing drugs.[166] A drug dealer who complies with Federal tax law is not relieved of the prohibitions on possessing and selling drugs that apply under other Federal laws.

Since SIPs are binding on States, the agencies recognize that certain States may need to work with EPA to revise their SIPs in light of this final action.[167] As stated in the proposal, EPA may subsequently consider whether to employ the appropriate provisions of the Clean Air Act to identify provisions of States' SIPs that may need review because they include preempted ZEV mandates or greenhouse gas emissions standards.[168] However, this practical consideration is not grounds for ignoring EPCA's limitations on State action. SIPs are not written in stone. They are subject to revision, including based on changed circumstances. The Clean Air Act allows SIPs to be revised for various reasons, including that part of the plan was approved in error, that the plan is ''substantially inadequate,'' or that the State is suspending or

[157] *See, e.g.,* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Class of 85 Regulatory Response Group, Docket No. NHTSA–2018–0067–12070; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[158] *See, e.g.,* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2018–0067–12078.

[159] Competitive Enterprise Institute, Docket No. NHTSA–2018–0067–12015.

[160] *See* South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[161] Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[162] SIPs must include ''enforceable emission limitations.'' 42 U.S.C. 7410(a)(2)(A). An EPCA preempted requirement is not enforceable. 49 U.S.C. 32919(a).

[163] *See* South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[164] *See* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[165] *See, e.g., Safe Air for Everyone* v. *United States Envt'l Prot. Agency,* 488 F.3d 1088, 1091 (9th Cir. 2007).

[166] Internal Revenue Service, Publication 525: Taxable and Nontaxable Income 32 (Mar. 8, 2019), *https://www.irs.gov/pub/irs-pdf/p525.pdf.*

[167] EPA explains below that it will consider whether and how to address SIP implications of this action, to the extent that they exist, in separate actions; EPA believes that it is not necessary to resolve those implications in the course of this action.

[168] 83 FR 42986, 43244 (Aug. 24, 2018).

revoking a program included in a plan. 42 U.S.C. 7410(a)(5)(iii), (k)(5)–(6).

I. NHTSA Has Appropriately Considered the Views of States and Local Governments Consistent With Law

NHTSA considers the views of all interested stakeholders—including States and local governments—in carrying out its statutory obligation to set nationally applicable fuel economy standards. However, EPCA does not permit States or local governments to act as co-regulators with NHTSA in the process of setting fuel economy standards. Indeed, EPCA precludes them from doing so, with the sole exception of information disclosure requirements identical to Federal requirements, and for requirements for fuel economy for automobiles obtained for a State or local governments' own use. A number of commenters urged NHTSA to work cooperatively with California, and to negotiate with and reach a compromise with California.[169] NHTSA appreciates such comments, and seeks to foster a collaborative regulatory approach to the extent possible. That said, California is not permitted by Federal law to have its own separate laws or regulations relating to fuel economy standards. 49 U.S.C. 32902 makes clear that NHTSA sets nationally applicable fuel economy standards, and NHTSA is implementing its authority to do so through this regulation clarifying the preemptive effect of its standards consistent with the express preemption provision in 49 U.S.C. 32919.

The very limited exceptions to preemption set forth in EPCA—covering vehicles for a government's own use, and for disclosure requirements that are identical to Federal requirements—only confirm the breadth of preemption. *See* 49 U.S.C. 32919(b)–(c). States or localities cannot adopt or enforce requirements related to fuel economy standards unless they fall into one of these two discrete exceptions. This means requirements related to fuel economy standards for automobiles for use by a State's citizens, and not merely the State itself, are not permitted. Since States are not permitted to adopt or enforce requirements related to fuel economy standards for vehicles sold or delivered to the public, Federal law does not allow California (or any other State or local government) to regulate in this area.

For California, or any other State or local government, to regulate in this area would require NHTSA to waive EPCA preemption, but commenters did not and cannot identify any statutory authorization for NHTSA to do so and no such authority exists, either expressly or impliedly. The Clean Air Act requires EPA to waive Clean Air Act preemption under a specific section of that statute unless it makes certain findings. But because EPCA does not enable NHTSA to issue a waiver of preemption, it also does not set forth terms upon which a waiver would be appropriate.[170] Thus, NHTSA lacks a legal basis for approving of or consenting to State or local requirements related to fuel economy standards.

Absent the affirmative authority to approve of or consent to State or locality's requirements related to fuel economy standards, commenters appear to ask NHTSA to simply to look aside. That is inconsistent with NHTSA's legal responsibility to set nationally applicable standards. It is also inconsistent with the self-executing nature of EPCA preemption, meaning that State or local requirements related to fuel economy standards are void *ab initio.* Even if NHTSA wanted to do so, it cannot breathe life into an expressly preempted State law. And doing so would effectively result in NHTSA's purporting to rewrite a statute, which is beyond the power of a regulatory agency.

NHTSA also disagrees that it is appropriate to ignore EPCA preemption as a strategy to avoid litigation over this issue, a strategy strongly suggested by a large number of commenters. NHTSA understands the concerns of such commenters who hope to avoid prolonged litigation.[171] However, NHTSA believes that long-term certainty is best achieved by applying the law as written. NHTSA agrees with commenters who acknowledge the disruption to the automotive marketplace that would come if preempted standards remained in place.[172] Addressing preemption directly, as NHTSA has done through its adoption of regulatory text in this document, will ultimately provide the needed regulatory certainty into the future.

Those commenters that ask NHTSA to negotiate with California demonstrate the nature of the problem.[173] The underlying reason commenters are concerned about the absence of a compromise resolution is because of the conflict that will result if States proceed with regulations that are inconsistent with Federal requirements.[174] Such commenters, appropriately, have recognized the disruptive effect of continuing to tolerate multiple regulators in this area. Moreover, as discussed in additional detail below, a negotiated resolution is inconsistent with the APA's notice and comment rulemaking process. NHTSA has no basis in law to ignore the substantive comments received on its proposal from many stakeholders and instead determine an outcome through negotiation with a regulatory agency in California. NHTSA is a safety agency with different priorities than CARB, with a different set of factors to balance, including safety implications.

As discussed above, many comments emphasized a desire for maintaining a National Program. Neither California nor any other State, of course, has the authority to set national standards in any area. If California were to adopt and enforce requirements related to fuel economy standards, there could only be uniform standards applicable throughout the country if California agrees with the standards set by NHTSA or vice versa. But EPCA requires that ''[e]ach standard shall be the maximum feasible average fuel economy level that the Secretary''—not a regulatory agency in the State of California—''decides that the manufacturers can achieve in that model year.'' [175] 49 U.S.C. 32902(a).

[169] *See, e.g.,* American Honda Motor Company, Inc., Docket No. NHTSA–2018–0067–11818; Sen. T. Carper, United States Senate, Docket No. NHTSA–2018–0067–11910; Maryland Department of the Environment, Docket No. NHTSA–2018–0067–12044; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735; Manufacturers of Emission Controls Association, Docket No. NHTSA–2018–0067–11994; North Carolina Department of Environmental Quality, Docket No. NHTSA–2018–0067–12025.

[170] EPA also does not have authority to waive EPCA preemption, under the Clean Air Act or otherwise.

[171] American Honda Motor Company, Inc., Docket No. NHTSA–2018–0067–11818; Ford Motor Company, Docket No. NHTSA–2018–0067–11928.

[172] Fiat Chrysler Automobiles (FCA), Docket No. NHTSA–2018–0067–11943.

[173] *See, e.g.,* American Honda Motor Company, Inc., Docket No. NHTSA–2018–0067–11818; Sen. T. Carper, United States Senate, Docket No. NHTSA–2018–0067–11910; Manufacturers of Emission Controls Association, Docket No. NHTSA–2018–0067–11994.

[174] *See* Cal. Code Regs. tit. 13, section 1961.3(c).

[175] As NHTSA explained in the proposal, it disagrees with the implication of the district court's statement in *Central Valley* that ''NHTSA is empowered to revise its standards'' to take into account California's regulations. 83 FR 42986, 43238 (Aug. 24, 2018); *see Cent. Valley Chrysler-Jeep, Inc.,* 529 F. Supp. 2d at 1179. NHTSA's duty under EPCA is to balance the statutory factors, not to acquiesce to the views of one State (which by its own assertion is attempting to address State-specific concerns, including the geography of its population centers). *See, e.g.,* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873 (stating that California's ''population continues to live predominantly in basins bounded by mountains, in which air quality is poor'').

Moreover, a faithful application of EPCA requires more than just avoiding inconsistency. For that reason, it is unavailing that CARB has previously implemented its program purportedly consistent with the Federal government.[176] EPCA requires NHTSA to set nationally applicably standards. EPCA does not permit States or local governments to adopt or enforce even identical or equivalent standards.[177] EPCA allows for only a single regulator—NHTSA—to set fuel economy standards. Moreover, it is now clear it does not intend to do so for model year 2021 through 2026 vehicles, should the forthcoming final SAFE rule finalize standards other than the no action alternative as described in the NPRM.[178] And even consistent programs subject manufacturers to duplicative enforcement regimes, in conflict with EPCA.[179] State standards that are identical or equivalent standards to the Federal standards manufacturers nevertheless obligate manufacturers to meet more onerous requirements. That is because States, of course, lack authority to set nationwide requirements. Therefore, manufacturers must meet State standards within *each* State that has adopted them. Since fuel economy standards are *fleetwide average* standards, it is more difficult to achieve a standard in a particular State, averaged across a smaller pool of vehicles, than it is to achieve the Federal standard, averaged across the pool of vehicles for all States.

In addition, there is no legal basis in EPCA or the APA for California or any other State to receive preferential treatment for their views in this statutory scheme or rulemaking process.[180] Nor is California, or any other State, entitled to negotiate the appropriate standards with NHTSA. Commenters appear to suggest closed-door negotiations, and not an alternative rulemaking process (such as negotiated rulemaking), that would ensure procedural fairness.[181] NHTSA disagrees that negotiation is the appropriate mechanism to set nationally applicable policy with billions of dollars of impacts. The notice-and-comment rulemaking process used by the agencies is the appropriate mechanism for setting standards under EPCA and the Clean Air Act, with due consideration to the views of all interested parties and transparency. NHTSA certainly would prefer a result that is satisfactory to all interested stakeholders, but it may not set aside its own considered views on the appropriate standards to reach a negotiated resolution, nor may it set aside Congress's commands in EPCA.

While States or local governments may not adopt or enforce requirements related to fuel economy standards, NHTSA, of course, is considering their views in setting appropriate standards. Many State and local governments commented at great length on both the preemption and standard setting portions of NHTSA's proposal.[182] NHTSA has taken their views into account in finalizing this rule, along with those of other commenters. States and local governments have had and will continue to have a say in the adoption of fuel economy standards, consistent with the APA. Indeed, many of the technical comments provided by California and other State and local governments and agencies are being considered to improve the analysis regarding the appropriate standards. In an area with express preemption, this APA process is the appropriate means by which the Federal government should consider the views of States and local governments.

NHTSA also disagrees with the view expressed by some commenters that there is not a direct conflict between State regulation of tailpipe carbon dioxide emissions from automobiles issued pursuant to a Clean Air Act waiver and NHTSA's ability to set fuel economy standards under EPCA. South Coast argues that when there are inconsistent standards, automakers can avoid a conflict by complying with the more stringent standard.[183]

NHTSA disagrees that this situation does not pose a conflict. Higher standards than those NHTSA has determined are ''maximum feasible'' after balancing the statutory factors negates the agency's judgment in setting national standards, including traffic safety. NHTSA addressed this conflict in detail in the proposal and reiterates that discussion here.[184] NHTSA also disagrees that all manufacturers should simply comply with a higher standard than the standards set by the Federal government based on statutory considerations. It may not be technically feasible for manufacturers to comply with higher standards or the higher standards may not be economically practicable. These are factors that NHTSA must carefully assess and balance in setting standards under EPCA, and the notion that a State has the unilateral ability to veto or undermine NHTSA's determination by setting higher standards directly conflicts with EPCA.

South Coast also asserted in its comments that there is no direct conflict between the purpose of EPCA to reduce fuel consumption by increasing fuel economy and the purpose of the Clean Air Act to protect public health from air pollution, including by allowing California to establish motor vehicle standards if it meets the criteria for a waiver.[185] While it is true that there need not be a conflict between EPCA and the Clean Air Act, this statement is irrelevant to the determination of whether State standards are preempted by EPCA. NHTSA and EPA conduct joint rulemaking in this area *because* EPA's greenhouse gas emissions standards are inherently related to NHTSA's fuel economy standards. This inherent linkage was recognized by the Supreme Court in *Massachusetts* v.

[176] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

[177] EPCA does allow States or local governments to adopt identical requirements for disclosure of fuel economy or fuel operating costs, but did not allow identical requirements in other areas related to fuel economy. *See* 49 U.S.C. 32919(b).

[178] *See* Cal. Code Regs. tit. 13, section 1961.3(c).

[179] EPCA has an unusual civil penalty provision for violations of fuel economy standards that enables various compliance flexibilities, including use of banked credits, credit plans, credit transfers, and credit trades. *See* 49 U.S.C. 32912. EPCA also requires specific procedures and findings before the Secretary of Transportation may increase the civil penalty rate applicable to violations of fuel economy standards. 49 U.S.C. 32912(c). State and local enforcement of even identical or equivalent requirements interferes with this enforcement structure.

[180] *See Nw. Austin Mun. Util. Dist. No. One* v. *Holder,* 557 U.S. 193, 203 (2009) (stating that ''a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets'').

[181] One comment noted that prior negotiations were ''closed-door, 'put nothing in writing, ever' negotiations.'' Competitive Enterprise Institute, Docket No. NHTSA–2018–0067–12015; *see also* Sen. Phil Berger & Rep. Tim Moore, North Carolina General Assembly, Docket No. NHTSA–2018–0067–11961.

[182] *See, e.g.,* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; Joint Submission from Governors of Texas, et al., Docket No. NHTSA–2018–0067–11935; Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735; Maryland Department of the Environment, Docket No. NHTSA–2018–0067–12044; Minnesota Pollution Control Agency (MPCA), the Minnesota Department of Transportation (MnDOT), and the Minnesota Department of Health (MDH), Docket No. NHTSA–2018–0067–11706; North Carolina Department of Environmental Quality, Docket No. NHTSA–2018–0067–12025; Pennsylvania Department of Environmental Protection, Docket No. NHTSA–2018–0067–11956; Washington State Department of Ecology, Docket No. NHTSA–2018–0067–11926.

[183] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[184] See section f of the proposal's preemption discussion. 83 FR 42986, 43237–38 (Aug. 24, 2018).

[185] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

EPA.[186] California and other States have, for many years, regulated ozone-forming emissions from vehicles pursuant to a Clean Air Act waiver without posing a conflict with NHTSA's regulation of fuel economy. It is when States regulate the emission of greenhouse gases, especially carbon dioxide, that the conflict arises because of the direct and substantial relationship between tailpipe emissions of carbon dioxide and fuel economy. Regulation in this area is related to NHTSA's fuel economy standards and impedes NHTSA's ability to set nationally applicable fuel economy standards.

NHTSA also disagrees with comments that assert it did not properly consider federalism concerns. Specifically, South Coast claimed that NHTSA violated the executive order on federalism, Executive Order 13132, although South Coast acknowledges the Executive Order does not create an enforceable right or benefit.[187] Setting aside the Executive Order's non-justiciability for the moment, NHTSA's action complies with Executive Order 13132. Contrary to South Coast's assertion, the executive order recognizes both express preemption and conflict preemption, and it does not bar the application of conflict preemption where a statute contains an express preemption provision.[188] The provisions concerning express preemption and conflict preemption are in separate paragraphs, which are not mutually exclusive. *See* E.O. 13132 section 4(a)–(b).

Moreover, the executive order supports NHTSA's action in construing preemption through rulemaking. *See id.* The executive order explicitly supports the process NHTSA used here to consider the views of States and local governments, stating that: ''When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.'' E.O. 13132 section 4(e). NHTSA cited to Executive Order 13132 in the preemption portion of its proposal,[189] and specifically solicited comments from State and local officials, as well as other members of the public. As discussed above, NHTSA has considered the extensive comments from State and local governments.

EPCA preemption also does not improperly impinge on the rights of States. Several commenters argued for allowing States to regulate in this area due to asserted benefits of State regulation.[190] CARB's comments went into extensive detail on its history of regulating vehicles.[191] It also asserted that there is industry support for its regulation in this area,[192] and argued that it has reliance interests in its regulations.[193] CARB also argued that NHTSA's proposal would adversely impact its police power and ability to protect its citizens.[194] In addition, it claimed that NHTSA's proposal would impact its State-imposed mandate for emissions reductions by 2030, given the transportation sector's contributions to California's greenhouse gas emissions.[195]

Notwithstanding these asserted interests of policy, Congress determined that NHTSA should have exclusive authority to set fuel economy standards and that States are not authorized to adopt or enforce regulations related to those standards, with limited exceptions described above. No commenter argued that EPCA's preemption provision is unconstitutional. Some commenters, however, have argued that special treatment afforded to the California is problematic.[196] Just as States have no valid police power to set fuel economy standards directly, neither are they permitted under EPCA and the Supremacy Clause to set standards related to fuel economy standards. States do have input into the Federal fuel economy standards established by NHTSA (as well as EPA's related greenhouse gas emissions standards) through the notice-and-comment process, and the interests of California's citizens as well as the citizens of the other 49 States are protected by the standards set by the Federal agencies.

NHTSA recognizes that California may have different policy views, as do many interested parties, including both those who expressed views in favor of and in opposition to the proposal. However, Congress gave NHTSA the duty to balance competing considerations. NHTSA also rejects the notion that California has valid reliance interests in regulations that are void *ab initio.* Indeed, even in the run-up to the 2012 rulemaking, California itself reserved its rights to go in a different direction and recognized that the Federal Government may assert preemption at a later date.[197] The extent to which all or part of industry does or does not support California's ability to regulate in this area is also not a relevant consideration to whether California is legally authorized to do so. NHTSA also notes that industry has expressed a strong preference for one national standard, which is the purpose of EPCA's preemption provision.[198] California has now made clear that it will not accept manufacturers' compliance with Federal standards, unless the agencies adopt the no action alternative from the proposal.[199] EPCA preemption ensures that such State regulations are unenforceable and that one set of national standards (the Federal standards) will control. Not even identical standards are permissible.

J. Clarifying Changes to Final Rule Text

No commenter offered alternative regulatory text for consideration by the

[186] *See Massachusetts* v. *EPA,* 549 U.S. 497, 532 (2007).

[187] E.O. 13132 section 11; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. South Coast also states that NHTSA did not mention the Tenth Amendment in its proposal. South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. However, South Coast does not assert that this action violates the Tenth Amendment, which is fully consistent with Federal preemption. *See* Constitution, Article VI.

[188] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[189] 83 FR 42986, 43233 n.496 (Aug. 24, 2018).

[190] *See, e.g.,* California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

[191] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

[192] *Id.*

[193] *Id.*

[194] *Id.; see also* Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[195] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873.

[196] *E.g.,* Sen. Phil Berger & Rep. Tim Moore, North Carolina General Assembly, Docket No. NHTSA–2018–0067–11961; Rep. M. Turzai, Pennsylvania House of Representatives, Docket No. NHTSA–2018–0067–11839.

[197] *See* Letter from M. Nichols, CARB to R. LaHood, DOT & L. Jackson, EPA (July 28, 2011), *available at https://www.epa.gov/sites/production/files/2016-10/documents/carb-commitment-ltr.pdf* (last visited Sept. 15, 2019) (making certain commitments for a National Program, conditioned on certain events including EPA's grant of a waiver of Clean Air Act preemption, vehicle manufacturers not challenging California's standards on the basis of EPCA preemption, and indicating that ''California reserves all rights to contest final actions taken or not taken by EPA or NHTSA as part of or in response to the mid-term evaluation'').

[198] *See* Alliance of Automobile Manufacturers, Docket No. NHTSA–2018–0067–12073; American Honda Motor Company, Inc., Docket No. NHTSA–2018–0067–11818; Association of Global Automakers, Docket No. NHTSA–2018–0067–12032; Fiat Chrysler Automobiles (FCA), Docket No. NHTSA–2018–0067–11943; Ford Motor Company, Docket No. NHTSA–2018–0067–11928; General Motors LLC, Docket No. NHTSA–2018–0067–11858; Jaguar Land Rover, Docket No. NHTSA–2018–0067–11916; Mazda Motor Company, Docket No. NHTSA–2018–0067–11727; Mitsubishi Motors RD of America, Inc. (MRDA), Docket No. NHTSA–2018–0067–12056; Subaru, Docket No. NHTSA–2018–0067–12020; Toyota Motor North America, Docket No. NHTSA–2018–0067–12150; Volkswagen Group of America, Docket No. NHTSA–2017–0069–0583.

[199] *See* Cal. Code Regs. tit. 13, section 1961.3(c).

agency on preemption. Because NHTSA is finalizing its views on preemption, it is adopting the proposed regulatory text, including an appendix. However, based on its review of comments, NHTSA is adopting a few minor, clarifying changes.

While not advocating for a change to the regulatory text, comments from South Coast and CARB persuaded us to make changes to ensure consistency with EPCA's express preemption provision, as was NHTSA's intention.[200] South Coast specifically pointed out that two provisions of the proposed regulatory text (appendix B, sections (a)(3) and (b)(3)) did not include the word ''automobiles.'' [201] Contrary to South Coast's suggestion, NHTSA's intention was not to reach beyond the statutory text. Most of the proposed regulatory text explicitly addressed automobiles. In the two provisions identified by South Coast as omitting that term, NHTSA addressed tailpipe carbon dioxide emissions and fuel economy. In context, these references address automobile emissions and automobile fuel economy. However, for clarity and consistency, NHTSA has added explicit reference to automobiles to these two provisions.

CARB also pointed out in its comments that the statute preempts laws or regulations ''related to fuel economy *standards,*'' not simply those related to fuel economy.[202] While other provisions of the proposed rule used the phrases ''relates to fuel economy standards'' or ''related to fuel economy standards,'' the word ''standards'' was inadvertently omitted from section (a)(3) of the appendix. In the final rule, NHTSA has added that word for clarity.

In addition, to ensure consistency throughout the regulatory text and with the preamble discussion, NHTSA is clarifying that a State law or regulations having either a direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions or fuel economy is a law or regulation related to fuel economy. The proposal included this statement in the proposed regulatory text: ''Automobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide.'' This provides the foundation for NHTSA's express and implied preemption analysis. NHTSA is therefore clarifying that requirements directly or substantially related to fuel economy are preempted by adding ''or substantially'' to two places in the regulatory text. This is consistent with the proposal, which explained that requirements with no bearing on fuel economy or those with only an incidental impact on fuel economy are not preempted.[203] Requirements with more than an incidental impact, *i.e.* those requirements that directly or substantially affect fuel economy are related to fuel economy and thus preempted. Therefore, this change in the regulatory text of the final rule provides additional clarity on the scope of preemption.

In addition, several references throughout the proposed regulatory text addressed a ''state law or regulation.'' Consistent with EPCA and the discussion in the notice of proposed rulemaking, NHTSA intended to address laws and regulations of States and their political subdivisions. For clarity, NHTSA revised all references in its regulatory text to cover States and their political subdivisions.

Specifically, in the rule NHTSA is finalizing in this document, appendix B, section (a)(3) reads: ''A law or regulation *of a State or political subdivision of a State* having the direct *or substantial* effect of regulating or prohibiting tailpipe carbon dioxide emissions from *automobiles* or *automobile* fuel economy is a law or regulation related to fuel economy *standards* and expressly preempted under 49 U.S.C. 32919.'' [204] Appendix B, section (b)(3) reads: ''A law or regulation *of a State or political subdivision of a State* having the direct *or substantial* effect of regulating or prohibiting tailpipe carbon dioxide emissions from *automobiles* or *automobile* fuel economy is impliedly preempted under 49 U.S.C. Chapter 329.'' [205]

Finally, NHTSA also added clarifying language to 49 CFR 531.7(b) and 533.7(b) to indicate that the references to ''section 32908'' are to section 32908 of title 49 of the United States Code.

These clarifying changes are consistent with the discussion in the preamble to NHTSA's proposed rule.

III. EPA's Withdrawal of Aspects of the January 2013 Waiver of CAA section 209(b) Preemption of the State of California's Advanced Clean Car Program

In this section of this joint action, EPA is finalizing its August 2018 proposal to withdraw aspects of its January 2013 waiver of Clean Air Act (CAA) section 209 preemption of the State of California's Advanced Clean Car (ACC) program. *First,* subsection A provides background regarding the ACC program. *Second,* subsection B finalizes EPA's proposed determination that it has the authority to reconsider and withdraw previously granted waivers. *Third,* subsection C finalizes EPA's proposed determination that, in light of NHTSA's determinations finalized elsewhere in this joint action regarding the preemptive effect of EPCA on state GHG and ZEV programs, EPA's January 2013 grant of a waiver of CAA preemption for those provisions of California's program was invalid, null, and void; that waiver is hereby withdrawn on that basis, effective on the effective date of this joint action. *Fourth,* subsection D, separate and apart from the determinations in subsection C with regard to the effect of EPCA preemption on the January 2013 waiver, finalizes EPA's reconsideration of, and its proposed determination that it is appropriate to withdraw, its January 2013 grant of a waiver of CAA preemption for the GHG and ZEV standards in California's ACC program for model years 2021 through 2025, based on a determination that California ''does not need [those] standards to meet compelling and extraordinary conditions'' within the meaning of CAA section 209(b)(1)(B). *Fifth,* subsection E sets forth and specifies the terms of the waiver withdrawal. *Sixth,* subsection F finalizes EPA's proposed determination that, separate and apart from the findings and determinations described above, states other than California cannot use CAA section 177 to adopt California's GHG standards. *Seventh and finally,* subsection G sets forth EPA's understanding and intention with regard to severability of, and the appropriate venue for judicial review of, this action.

A. Background

On January 9, 2013, EPA granted California's request for a waiver of preemption to enforce its Advanced Clean Car (ACC) program regulations under CAA section 209(b)(1).[206] 78 FR

[200] South Coast and CARB asked NHTSA to withdraw its proposal on preemption, rather than to change the text of the proposed rule. California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813. NHTSA declines to do so for the reasons discussed in this final rule.

[201] South Coast Air Quality Management District, Docket No. NHTSA–2018–0067–11813.

[202] California Air Resources Board (CARB), Docket No. NHTSA–2018–0067–11873; *see also* Joint Submission from the States of California et al. and the Cities of Oakland et al., Docket No. NHTSA–2018–0067–11735.

[203] 83 FR 42986, 43235 (Aug. 24, 2018). It is also consistent with the Supreme Court case law interpreting ''related to'' in preemption provisions, as discussed both in the proposal and this final rule. *See, e.g., Rowe,* 552 U.S. at 375.

[204] Emphases added.

[205] Emphases added.

[206] As in the proposal, this final action uses ''California'' and ''California Air Resources Board'' (or ''CARB'') interchangeably.

2112. On August 24, 2018, EPA proposed to withdraw this waiver of preemption with regard to the GHG and ZEV standards of its Advanced Clean Car (ACC) program for MY 2021–2025. 83 FR 43240. In the SAFE proposal, EPA provided extensive background on the history of CAA section 209 and waivers granted thereunder, as well as on the specific waiver which California sought for the ACC program which is at issue here, in the SAFE proposal.[207] 83 FR 43240–43242.

Since publication of the SAFE proposal, California has clarified its ''deemed to comply'' provision, under which manufacturers are afforded the option of complying with CARB's GHG standards by showing that they comply with the applicable federal GHG standards. As amended, CARB's ''deemed to comply'' provision now provides that compliance with CARB's GHG standards can be satisfied only by complying with the federal standards as those standards were promulgated in 2012. In other words, while the content of CARB's GHG standards has never been identical to the corresponding Federal standards, the ''deemed to comply'' provision as originally designed, and as it existed when EPA issued the January 2013 waiver, would have shielded automobile manufacturers from having to comply with two conflicting sets of standards unless they chose to do so. After the December 2018 amendment, however, CARB's regulations now contain within them a mechanism which will automatically impose that state of affairs the moment that the Federal government should exercise its authority to revise its standards. California has further recently announced a ''voluntary agreement'' with four automobile manufacturers that, among other things, requires the automobile manufacturers to refrain from challenging California's GHG and ZEV programs. This ''voluntary agreement'' further provides that California will accept automobile manufacturer compliance with a less stringent standard (and one that extends the phase-in of the GHG standard from 2025 to 2026) than either the California program that was the subject of the 2013 waiver or the Federal standards as promulgated in 2012. Neither California's amendment of its ''deemed to comply'' provision, nor its more recent announcement of the new ''voluntary agreement,'' constitute a necessary part of the basis for the waiver withdrawal and other actions that EPA finalizes in this document, and EPA would be taking the same actions that it takes in this document even in their absence. Nevertheless, EPA does not believe it appropriate to ignore these recent actions and announcements on the State's part, and, as discussed below, believes that they confirm that this action is appropriate.[208]

On January 9, 2013, EPA granted CARB's request for a waiver of preemption to enforce its ACC program regulations pursuant to CAA section 209(b). 78 FR 2112. The ACC program comprises regulations for ZEV, tailpipe GHG emissions standards, and low-emission vehicles (LEV) regulations [209] for new passenger cars, light-duty trucks, medium-duty passenger vehicles, and certain heavy-duty vehicles, for MY 2015 through 2025. Thus, in terms of the scope of coverage of the respective state and federal programs, the ACC program is comparable to the combined Federal Tier 3 Motor Vehicle Emissions Standards and the 2017 and later MY Light-duty Vehicle GHG Standards, with an additional mandate to force the development and deployment of non-internal-combustion-engine technology. According to CARB, the ACC program was intended to address California's near and long-term ozone issues as well as certain specific GHG emission reduction goals.[210] 78 FR 2114. See also 78 FR 2122, 2130–2131. The ACC program regulations impose multiple and varying complex compliance obligations that have simultaneous, and sometimes overlapping, deadlines with each standard. These deadlines began in 2015 and are scheduled to be phased in through 2025. For example, compliance with the GHG requirements began in 2017 and will be phased in through 2025.[211] The implementation schedule and the interrelationship of regulatory provisions with each of the three standards together demonstrates that CARB intended that at least the GHG and ZEV standards, if not also the LEV standards, would be implemented as a cohesive program. For example, in its ACC waiver request, CARB stated that the ''ZEV regulation must be considered in conjunction with the proposed LEV III amendments. Vehicles produced as a result of the ZEV regulation are part of a manufacturer's light-duty fleet and are therefore included when calculating fleet averages for compliance with the LEV III GHG amendments.'' CARB's Initial Statement of Reasons at 62–63.[212] CARB also noted ''[b]ecause the ZEVs have ultra-low GHG emission levels that are far lower than non-ZEV technology, they are a critical component of automakers' LEV III GHG standard compliance strategies.'' *Id.* CARB further explained that ''the ultra-low GHG ZEV technology is a major component of compliance with the LEV III GHG fleet standards for the overall light duty fleet.'' *Id.* CARB's request also repeatedly touted the GHG emissions benefits of the ACC program. Up until the ACC program waiver request, CARB had relied on the ZEV requirements as a compliance option for reducing criteria pollutants. Specifically, California first included the ZEV requirement as part of its first LEV program, which was then known as LEV I, that mandated a ZEV sales requirement that phased-in starting with the 1998 MY through 2003 MY. EPA issued a waiver of preemption for these regulations on January 13, 1993 (58 FR 4166 (January 13, 1993). Since this initial waiver of preemption, California has amended the ZEV requirements multiple times and EPA has

[207] A complete description of the ACC program, as it existed at the time that CARB applied for the 2013 waiver, can be found in CARB's waiver request, located in the docket for the January 2013 waiver action, Docket No. EPA–HQ–OAR– 2012–0562.

[208] EPA does not take any position at this point on what effect California's December 2018 amendment to its ''deemed to comply'' provision, or its July 2019 ''framework'' announcement, may of their own force have had on the continued validity of the January 2013 waiver. EPA may address that issue in a separate, future action.

[209] The LEV regulations in question include standards for both GHG and criteria pollutants (including ozone and PM).

[210] ''The Advanced Clean Cars program . . . will reduce criteria pollutants . . . and . . . help achieve attainment of air quality standards; The Advanced Clean Cars Program will also reduce greenhouse gases emissions as follows: by 2025, CO2 equivalent emissions will be reduced by 13 million metric tons (MMT) per year, which is 12 percent from base line levels; the reduction increases in 2035 to 31 MMT/year, a 27 percent reduction from baseline levels; by 2050, the proposed regulation would reduce emissions by more than 40 MMT/year, a reduction of 33 percent from baseline levels; and viewed cumulatively over the life of the regulation (2017–2050), the proposed Advanced Clean Cars regulation will reduce by more than 850 MMT CO2-equivalent, which will help achieve the State's climate change goals to reduce the threat that climate change poses to California's public health, water resources, agriculture industry, ecology and economy.'' 78 FR 2114. CARB Resolution 12–11, at 19, (January 26, 2012), available in the docket for the January 2013 waiver action, Document No. EPA–HQ–OAR–2012–0562, the docket for the ACC program waiver.

[211] As discussed above, California has further entered into a voluntary agreement with four automobile manufacturers that amongst other things, purports to allow compliance with a less stringent program than either the program that was the subject of the 2013 waiver or the Federal standards promulgated in 2012. *See https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/* (last visited Aug. 30, 2019).

[212] Available in the docket for the January 2013 waiver decision, Docket No. EPA–HQ–OAR–2012–0562.

subsequently granted waivers for those amendments. Notably, however, in the ACC program waiver request, California also included a waiver of preemption request for ZEV amendments that related to 2012 MY through 2017 MY and new requirements for 2018 MY through 2025 MY (78 FR 2118–9). Regarding the ACC program ZEV requirements, CARB's waiver request noted that there was no criteria emissions benefit in terms of vehicle (tank-to-wheel—TTW) emissions because its LEV III criteria pollutant fleet standard was responsible for those emission reductions.[213] CARB further noted that its ZEV regulation was intended to focus primarily on zero emission drive—that is, battery electric (BEVs), plug-in hybrid electric vehicles (PHEVs), and hydrogen fuel cell vehicles (FCVs)—in order to move advanced, low GHG vehicles from demonstration phase to commercialization (78 FR 2122, 2130–31). Specifically, for 2018 MY through 2025 MY, the ACC program ZEV requirements mandate use of technologies such as BEVs, PHEVs and FCVs, in up to 15% of a manufacturer's California fleet by MY 2025 (78 FR 2114). Additionally, the ACC program regulations provide various compliance flexibilities allowing for substitution of compliance with one program requirement for another. For instance, manufacturers may opt to over-comply with the GHG fleet standard in order to offset a portion of their ZEV compliance requirement for MY 2018 through 2021. Further, until MY 2018, sales of BEVs (since MY 2018, limited to FCVs) [214] in California count toward a manufacturer's ZEV credit requirement in CAA section 177 States. This is known as the ''travel provision'' (78 FR 2120).[215] For their part, the GHG emission regulations include an optional compliance provision that allows manufacturers to demonstrate compliance with CARB's GHG standards by complying with applicable Federal GHG standards. This is known as the ''deemed to comply'' provision. Since proposal, California has amended its regulations to provide that the ''deemed to comply'' provision only applies to the standards originally agreed to by California, the federal government, and automakers in 2012. In other words, automobile manufacturers would not be able to rely on the ''deemed to comply'' provision for any revision to those 2012 standards. California has further entered into a voluntary agreement with four automobile manufacturers that amongst other things, requires the automobile manufacturers to refrain from challenging California's GHG and ZEV programs, and provides that California will accept automobile manufacturer compliance with a less stringent standard than either the California program that was the subject of the 2013 waiver or the Federal standards as promulgated in 2012.

As explained in the SAFE proposal (83 FR 83 FR 23245–46), up until the 2008 GHG waiver denial, EPA had interpreted CAA section 209(b)(1)(B) as requiring a consideration of California's need for a separate motor vehicle program designed to address local or regional air pollution problems and not whether the specific standard that is the subject of the waiver request is necessary to meet such conditions (73 FR 12156; March 6, 2008). We also explained that California would typically seek a waiver of particular aspects of its new motor vehicle program up until the ACC program waiver request. We further explained that in the 2008 GHG waiver denial, which was a waiver request for only GHG emissions standards, EPA had determined that its interpretation of CAA section 209(b)(1)(B) as calling for a consideration of California's need for a separate motor vehicle program was not appropriate for GHG standards because such standards are designed to address global air pollution problems in contrast to local or regional air pollution problems specific to and caused by conditions specific to California (73 FR 12156–60). In the 2008 GHG waiver denial, EPA further explained that its previous reviews of California's waiver request under CAA section 209(b)(1)(B) had usually been cursory and undisputed, as the fundamental factors leading to California's air pollution problems—geography, local climate conditions (like thermal inversions), significance of the motor vehicle population—had not changed over time and over different local and regional air pollutants. These fundamental factors applied similarly for all of California's air pollution problems that are local or regional in nature. In the 2008 GHG waiver denial, EPA noted that atmospheric concentrations of GHG are substantially uniform across the globe, based on their long atmospheric life and the resulting mixing in the atmosphere. EPA therefore posited that with regard to atmospheric GHG concentrations and their environmental effects, the California specific causal factors that EPA had considered when reviewing previous waiver applications under CAA section 209(b)(1)(B)—the geography and climate of California, and the large motor vehicle population in California, which were considered the fundamental causes of the air pollution in California—do not have the same relevance to the question at hand. EPA explained that the atmospheric concentration of GHG in California is not affected by the geography and climate of California. The long duration of these gases in the atmosphere means they are well-mixed throughout the global atmosphere, such that their concentrations over California and the U.S. are substantially the same as the global average. The number of motor vehicles in California, while still a notable percentage of the national total and still a notable source of GHG emissions in the State, is not a significant percentage of the global vehicle fleet and bears no closer relation to the levels of GHG in the atmosphere over California than any other comparable source or group of sources of GHG anywhere in the world. Emissions of greenhouse gases from California cars do not generally remain confined within California's local environment but instead become one part of the global pool of GHG emissions, with this global pool of emissions leading to a relatively homogenous concentration of GHG over the globe. Thus, the emissions of motor vehicles in California do not affect California's air pollution problem in any way that is different from how emissions from vehicles and other pollution sources all around the U.S. (and, for that matter, the world) do.

[213] ''There is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions.'' CARB ACC waiver request at 15 (May 2012), EPA–HQ–OAR–2012–0562–0004.

[214] This kind of ZEV technology continues to present technological challenges and in 2006, for instance, EPA granted California a waiver of its ZEV standards through the 2011MY but due to feasibility challenges declined to grant a waiver for MY 2012 and subsequent model years. See 71 FR 78190; EPA, EPA ZEV Waiver Decision Document, EPA–HQ–OAR–2004–0437 (Dec. 21, 2006).

[215] On March 11, 2013, the Association of Global Automakers and Alliance of Automobile Manufacturers filed a petition for reconsideration of the January 2013 waiver grant, requesting that EPA reconsider the decision to grant a waiver for MYs 2018 through 2025 ZEV standards on technological feasibility grounds. Petitioners also asked for consideration of the impact of the travel provision, which they argue raise technological feasibility issues in CAA section 177 States, as part of the agency's review under the third waiver prong, CAA section 209(b)(1)(C). EPA continues to evaluate the petition. As explained below, in this action EPA is not taking final action with regard to the proposed determinations under the third waiver prong. Whether and how EPA will respond to the March 2013 petition will be considered in connection with a potential future final action with respect to the proposed third prong determinations set forth in the SAFE proposal.

Similarly, the emissions from California's cars do not only affect the atmosphere in California but in fact become one part of the global pool of GHG emissions that affect the atmosphere globally and are distributed throughout the world, resulting in basically a uniform global atmospheric concentration. EPA then applied this reasoning to the GHG standards at issue in the 2008 GHG waiver denial. Having limited the meaning of this provision to situations where the air pollution problem was local or regional in nature, EPA found that California's GHG standards did not meet this criterion. Additionally, in the 2008 GHG waiver denial, EPA also applied an alternative interpretation where EPA would consider effects of the global air pollution problem in California in comparison to the effects on the rest of the country and again addressed the GHG standards separately from the rest of California's motor vehicle program. Under this alternative interpretation, EPA considered whether impacts of global climate change in California were sufficiently different from impacts on the rest of the country such that California could be considered to need its GHG standards to meet compelling and extraordinary conditions. EPA determined that the waiver should be denied under this alternative interpretation as well. 83 FR 23245–46.

In 2009, EPA reversed its previous denial and granted California's preemption waiver request for its GHG emission standards ''for 2009 and later model years.'' 74 FR 32744. EPA announced that it was returning to what it styled as the traditional interpretation of CAA section 209(b)(1)(B), under which it would only consider whether California had a ''need for its new motor vehicle emissions program as a whole,'' *id.* at 32761. It determined that California did, based on ongoing NAAQS attainment issues. *Id.* at 32762–32763. In the alternative, while not adopting either of the 2008 waiver denial's alternative approaches, EPA also determined that California needed its GHG standards as part of its NAAQS attainment strategy due to the indirect effects of climate change on ground-level ozone formation, *id.* at 32763, and that waiver opponents had not met their burden of proof to demonstrate that California climate impacts ''are not sufficiently different'' to nationwide impacts, *id.* at 32765. EPA also determined that there were no grounds to deny the waiver under CAA section 209(b)(1)(A) (whether the State's determination that its standards in the aggregate are at least as protective as federal standards) or CAA section 209(b)(1)(C) (whether ''such state standards'' and accompanying enforcement procedures are inconsistent with CAA section 202(a)). *Id.* at 32759, 32780.

B. EPA's Authority To Reconsider and Withdraw a Previously Granted Waiver Under CAA Section 209(b)

In this action, EPA finalizes its proposed determination that it has the authority to withdraw a waiver in appropriate circumstances. EPA explains below (in this subsection, III.B) the basis for its conclusions that it has authority to withdraw a waiver in appropriate circumstances, and (in subsections III.C and III.D) that it is appropriate for EPA to exercise that authority at this time.[216]

Agencies generally have inherent authority to reconsider their prior actions. Nothing in CAA section 209(b) indicates Congressional intent to remove that authority with respect to waivers that it has previously granted. The text, structure, and context of CAA section 209(b) support EPA's interpretation that it has this authority. And no cognizable reliance interests have accrued sufficient to foreclose EPA's ability to exercise this authority here.

In considering EPA's authority to withdraw a waiver, it is clear that EPA has authority to review and grant California's applications for a waiver based on its evaluation of the enumerated criteria in CAA section 209(b). In this action, we affirm the Agency's proposed view that the absence of explicit language with regard to withdrawal of a waiver does not foreclose agency reconsideration and withdrawal of a waiver.

As explained at proposal, California's ability to obtain a waiver under CAA section 209(b)(1) in the first instance is not unlimited. Specifically, CAA section 209(b)(1) provides that ''no such waiver will be granted'' if the Administrator finds *any* of the following: ''(A) [California's] determination [that its standards in the aggregate will be at least as protective] is arbitrary and capricious, (B) [California] does not need such State standards to meet compelling and extraordinary conditions, *or* (C) such State standards and accompanying enforcement procedures are not consistent with section [202(a)].'' CAA section 209(b)(1)(A)–(C), 42 U.S.C. 7543(b)(1)(A)–(C) (emphasis added). CAA Section 209(b)(1) is therefore, premised on EPA review and grant of a waiver prior to California's enforcement of vehicle and engine standards unless certain enumerated criteria are met.

Congress could have simply carved out an exemption from preemption under CAA section 209(b)(1), similar to the exemption it created in CAA section 211(c)(4)(B) for California fuel controls and prohibitions. Under CAA section 211(c)(4)(A), states and political subdivisions are preempted from prescribing or attempting ''to enforce, for purposes of motor vehicle emission control, any control or prohibition, respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine'' if EPA has prescribed a control or prohibition applicable to such characteristic or component of the fuel or fuel additive under CAA section 211(c)(1). EPA may waive preemption for states other than California to prescribe and enforce nonidentical fuel controls or prohibitions subject to certain conditions. Further, waivers are not required where states adopt state fuel controls or prohibitions that are identical to federal controls or for California to adopt fuel controls and prohibitions. CAA sections 211(c)(4)(A)(ii) and 211(c)(4)(B). This stands in stark contrast to CAA section 209(b), which requires EPA to make a judgment about California's request for a waiver of preemption.[217] Notably, CAA section 211(c)(4)(B) also cross-references CAA section 209(b)(1): ''(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b)[218] of this title may at any time

[216] As a general matter, for purposes of determining if withdrawal is appropriate, EPA may initiate reconsideration *sua sponte* where CARB amends either a previously waived standard or accompanying enforcement procedure. 47 FR 7306, 7309 (Feb. 18, 1982). See also 43 FR 998 (January 5, 1978) (Grant of reconsideration to address portions of waived California's motorcycle program that California substantially amended). Additionally, if California acts to amend either a previously waived standard or accompanying enforcement procedure, the amendment may be considered to be within-the-scope of a previously granted waiver provided that it does not undermine California's determination that its standards, in the aggregate, are as at least as protective of public health and welfare as applicable Federal standards, does not affect its consistency with section 202(a) of the Act, and raises no new issues affecting EPA's previous waiver decisions. See, *e.g.,* 51 FR 12391 (April 10, 1986) and 65 FR 69673, 69674 (November 20, 2000).

[217] ''Noteworthy is the fact that under the terms of the Act, EPA approval of California fuel regulations *is not required. See* Act section 211(c)(4)(B), 42 U.S.C. 7545(c)(4)(B).'' (Emphasis in original.) *Motor Vehicle Mfrs. Ass'n* v. *NYS Dep. of Envt'l Conservation,* 17 F.3d 521, 527 (2d Cir. 1994).

[218] CAA section 211(c)(4)(B), 42 U.S.C. 7545(c)(4)(B). This provision does not identify California by name. Rather, it references CAA

Continued

prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.'' CAA section 211(c)(4)(B).

Under the third waiver prong, CAA section 209(b)(1)(C), for example, EPA is to review the consistency of California's standards with CAA section 202(a), a provision of the Clean Air Act that EPA solely implements.[219] CAA Section 202(a) provides in relevant part that standards promulgated under this section ''shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.''

In tying the third waiver prong to CAA section 202(a), Congress gave a clear indication that, in determining whether to grant a waiver request, EPA is to engage in a review that involves a considerable degree of future prediction, due to the expressly future-oriented terms and function of CAA section 202(a).[220] In turn, where circumstances arise that suggest that such predictions may have been inaccurate, it necessarily follows that EPA has authority to revisit those predictions with regard to rules promulgated under CAA section 202(a), the requirements of that section, and their relation to the California standards at issue in a waiver request, and, on review, withdraw a previously granted waiver where those predictions proved to be inaccurate.

Under CAA section 202(a), standards are often technology-forcing and thus involve predictions on the part of EPA with regard to future trends in technological and economic factors. This calls for ''substantial room for deference to the EPA's expertise in projecting the likely course of development.'' *Natural Resources Defense Council* v. *EPA* (*NRDC*), 655 F.2d 318, 331 (D.C. Cir. 1981) (upholding EPA's lead time projections for emerging technologies as reasonable). The D.C. Circuit has recognized that EPA might modify standards ''if the actual future course of technology diverges from expectation.'' *Id.* at 329. It cannot be that EPA has the inherent authority to revisit and revise its own determinations under CAA section 202(a), but it lacks authority to revisit those same determinations under CAA section 209(b).[221]

Thus, the structure of the statute—where State standards may only be granted a waiver under CAA section 209(b) to the extent that they are consistent with CAA section 202(a)—confirms that EPA has inherent authority to reconsider its prior determination that a request for a waiver for California standards met the criteria of CAA section 209(b). This renders untenable the stance taken by some commenters that EPA is somehow precluded from conducting a subsequent review and withdrawing a waiver even when it becomes aware that its initial predictions in this regard have proven inaccurate.

Further, as discussed in the SAFE proposal, the legislative history of CAA section 209(b) confirms that Congress intended EPA's authority under CAA section 209(b) to include the authority to withdraw a previously granted waiver under appropriate circumstances. 83 FR 43242–43243. *See* S. Rep. No. 50–403, at 34 (1967) (''Implicit in this provision is the right of the [Administrator] to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver.'').

Some commenters that oppose the proposed withdrawal of the waiver concede that the agency may review California's waiver applications under the third waiver prong but then argue that such agency review is a ''narrow one.'' [222] Under CAA Section 209, they contend, grants California ''maximum authority'' to set engine and vehicle standards. Commenters' objection to the instant withdrawal therefore appears to be grounded in some belief that CAA section 209(b) calls for complete deference to California. This view is erroneous. EPA has in fact previously initiated reconsideration under the third waiver prong, CAA section 209(b)(1)(C), in order to ''vacate that portion of the waiver previously granted under section 209(b)'' in response to CARB's post waiver modification for previously waived standards. 47 FR 7309. In that reconsideration action, EPA affirmed the grant of a waiver in the absence of ''findings necessary to revoke California's waiver of Federal preemption for its motorcycle fill-pipe and fuel tank opening regulations.'' 43 FR 7310. Additionally, EPA has explained that reconsideration will be initiated where leadtime concerns arise after the grant of an initial waiver. ''If California's leadtime projections later prove to have been overly optimistic, the manufacturer can ask that California reconsider its standard, if they are unsuccessful in securing such relief, the

section 209(b), which applies on its face to ''any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966.'' California is the only State that meets this requirement. *See* S. Rep. No. 90–403 at 632 (1967).

[219] EPA has explained that California's standards are not consistent with CAA section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, given appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would also be inconsistent with CAA section 202(a) if the Federal and California test procedures were inconsistent. Legislative history indicates that under CAA section 209(b)(1)(C), EPA is not to grant a waiver if it finds that there is: ''Inadequate time to permit the development of the necessary technology given the cost of compliance within that time period.'' H. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967); ''That California standards are not consistent with the intent of section 202(a) of the Act, including economic practicability and technological feasibility.'' S. Rep. No. 403, 90th Cong. 1st Sess. 32 (1967).

[220] There is another textual indication that EPA's grant of a waiver is not limited to a snapshot in time, with the Agency having no authority to ever revisit, reconsider, and, where appropriate, modify or withdraw waivers that it has previously granted. CAA section 209(b) provides authority to waive the preemptive provision of CAA section 209(a). CAA section 209(a) forbids states from ''adop[ting] or attempt[ing] to enforce'' vehicle emission standards; so states cannot do so without or beyond the scope of a waiver. EPA must presume that ''attempt to enforce'' is not surplusage; it must mean something, and its potential meanings all suggest some ability on EPA's part to consider actions on the state's part separate from the state's ''adopt[ion]'' of statutory or regulatory provisions and submission to EPA of a waiver request for those provisions. An ''attempt to enforce'' could potentially mean either a state's attempt to *de facto* control emissions without having *de jure* codified emissions control requirements, or it could refer to a state's enforcement actions under a program that it has already ''adopt[ed].'' Under either scenario, the prohibition on ''attempt[ing] to enforce'' envisions state activity outside the scope of what can be determined by EPA from the face of a waiver submission. The prohibited activity is not limited to that which can be subject to a snapshot, one-time-only waiver application, which is further support for the conclusion that EPA has authority to reconsider its action on such applications in light of activity later in time than or outside the authorized scope of a waiver once granted.

[221] According to one commenter, ''it would be very odd if § 209(b) waivers were a one-way ratchet that could be granted but never rescinded. . . . For example, it would run contrary to the statutory scheme to require EPA to leave a waiver in place even after the compelling and extraordinary conditions that justified the waiver are fully addressed.'' Comments of the Alliance of Automobile Manufacturers at 182. EPA agrees.

[222] According to several commenters, CAA section 209(b) contains no express delegation of authority to EPA to withdraw a waiver, and in proposing to revoke a previous waiver ''EPA has arrogated to itself power only Congress can exercise.'' Comments of the Center for Biological Diversity, Conservation Law Foundation, EarthJustice, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and Union of Concerned Scientists at 68. One commenter also argued that either EPA lacks authority to revoke a previously granted waiver or that any authority to do so is ''limited.'' ''The unique text and structure of this section *limits* EPA's authority, contrary to EPA's assertion of open-ended revocation authority in the proposal.'' Comments of the California Air Resources Board at 340.

manufacturers could petition EPA to reconsider the waiver.'' 49 FR 18895, 18896 n.104. Further, EPA has in the past repeatedly denied portions of several waiver requests.[223] EPA has also historically deferred or limited the terms of its grant of aspects of some waiver requests as a means of ensuring consistency with CAA section 202(a).[224] It is precisely these kinds of EPA actions that have forestalled withdrawal of any waiver to date—not any lack of authority on EPA's part to withdraw. None of the commenters, however, provided explanations as to why their apparent view of maximum deference to California is not implicated by EPA's authority to either deny a waiver request or to modify the terms of a waiver request in the course of granting one. And EPA's 2009 reversal of its 2008 denial supports, and demonstrates the long-held nature of, its position that EPA has authority to reconsider and reverse its actions on waiver applications.[225]

At least one commenter argued that this legislative history did not support the position that EPA has authority to withdraw a previously granted waiver because the legislative history relates to the original creation of the waiver provision in the Air Quality Act of 1967, whereas the Clean Air Act Amendments of 1977 revised language in the root text of CAA section 209(b)(1). Specifically, Congress in 1977 amended CAA section 209(b)(1) to establish as a prerequisite for the grant of a waiver that the State determine that its standards ''will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards'' for EPA to issue a waiver, rather than the original requirement that State standards be ''more stringent'' than corresponding federal standards.[226] EPA disagrees that this amendment was either intended to deprive EPA of authority to withdraw a previously granted waiver when the Administrator finds applicable one or more of the three criteria in CAA section 209(b)(1) under which a waiver is inappropriate, or that the amendment can be reasonably construed to have had such effect. There is no indication that the amendment was intended to alter EPA's authority under the original provision. Nor did the amendment alter the language of the criteria enumerated in CAA section 209(b). In any event, as previously discussed above, EPA has initiated reconsideration for purposes of revoking a waiver since the 1977 CAA amendments. See for example, 47 FR 7306 (Feb. 18, 1982) (Agency reconsideration of grant of waiver for purposes of withdrawal in response to CARB's post waiver modification for previously waived standards).

Some commenters question whether EPA has any authority at all to reconsider a previously granted waiver. It is well-settled, however, that EPA has inherent authority to reconsider, revise, or repeal past decisions to the extent permitted by law. At proposal, EPA explained that, although CAA section 209(b)(1) may not expressly communicate that EPA has authority to reconsider and withdraw a waiver, both the legislative history of the waiver provision and fundamental principles of administrative law establish that EPA necessarily possesses that authority. The authority to reconsider prior agency decisions need not be rooted in any particular ''magic words'' in statutory text. Subject to certain limitations, administrative agencies possess inherent authority to reconsider their decisions. *See ConocoPhillips Co.* v. *EPA,* 612 F.3d 822, 832 (5th Cir. 2010) (''Embedded in an agency's power to make a decision is its power to reconsider that decision.''); *Dun & Bradstreet Corp. Found.* v. *U.S. Postal Serv.,* 946 F.2d 189, 193 (2d Cir. 1991) (''It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.''); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977) (''[A]n agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.''); *Belville Min. Co.* v. *United States,* 999 F.2d 989, 997 (6th Cir. 1993) (''Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision.'').

The commenters' position that EPA does not have any authority to reconsider either a grant or a denial of a waiver founders in light of these principles. As explained in the SAFE proposal, 83 FR 43242–43243, EPA does have that authority, in part because its interpretations of the statutes it administers ''are not carved in stone.'' *Chevron U.S.A.* v. *NRDC,* 467 U.S. 837, 863 (1984). An agency ''must consider varying interpretations and the wisdom of its policy on a continuing basis.'' *Id.* at 863–64. Notably, in response to CARB's request, EPA has previously reconsidered and reversed a previous waiver denial.[227] Similarly, in keeping with agency CAA section 209(b)(1) practice, EPA has reconsidered its previous decision to grant a waiver for portions of California's motorcycle program in response to a petition for reconsideration from the motorcycle industry.[228]

Other commenters assert that EPA's proposal to withdraw the waiver is solely based on a change in Presidential administration. There is no basis for this claim. While EPA noted in the SAFE proposal that the agency can review and reconsider a prior decision ''in response to . . . a change in administration,'' *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services,* 545 U.S. 967, 981 (2005), we further acknowledged that ''the EPA must also be cognizant where it is changing a prior position and articulate a reasoned basis for the change.'' *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). 83 FR 43242–43243, 43248. In keeping with the proposed waiver withdrawal, under the second waiver prong, CAA section 209(b)(1)(B), as discussed below, EPA in this document finalizes a determination that California does not

[223] 38 FR 30136 (November 1, 1973) (denial of waiver for MY 1975 HC and CO standards ''because costs of compliance within the lead time remaining is excessive.''); 43 FR 998 (January 5, 1978) (denial of waiver for MY 1978 test procedures due to insufficient lead time); 40 FR 30311 (July 18, 1975) (denial of waiver due to insufficient lead time for MY 1977).

[224] 58 FR 4166 (January 13, 1993) (deferring consideration of portions of waiver request); 67 FR 54180, 81 n.1 (August 21, 2002) (granting waiver with certain exceptions).

[225] In seeking reconsideration of the March 8, 2008 waiver denial, CARB also noted that ''EPA has the inherent authority to reconsider its previous waiver denial'' 74 FR 32747.

[226] The intent of the 1977 amendment was to accommodate California's particular concern with NO_X, which the State regarded as a more serious threat to public health and welfare than carbon monoxide. California was eager to establish oxides of nitrogen standards considerably more stringent than applicable Federal standards, but technological developments posed the possibility that emission control devices could not be constructed to meet both the stringent California oxides of nitrogen standard and the stringent federal carbon monoxide standard. *Motor & Equip. Mfrs. Ass'n, Inc.* v. *EPA,* 627 F.2d at 1110 n.32. EPA has explained that the phrase ''in the aggregate'' was specifically aimed at allowing California to adopt CO standards less stringent than the corresponding federal standards, while at the same time adopting more stringent NO_X standards, as part of California's strategy to address ozone problems. California reasoned that a relaxed CO standard would facilitate the technological feasibility of more stringent NO_X standards. 78 FR 43247.

[227] EPA reconsidered the 2008 GHG waiver denial in response to CARB's request and granted it upon reconsideration. 72 FR 32744 (July 9, 2009). See also 43 FR 998 (January 5, 1978) (Grant of reconsideration to address portions of waived California's motorcycle program that California substantially amended).

[228] 43 FR 998 (January 5, 1978).

need its GHG and ZEV standards to meet compelling and extraordinary conditions, within the meaning of those terms as they are used in the statute, that differs from its determination on the same question made in the course of granting the ACC program waiver. Additionally, the agency, in response to a request by automobile manufacturers, who have consistently expressed reservations over their ability to comply with MY 2022–2025 GHG standards, is reconsidering standards that are the compliance mechanism for CARB's MY 2022–2025 GHG standards. This is the compliance mechanism that California had provided in response to automobile manufacturers request and support for the waiver of preemption.

At proposal, EPA noted that California had given public notice that it was considering amending its ''deemed to comply'' provision to provide that that provision would be applicable only to vehicles that meet the standards originally agreed to by California, the federal government, and automakers in 2012. *See* 83 FR 43252 n.589. California finalized that amendment to its regulations after the close of the SAFE comment period, in late 2018. California more recently, in July 2019, announced a ''framework'' agreement with certain automakers that purported to establish a ''nationwide'' standards program different from *both* the 2012 Federal standards *and* from the California program for which EPA granted the January 2013 waiver. These actions on California's part, while not proposed as bases for waiver withdrawal in the August 2018 SAFE proposal, as those actions had not yet transpired at the time of proposal, and while not necessary for the finalization of this action, do provide further support for this action (although EPA does not view them as necessary predicates for this action and would be taking this action even in their absence).

Thus, contrary to some commenters' assertions, reconsideration of the grant of the waiver, and EPA's proposal to withdraw the waiver, was not solely motivated by a change in Presidential administration. The policy, technical, and legal considerations discussed in the proposal and in this final action provide the rationale for EPA's actions here. It is therefore distinguishable from the instance where, for example, an agency undertook reconsideration subsequent to a change in administration because ''the withdrawn decision was doubtful in light of changing policies.'' *Coteau Properties Co.* v. *DOI,* 53 F.3d 1466, 1479 (8th Cir. 1995).

Further, as earlier noted, California has now entered into a voluntary agreement with at least four automobile manufacturers that amongst other things, requires the automobile manufacturers to refrain from challenging California's GHG and ZEV programs, and provides that California will accept automobile manufacturer compliance with a less stringent standard than either the California program that was the subject of the 2013 waiver or the Federal standards as promulgated in 2012.[229] This agreement appears to materially depart from the existing grant of waiver for MY 2021–2025 GHG standards, is in tension with California's above-mentioned amendment of the ''deemed to comply'' provision, and raises an additional reason to question whether California ''needs'' their existing standards within the meaning of CAA section 209(b)(1)(B), given that California has announced it is proceeding to create a new ''voluntary'' program that would relax the stringency of some aspects of those standards. That is to say, California's apparent weakening of its program as it was originally submitted for waiver calls into question whether it needs that program. EPA believes that this provides additional support for its conclusion, as set forth in subsections III.B and III.D, both that it has authority to withdraw its grant of the waiver and that California does not in fact need these waived standards to meet ''compelling and extraordinary conditions,'' CAA section 209(b)(1)(B), if the State is itself already proceeding to allow departures from those waived standards.[230] EPA further believes that California cannot claim reliance interests when it is undertaking steps to alter the *status quo.*

In short, the text, structure, and history of CAA section 209(b)(1) support EPA's authority to withdraw previously granted waivers.[231] At the same time, nothing in CAA section 209(b)(1) can reasonably be read to preclude the agency from withdrawing a previously issued waiver under appropriate circumstances. EPA is not persuaded by commenters' assertions to the contrary. In this action, EPA affirms the position that the scope of review for California waivers under CAA section 209(b)(1) includes both a pre-grant review and, where appropriate, post-grant review of an approved waiver; that post-grant review may, in appropriate circumstances, result in a withdrawal of a prior waiver. A withdrawal action could be premised on any one of the three findings in CAA section 209(b)(1)(A)–(C) that render a waiver unavailable.

EPA also disagrees with some commenters' assertions that ostensible reliance interests foreclose withdrawal of the waiver for MY 2021–2025 GHG and ZEV standards. According to these commenters, ''California, and the section 177 states that have elected to adopt those standards as their own have incurred reliance interests ultimately flowing from those standards. For instance, California has incurred reliance interests because it is mandated to achieve an aggressive GHG emissions reduction target for 2030.'' [232] They further state: ''[b]ut EPA provides no justification for applying that change in policy *retroactively* to upend a five-year-old decision to which substantial reliance interests have attached.'' (Emphasis in original).[233]

The federal GHG standards that EPA promulgated in 2012 included a commitment to conduct and complete a Mid-Term Evaluation (MTE) of the GHG standards for MY 2022–2025, given the lengthy phase-in compliance period, EPA projections of control technology availability or feasibility for MY 2021–2025, and the fact that EPA promulgated those standards in a joint action with NHTSA, where NHTSA was acting under a statute which limited its promulgation of fuel economy standards to periods of five years.[234] *See NRDC,*

[229] *https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/.*

[230] Again, neither California's late 2018 amendment to its ''deemed to comply'' provision, nor its July 2019 announcement of a new ''framework,'' are necessary bases for the action EPA takes in this document; instead, they provide further support for that action.

[231] In 2009, EPA reconsidered the 2008 GHG waiver denial at CARB's request and granted it upon reconsideration. 74 FR 32744. EPA noted the authority to ''withdraw a waiver in the future if circumstances make such action appropriate.'' *See* 74 FR 32780 n.222; *see also id.* at 32752–32753 n.50 (citing 50 S. Rep. No. 403, at 33–34).

[232] Comments of CARB at 83.

[233] Comments of States of California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington, the Commonwealth of Massachusetts, Pennsylvania and Virginia, the District of Columbia, and the Cities of Los Angeles, New York, Oakland, San Francisco and San Jose at 123; Comments of CARB at 352.

[234] 40 CFR 86.1818–12(h). 77 FR 62624 (October 15, 2012). EPA notes in this regard that the Supreme Court in *Massachusetts* v. *EPA,* in rejecting the position that greenhouse gases are not air pollutants under the general definition of that term in CAA section 302 because, if they were, EPA's regulations of GHG emissions from the motor vehicle fleet could intrude on DOT's fuel economy authority, opined that ''[t]he two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.'' 549 U.S. 497, 532 (2007). In order for the two agencies to do so, they

655 F.2d at 329 (upholding EPA's lead time projections for emerging technologies as reasonable, noting a longer lead time tends to ''give[ ] the agency greater leeway to modify its standards if the actual future course of technology diverges from expectation.''). The 2012 rulemaking also established the GHG standards for MY 2021–2025 that are the subject of the ''deemed to comply'' provision. (*i.e.,* California allowed automobile manufacturers to demonstrate compliance with California's GHG standards by complying with EPA's GHG standards). The MTE construct required EPA to issue a Final Determination by April 1, 2018 regarding whether the GHG standards for MY 2022–2025 remained appropriate under CAA section 202(a).[235] Specifically, the MTE would, amongst other things, assess the relevant factors pertinent to setting standards under CAA section 202(a), such as the feasibility and practicability of the standards, costs to vehicle manufacturers and consumers, impacts on the automobile industry, emissions impacts, and safety impacts. In comments during the 2012 national GHG rulemaking, automakers supported the MTE, and several expressly predicated their support of the GHG standards for MY 2022–2025 on the MTE.[236] In the waiver action, EPA reiterated its commitment to the MTE in light of these considerations.[237]

In these circumstances, where GHG standards were being set far into the future with an explicit commitment to revisit them, where California agreed to deem compliance with certain federal GHG standards to constitute compliance with California standards, and where all parties were provided ample notice that EPA would be revisiting federal standards and, accordingly, the waiver granted for a program that acceded to those standards through the ''deemed to comply'' provision, neither the State of California nor other parties (such as automakers) have reasonable reliance interests sufficient to foreclose the extension of federal standards to California. Likewise, under CAA section 177, even though States other than California, under certain circumstances and conditions, may ''adopt and enforce'' standards that are ''identical to the California standards for which EPA has granted a waiver for such model year,'' given that Title I[238] does not call for NAAQs attainment planning as it relates to GHG standards, those States that may have adopted California's GHG standards and ZEV standards for certain MYs would also not have any reliance interests as a result of the grant of the ACC program waiver. As previously noted, CAA section 177 States also lack reliance interests sufficient to preclude reconsideration and withdrawal of the waiver both because they were on notice of the commitment to review the federal standards, as discussed above.[239] Relatedly, with the revocation of these standards in this action there will be no ''standards identical to the California standards for which a waiver has been granted'' that any state may adopt and enforce, under CAA section 177(1).[240] (States may not ''tak[e] any action that has the effect of creating a car different from those produced to meet either federal or California emission standards, a so-called 'third vehicle.' '' *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 521, 528 (2d Cir. 1994)). California also did not seek approval for MY 2021–2025 GHG standards in its 2016 SIP approval request. 81 FR 39424, 27–28 (June 16, 2016).

As a general matter, ''[w]henever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: The desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.'' *Civil Aeronautics Bd.* v. *Delta Air Lines, Inc.,* 367 U.S. 316, 321–22 (1961). *See also ConocoPhillips,* 612 F.3d at 832 (5th Cir. 2010) (''Furthermore, reconsideration also must occur within a reasonable time after the decision being reconsidered was made, and notice of the agency's intent to reconsider must be given to the parties.''); *Belville Min. Co.* v. *United States,* 999 F.2d 989, 997 (6th Cir. 1993) (''Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision.''); *Bookman* v. *United States,* 453 F.2d 1263, 1265 (Fed. Cir. 1972) (''[A]bsent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period.'').

For the reasons stated above, there was no ''finality'' in the federal MY 2021–2025 GHG standards that EPA promulgated in 2012 in the sense required for cognizable reliance to accrue sufficient to foreclose EPA's exercise of authority to reconsider and, if appropriate, withdraw the waiver. Nor is such ''finality'' to be found in the January 2013 grant of the waiver for California's MY 2021–2025 GHG and ZEV standards. As explained at proposal, in granting the waiver for the ACC program GHG and ZEV standards, EPA had evaluated certain compliance flexibilities allowed by California under the third waiver prong, CAA section 209(b)(1)(C) (consistency with CAA section 202(a)). Specifically, EPA evaluated California regulations that included an optional compliance provision (the ''deemed to comply'' provision) that would allow automobile and engine manufacturers to demonstrate compliance with CARB's GHG standards for MY 2017–2025 by complying with applicable national or federal GHG standards. 78 FR 2136. During the waiver proceedings, most automobile manufacturers either opposed the grant of the waiver for MY 2021–2025 GHG and ZEV standards as not consistent with CAA section 202(a)[241] or premised their support for

needed to take account of the fact that DOT's fuel-economy authority faces temporal constraints that EPA's emissions authority does not. They did so through the MTE, and the MTE mechanism provided notice to all interested parties that EPA's 2012 federal standards under CAA section 202(a), and EPA's January 2013 waiver grounded in part on a finding that the State provisions subject to the waiver were compatible with CAA section 202(a), would be subject to review and possibly revision within a few years of the waiver grant. Under these circumstances, no reliance interests accrued sufficient to foreclose EPA's authority to reconsider and withdraw the waiver.

[235] The MTE process also called for a ''draft Technical Assessment Report'' (to be prepared no later than November 15, 2017), public comments on that draft report, and public comments on whether the model year 2022–2025 standards are ''appropriate'' under CAA section 202(a).

[236] 77 FR at 62636, 62652, 62785.

[237] ''EPA is committed to conducting a mid-term evaluation for MYs 2022–2025 in close coordination with NHTSA and CARB given the long-time frame in implementing standards out to MY 2025 and given NHTSA's obligation to conduct a separate rulemaking in order to establish final standards for vehicles for those years.'' 78 FR 2137.

[238] Under title I of the Clean Air Act, EPA establishes national ambient air quality standards (NAAQS) to protect public health and welfare, and has established such ambient standards for ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, and particulate matter.

[239] ''This new State authority should not place an undue burden on vehicle manufacturers who will be required, in any event, to produce vehicles meeting the California standards for sale in California.'' H.R. Conf. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977).

[240] A State may not ''make attempt[s] to enforce'' California standards for which EPA has not waived preemption. *Motor Vehicle Mfrs. Ass'n* v. *NYS Dep. of Envtl Conservation,* 17 F.3d 521, 534 (2d Cir. 1994).

[241] 78 FR 2132 (manufacturers suggested that EPA should grant California's waiver request after CARB finalized its regulatory amendments to allow for a national compliance option; manufacturers oppose granting the waiver for the ZEV program past the 2017 MY, asserting that those standards will not be feasible either in California or in the individual

Continued

those standards on California's permitting compliance through the ''deemed to comply'' provision.[242] In comments on the proposed withdrawal, California did not contest this aspect of the waiver proceedings. For example, California in its comments on the SAFE proposal, at page 57, states ''[b]ecause the federal program was expected to achieve GHG emission reductions that are equivalent to the California program, CARB modified its LEV III GHG regulation to continue to allow the 'deemed to comply' option beyond model year 2016, by accepting federal compliance with the EPA standards as sufficient to demonstrate compliance with California's standards for the 2017 through 2025 model years.'' Additionally, most automobile manufacturers indicated that they would comply with California's GHG standards through the ''deemed to comply'' provision. Both California and some automobile manufacturers also alluded to their expectations that standards would be revised in the future in light of technological feasibility and cost considerations surrounding MY 2022–2025 GHG standards.[243] [244]

Regarding whether EPA is foreclosed from reconsidering its January 2013 waver grant due to the passage of time, on January 12, 2017, well in advance of the April 2018 deadline that it had set for itself, EPA completed the Mid-Term Evaluation called for under the 2012 national GHG standards, determining that the MY 2017–2025 GHG standards promulgated in that rulemaking were appropriate. Automobile manufacturers, however, petitioned EPA for reconsideration of that January 2017 determination. In March 2017, EPA granted this petition for reconsideration. 82 FR 14671 (Mar. 22, 2017). In March 2017 California completed its own Mid-Term Evaluation review, in which it arrived at different conclusions on technological feasibility and costs for these standards than those that EPA would later reach. Subsequently, in April 2018, consistent with the timing specified in its regulations, EPA revised its finding on the appropriateness of the federal MY 2022–2025 GHG standards, concluding that those standards ''are not appropriate and, therefore, should be revised.'' [245] This finding provided notice of a reasonable possibility that these federal GHG standards would likely be changing.[246] In the April 2018 action, EPA also withdrew the January 2017 finding. 83 FR at 16077. Since then California has challenged this revised finding; that challenge is pending in the United States Court of Appeals for the District of Columbia. *California* v. *EPA,* No. 18–1114 (D.C. Cir. argued Sept. 6, 2019). Moreover, California in December 2018 amended the ''deemed to comply'' provision in its regulations after the publication of the SAFE proposal, and in July 2019 announced a putative nationwide framework for vehicle standards, as discussed above.

These procedural aspects of the federal GHG standards and the grant of a waiver for California's ACC program are indicative of the absence of the possibility of reasonable reliance in the ''finality'' of the waiver, contrary to commenters' assertion of reliance interests. For instance, as shown above, the engine and vehicle manufacturers have not only complained about the stringency of MY 2021–2025 GHG and ZEV standards, but also requested reconsideration of both the waiver as it relates to the ZEV standards, and the 2017 Mid-Term Evaluation that addresses the ''deemed to comply'' provision, which California provided in response to their request. EPA has also initiated joint rulemaking with NHTSA that proposes amended EPA GHG standards and fuel economy standards for MY 2021–2026. See, the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks. 83 FR 42986 (Aug. 24, 2018). As also previously noted, automobile and engine manufacturers operated under the assumption that both California and national standards would, or at least could, be revised.[247] These circumstances are sufficient to put California and others on notice that standards were in flux such that they could not give rise to reasonable reliance interests. Further, CAA section 177 States do not have any reliance interests that are engendered by the withdrawal of the waiver for the MY 2021–2025 GHG and ZEV standards. As previously explained, although CAA section 177 allows States other than California to adopt standards that are promulgated by California and for which a waiver of preemption is granted by EPA pursuant to CAA section 209, CAA section 177 States may do so only subject to certain conditions and circumstances. None of these conditions and circumstances, however, are at issue in this waiver decision, in light of EPA's determination that CAA section 177 does not apply to states seeking to adopt and enforce CARB's GHG standards. As also previously noted, with the revocation of these standards in this action, there will be no ''standards identical to the California standards for which a waiver has been granted'' that any state may adopt and enforce, under CAA section 177(1).[248] States may not ''tak[e] any action that has the effect of creating a car different from those produced to meet either federal or California emission standards, a so-called 'third vehicle.' '' *Motor*

CAA section 177 States given the status of the infrastructure and the level of consumer demand for ZEVs; dealers suggest that EPA should not grant California a waiver for its ZEV and GHG emission standards past MY 2018 and 2021, respectively, asserting that technical capabilities after that time are uncertain.).

[242] ''[T]his national compliance option is integral to the commitment letters the industry and California signed in July 2011 and to the single national GHG/fuel economy program all stakeholders sought to achieve.'' 78 FR 2138.

[243] 78 FR 2128. A waiver ''will remain an important backstop in the event the national program is weakened or terminated;'' manufacturers note that both the federal and the California GHG emission standards provide for a comprehensive mid-term evaluation of the MYs 2022–2025; manufacturers clearly state that ''[a]ny amendments to California's GHG emission standards made as a result of the mid-term evaluation will require analysis to determine whether the amendments fall within the scope of this waiver, or, if not, whether they qualify for a separate waiver under Section 209(b) of the Clean Air Act.'' 78 FR 2132. *See also, e.g.,* comments of the National Automobile Dealers Association, n.43. On March 11, 2013, the Association of Global Automakers and Alliance of Automobile Manufacturers filed a petition for reconsideration of the January 2013 waiver grant, requesting that EPA reconsider the decision to grant a waiver for MYs 2018 through 2025 ZEV standards on technological feasibility grounds. Petitioners also asked for consideration of the impact of the travel provision, which they argue raise technological feasibility issues in CAA section 177 States, as part of the agency's review under the third waiver prong, CAA section 209(b)(1)(C). EPA continues to evaluate the petition. As explained below, in this action EPA is not taking final action with regard to the proposed determinations under the third waiver prong. Whether and how EPA will respond to the March 2013 petition will be considered in connection with a potential future final action with respect to the proposed third prong determinations set forth in the SAFE proposal.

[244] Since the grant of the ACC waiver program, engine and vehicle manufacturers who voiced concerns about the stringency of MY 2021–2025 GHG and ZEV standards during the waiver proceedings have requested both reconsideration of the grant of the waiver for the ZEV standards (which is a compliance mechanism for the GHG standards) and aspects of the national GHG program.

[245] Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles: Notice; Withdrawal. 83 FR 16077 (Apr. 13, 2018).

[246] 82 FR 14671 (Mar. 22, 2017).

[247] ''The manufacture of automobiles is a complex matter, requiring decisions to be made far in advance of their actual execution. The ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance so as to permit economies in production.'' S. Rep. No. 403, 90th Cong., at 730 1st Sess. (1967).

[248] A State may not ''make attempt[s] to enforce'' California standards for which EPA has not waived preemption. *Motor Vehicle Mfrs. Ass'n* v. *NYS Dep. of Envtl Conservation,* 17 F.3d 521, 534 (2d Cir. 1994).

Vehicle Mfrs. Ass'n of U.S., Inc. v. *New York State Dep't of Envt'l Conservation,* 17 F.3d 521, 528 (2d Cir. 1994).

California's comments argue that EPA cannot revisit its waiver with respect to the ZEV standards in particular because EPA, in a SIP approval action, approved ZEV provisions into the State's SIP. Final CARB Detailed Comments, at 351. But in so doing, EPA noted that California's *GHG* provisions were *not* part of California's SIP submission.[249] At the time, EPA explained that ''CARB has expressly excluded from the August 14, 2015 SIP submittal certain sections or subsections of California code that have been authorized or waived by EPA under CAA section 209.'' [250] Further, in the SAFE proposal, EPA explained that the proposed withdrawal of the waiver for MY 2021–2025 ZEV standards was premised in part on California's explicit indications that compliance with those standards formed part of the compliance mechanism for MY 2021–2025 GHG standards. For instance, at proposal, we explained ''because the ZEV and GHG standards are closely interrelated, as demonstrated by the description above of their complex, overlapping compliance regimes, EPA is proposing to withdraw the waiver of preemption for ZEV standards under the second and third prongs of section 209(b)(1).'' 83 FR 43243. California's responses to the SAFE proposal do not rebut the Agency's views that the ZEV standards for MY 2021–2025 are inextricably interconnected with the design and purpose of California's overall GHG reduction strategy.[251] According to California, for example, CARB's GHG standards for the 2017 through 2025 MYs are designed to respond to California's identified goals of reducing GHG emissions to 80 percent below 1990 levels by 2050 and in the near term to reduce GHG levels to 1990 levels by 2020;'' ''In 2009, CARB staff analyzed pathways to meeting California's long-term 2050 GHG reduction goals in the light duty vehicle subsector and determined that ZEVs would need to comprise nearly 100 percent of new vehicle sales between 2040 and 2050, and commercial markets for ZEVs would need to launch in the 2015 to 2020 time frame.'' Analysis in support of comments of the California Air Resources Board on the SAFE proposal, pg. 54, 59 & 83. EPA reviewed California's SIP submission, including ZEV measures, as a matter of NAAQS compliance strategy. But in the 2012–2013 CAA section 209(b) waiver proceeding, CARB presented its ZEV program to EPA solely as a GHG compliance strategy—indeed, CARB expressly stated that the ZEV program *did not confer NAAQS pollutant benefits.* ''There is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions.'' CARB ACC waiver request at 15, EPA–HQ–OAR– 2012–0562–0004.[252]

Similarly, some commenters argued that EPA reconsideration would constitute impermissible retroactive action, citing *Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204 (1988). However, the rulemaking which the Supreme Court held was impermissibly retroactive in that case had been proposed in February 1984 and had purported to establish reimbursement rates effective July 1, 1981. By contrast, here EPA is reconsidering a previous grant of a waiver of preemption for *future* model years 2021–2025.[253] Reconsideration of aspects of a prior adjudication whose effects have not yet ripened is not barred by *Bowen's* proscription on retroactive rulemaking—otherwise any reconsideration of agency action would likewise be barred.

For all these reasons, EPA concludes it has authority under CAA section 209 to reconsider its prior grant of the ACC waiver and to withdraw the waiver for MY 2021–2025 GHG and ZEV standards, consistent with the SAFE proposal.

C. The Effect of Preemption Under the Energy Policy and Conservation Act (EPCA) on EPA's Previously Granted Waiver Under CAA Section 209(b) With Regard to California's GHG and ZEV Standards

In the SAFE proposal, EPA explained its historical practice of reviewing waiver requests under the prism of CAA section 209. Specifically, EPA has ''historically declined to consider as part of the waiver process whether California standards are constitutional or otherwise legal under other Federal statutes apart from the Clean Air Act.'' 83 FR 42340. *See also Motor & Equip. Mfrs. Ass'n, Inc.* v. *EPA,* 627 F.2d 1095, 1115 (D.C. Cir. 1979) (*MEMA I*) ''[T]he Administrator operates in a narrowly circumscribed proceeding requiring no broad policy judgments on constitutionally sensitive matters. Nothing in CAA section 209 requires him to consider the constitutional ramifications of the regulations for which California requests a waiver.''). This historic position was reflected in granting the initial ACC program waiver where EPA explained: ''Evaluation of whether California's GHG standards are preempted, either explicitly or implicitly, under [the Energy Policy and Conservation Act] EPCA, is not among the criteria listed under section 209(b). EPA may only deny waiver requests based on the criteria in section 209(b), and inconsistency with EPCA is not one of those criteria.'' 78 FR 2145. But EPA, in the past, has also solicited comments on ''whether the Energy Policy and Conservation Act (EPCA) fuel economy provisions are relevant to EPA's consideration of the request and to California's authority to implement its vehicle GHG regulations'' and in response to comments opted to ''take[ ] no position regarding whether or not California's GHG standards are preempted under EPCA.'' 74 FR 32744, 32782–83 (July 8, 2008).

[249] 81 FR 39424, 27–28 (June 16, 2016).

[250] 81 FR 29427–28. ''The excluded provisions pertain to: Greenhouse Gas (GHG) exhaust emission standards 2009 through 2016 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, and 2017 and subsequent Model Passenger Cars, Light-Duty Trucks, and Medium Duty Vehicles.''

[251] Analysis in support of comments of the California Air Resources Board on the SAFE proposal, at 342. ''For example, and relevant here, California's Legislature has established an aggressive GHG emissions reduction target for 2030.'' ''The ZEV mandate is a crucial part of this strategy; it 'act[s] as the technology forcing piece of the 2016 Draft TAR program' which is necessary because 'the new vehicle fleet [in California] will need to be primarily composed of advanced technology vehicles . . . by 2035' in order to meet the State's 2050 GHG goal.'' *Id.* at 369–70 (Internal citations omitted). ''This increasing ZEV deployment is critical to achieving the statewide 2030 and 2045 GHG requirements and 2031 South Coast SIP commitments (the 2016 State SIP Strategy identified the need for light-duty vehicles to reduce NO_X emissions by over 85 percent by 2031 to meet federal standards).'' *Id.* at 373.

[252] CARB in its SAFE proposal comments refers to this as an ''alleged[ ]'' statement, Final Carb Detailed Comments at 351. The SAFE proposal cited the Waiver Support Document in which CARB made this statement, 83 FR at 43248 n.580. The statement is directly quoted above. California's comments on the SAFE proposal do not contest that California's ACC waiver request expressly disclaimed criteria pollutant benefits from the ZEV program, nor do they establish that EPA is foreclosed from revisiting the grant of the waiver in light of the interpretation of 209(b)(1)(B) adopted below. EPA notes in this regard that California's approach in its ACC waiver request differed from the state's approach in its waiver request for MY 2011 and subsequent heavy-duty tractor-trailer GHG standards, where California quantified NO_X emissions reductions attributed to GHG standards and explained that they would contribute to PM and ozone NAAQS attainment. 79 FR 46256, 46257 n.15, 46261, 46262 n.75 (August 7, 2014).

[253] As explained above, to the extent that NHTSA's final determination that EPCA preempts State GHG and ZEV programs, the implications of that determination for prior EPA waivers of such programs are effective upon the effective date of this joint action. Separate and apart from that analysis, to the extent that EPA is withdrawing the waiver based on its determination that the waiver does not meet the CAA section 209(b)(1)(B) criterion, that withdrawal is for model years 2021–2025, as proposed in the SAFE proposal.

In the January 2013 waiver, EPA stated: ''Evaluation of whether California's GHG standards are preempted, either explicitly or implicitly, under EPCA, is not among the criteria listed under section 209(b). EPA may only deny waiver requests based on the criteria in section 209(b), and inconsistency with EPCA is not one of those criteria. In considering California's request for a waiver, [EPA] therefore [has] not considered whether California's standards are preempted under EPCA.'' 78 FR at 2145.

EPA believes that this January 2013 statement was inappropriately broad, to the extent it suggested that EPA is categorically *forbidden* from ever determining that a waiver is inappropriate due to consideration of anything other than the ''criteria'' or ''prongs'' at CAA section 209(b)(1)(B)(A)–(C). The statements quoted above, and EPA's historical practice of disregarding issues of ''[c]onsistency with EPCA'' in the context of evaluating California's waiver applications, were made in the context of EPA acting on its own to administer CAA section 209(b) in considering such applications. The context here is different: EPA is undertaking a joint action with NHTSA. In the SAFE proposal, EPA noted that NHTSA had proposed and could well finalize a determination that California's GHG and ZEV standards are both explicitly and implicitly preempted under EPCA.[254] EPA explained that such a determination would present a threshold question as to California's ability to enforce these standards and proposed to conclude that standards preempted under EPCA cannot be afforded a waiver of preemption under CAA section 209(b). Unlike the Clean Air Act, EPCA does not allow for any waiver of its express preemption provision. EPCA contains no language that can be read to allow States to either prescribe or enforce regulations related to fuel economy standards. Consistent with this view, at SAFE proposal, NHTSA explained that, ''when a State establishes a standard related to fuel economy, it does so in violation of EPCA's preemption statute(sic) and the standard is therefore void *ab initio*.'' 83 FR 43235. At the same time, NHTSA explained that certain other GHG requirements that do not relate to fuel economy, such as regulations addressing leaking refrigerants, would likely not be preempted under EPCA. 83 FR 4324–35.

EPA does not intend in future waiver proceedings concerning submissions of California programs in other subject areas to consider factors outside the statutory criteria in CAA section 209(b)(1)(A)–(C). But the unique situation in which EPA and NHTSA, coordinating their actions to avoid inconsistency between their administration of their respective statutory tasks, address in a joint administrative action the issues of the preemptive effect of EPCA and its implications for EPA's waivers, has no readily evident analogue.[255] EPA will not dodge this question here.

Consistent with the SAFE proposal, NHTSA is finalizing a determination that EPCA preempts State GHG and ZEV standards. EPA agrees with commenters that EPA is not the agency that Congress has tasked with administering and interpreting EPCA. This is especially so because ''[t]he waiver proceeding produces a forum ill-suited to the resolution of constitutional claims.'' *MEMA I,* 627 F.2d at 1115. In the SAFE proposal, EPA took the position that it is, at a minimum, reasonable to consider NHTSA's conclusions about the preemptive effect of EPCA. To the extent that NHTSA has determined that these standards are void *ab initio* because EPCA preempts standards that relate to fuel economy, that determination presents an independent basis for EPA to consider the validity of the initial grant of a waiver for these standards, separate and apart from EPA's analysis under the criteria that invalidate a waiver request. In the context of a joint action in which our sister agency is determining, and codifying regulatory text to reflect, that a statute Congress has entrusted it to administer preempts certain State law, EPA will not disregard that conclusion, which would place the United States Government in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*.

This conclusion is consistent with the Supreme Court's holding in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007). While this case did not address EPCA preemption, the Supreme Court anticipated that EPA and NHTSA would administer their respective authorities in a consistent manner. (''The two obligations [for NHTSA to set fuel economy standards under EPCA and for EPA to regulate motor vehicle GHG emissions under CAA section 202] may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.'' *Id.* at 532.) Considering that California cannot enforce standards that are void *ab initio,* even assuming *arguendo* that there existed a valid grant of waiver under CAA section 209(b), NHTSA's determination renders EPA's prior grant of a waiver for those aspects of California's regulations that EPCA preempts invalid, null, and void, and, to the extent that administrative action is necessary on EPA's part to reflect that state of affairs, EPA hereby withdraws that prior grant of a waiver on this basis.

EPA's finding that California's GHG and ZEV standards are preempted as a result of NHTSA's finalized determinations, issued in this joint action, with respect to EPCA's preemptive effect on State GHG and ZEV standards, is effective upon the effective date of this joint action. This finding is separate and apart from findings with respect to EPA's 2013 waiver for CARB's Advanced Clean Car Program as it pertains to its 2021 through 2025 MY relating to GHG and ZEV standards and accompanying withdrawal of the waiver, pursuant to CAA section 209(b)(1), as set forth in subsection D below; as a matter of EPA's administration of CAA section 209(b), without reference to EPCA's preemptive effect as determined by NHTSA, that withdrawal applies to 2021 through 2025 MY GHG and ZEV standards, as proposed in the SAFE proposal.[256] [257]

[254] 49 U.S.C. 32919(a). *See* 83 FR 43233.

[255] *See Massachusetts* v. *EPA.*

[256] EPA acknowledges that its action in this document may have implications for certain prior and potential future EPA reviews of and actions on state SIPs that may incorporate certain aspects of California's state program, either California's own SIPs or SIPs from states that have adopted one or more aspects of California's state program pursuant to CAA section 177. EPA will consider whether and how to address those implications, to the extent that they exist, in separate actions. But EPA believes that it is not necessary to resolve those implications in the course of this action because the effects of EPCA preemption, as set forth in subsection III.C, and the proper interpretation and application of CAA section 209(b)(1)(B) to California's GHG and ZEV program, as set forth in subsection III.D, provide sufficient reason to take this final action and that the potential implications for prior and future SIP actions are not a sufficient basis to alter the rationale for or terms of this final action. The questions of what EPCA means and what its preemptive effect on certain state regulations is, and what CAA section 209(b)(1)(B) means and what its limitations on California's ability to obtain a waiver for its state programs are, do not depend on whether one or more SIP actions pertaining to NAAQS attainment and maintenance strategies may directly or indirectly be affected by the agencies' resolution of those questions.

[257] In the August 2018 SAFE proposal, EPA solicited comment on whether one or more of the grounds supporting the proposed withdrawal of this waiver would also support withdrawing other waivers that it has previously granted. 83 FR at 43240 n.550. At this time, EPA does not intend to take action with respect to any prior waiver grants other than those specified above.

D. Reconsideration of January 2013 Waiver and Determination That It Is Appropriate To Withdraw EPA's January 2013 Waiver of CAA Section 209 Preemption for California's GHG and ZEV Standards for Model Years 2021–2025, Pursuant to CAA Section 209(b)(1)(B)

1. Interpretation of CAA Section 209(b)(1)(B)

Under CAA section 209(b)(1)(B), EPA cannot grant a waiver request if EPA finds that California ''does not need such State standards to meet compelling and extraordinary conditions.'' [258] In the August 2018 SAFE Proposal, EPA proposed to determine: (1) That it was reasonable and appropriate to interpret the scope of ''such State standards'' to authorize a consideration of whether California needs to have its own GHG vehicle emissions program *specifically,* rather than whether California needs any separate vehicle emissions program *at all;* and (2) that California did not ''need'' its own GHG and ZEV programs ''to meet compelling and extraordinary conditions'' within the meaning of the statute. EPA finalizes those determinations in this document.

EPA notes in this regard that regulation of emissions from new motor vehicles and new motor vehicle engines under CAA section 202(a) is triggered by a determination that ''the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' This ''endangerment finding,'' which triggers EPA's ability to use the CAA section 202(a) regulatory authority which CAA section 209(a) preempts the states from exercising (subject to the availability of a CAA section 209(b) preemption waiver), links (1) emission of pollutants from sources; to (2) air pollution; and (3) resulting endangerment to health and welfare.[259]

Congress enacted waiver authority for California under CAA section 209(b) against the backdrop of traditional, criteria pollutant environmental problems, under which all three links in this chain bear a particularized nexus to specific local California features: (1) Criteria pollutants are emitted from the tailpipes of the California motor vehicle fleet; (2) those emissions of criteria pollutants contribute to air pollution by concentrating locally in elevated ambient levels, which concentration, in turn; (3) results in health and welfare effects (*e.g.,* from ozone) that are extraordinarily aggravated in California as compared to other parts of the country, with this extraordinary situation being attributable to a confluence of California's peculiar characteristics, *e.g.,* population density, transportation patterns, wind and ocean currents, temperature inversions, and topography. In the case of GHG emissions from motor vehicles, however, this particularized nexus to California's specific characteristics is missing: (1) The GHG emissions from California cars are no more relevant to the pollution problem at issue (*i.e.,* climate change) as it impacts California than are the GHG emissions from cars being driven in New York, London, Johannesburg, or Tokyo; (2) the resulting air pollution, *i.e.,* elevated concentrations of GHG in the upper atmosphere, is globally mixed; (3) the health and welfare effects of climate change impacts on California are not extraordinary to that state and to its particular characteristics. Although EPA concludes that all three of these aspects are lacking in the case of GHG, EPA further concludes that it is the *connection* between all the three which is the original motivation for Congress's creation of the waiver. It is that original motivation that informs the proper understanding of what CAA section 209(b)(1)(B) requires.

It is important to note that, while this interpretation of CAA section 209(b)(1)(B) departs in major respects from the interpretation applied in the 2009 waiver denial reversal (74 FR 32744) and the 2013 waiver grant (78 FR 2112), it does not simply constitute a re-adoption of the interpretation applied in the 2008 waiver denial (73 FR 12156). The 2008 waiver denial applied what it styled as two alternative approaches to determining whether California ''need[ed]'' its own vehicle GHG emissions program to address global climate change ''to meet compelling and extraordinary conditions'': One that looked at the *causal* link between California emissions and elevated GHG concentrations, 73 FR at 12160 (styled as ''the distinct nature of global pollution as it relates to section 209(b)(1)(B)''), and an ''alternative'' approach that looked at the magnitude of California climate *effects* compared to the rest of the nation, 73 FR at 12163–12164 (''whether the potential impact of climate change resulting from these emissions and concentrations will differ across geographic areas and if so whether the likely effects in California amount to compelling and extraordinary conditions''). The 2009 waiver denial reversal, and the 2013 waiver grant, in contrast, applied an interpretation which EPA styled as a return to the ''traditional'' interpretation. Under that approach, EPA determined that California ''needs'' its own vehicle GHG emissions program ''to meet compelling and extraordinary conditions,'' a determination that was predicated on what was then EPA's view that, in the case of such later-adopted programs, satisfaction of the ''need'' criterion of CAA section 209(b)(1)(B) was effectively automatic, being derivative as it were of the State's having long ago established a ''need'' to have *some form* of its own vehicle emissions program (*i.e.,* its criteria pollutant program for which it had already received many waivers). In conjunction with this, EPA also pointed to the effects of climate change on certain criteria pollutant impacts. *See* 74 FR at 32746; 78 FR at 2125 *et seq.*

In this action, EPA adopts an interpretation of CAA section 209(b)(1)(B) that it concludes is more in accord with the text, structure, purpose, and legislative history of that provision than were either the position in the 2008 denial (because it does not separate causal issues and effects issues into alternatives) or the position the 2009 and 2013 grants (because it considers application of CAA section 209(b)(1)(B) to California's need for a GHG/climate program, rather than subordinating that consideration to California's need for a criteria pollutant program). Under this interpretation, EPA begins by noting that only one state, California, is entitled to apply under CAA section 209(b) for a waiver of the preemptive effect of CAA section 209(a). CAA section 209(a), in turn, provides that (unless a waiver is issued) no state may regulate new motor vehicle or new motor vehicle engine emissions. That authority instead is conferred on EPA under CAA section 202(a), subject to an ''endangerment finding.'' That finding requires EPA to consider the relationship between [1] sources and their emissions of *pollutants*; [2] the *pollution* to which those emissions contribute; and [3] resulting *impacts* on health and welfare. Congress has

[258] EPA notes that Congress provided no definition of the phrase ''compelling and extraordinary conditions,'' and that the phrase appears to be entirely unique, not found anywhere else in the United States Code.

[259] We therefore, also disagree with CARB's argument that EPA's reading of CAA section 209(b)(1)(B) ''ignores the statutory structure—improperly reading Section 209(b) without consideration of the relationship between Sections 202(a), 209(a) and 209(b). Specifically, EPA proposes to read Section 209(b) as excluding GHGs at the same time that it proposes to continue regulating GHGs under Section 202(a) and presumes, albeit implicitly, that Section 209(a) preempts other States from regulating GHGs.'' CARB comments at 359.

therefore, in the elements of the endangerment finding, laid out the terms of what constitutes a pollution problem to provide the appropriate and requisite predicate for federal regulation. Because CAA section 209(a) expresses Congress's judgment that vehicle emission pollution problems are presumptively appropriate only for federal regulation, with one state afforded the extraordinary treatment under CAA section 209(b) of being able to apply for a waiver from that preemption, the best, if not the only, reading of the waiver criterion under CAA section 209(b)(1)(B) is that it requires a pollution problem at the local level that corresponds in a state-specific particularized manner to the type of pollution problem that Congress required as the predicate for federal regulation.

It is against this backdrop that EPA believes the text of CAA section 209(b)(1)(B) is best interpreted. Informed by the criteria-pollutant context in which California's pre-1970 program was enacted, the legislative history, and the principle, as discussed elsewhere in this action, that differential treatment of the states by Congress in a geographically disparate way is extraordinary and is justified only by a sufficient link between that differential treatment and particularized local facts, EPA interprets Congress's command in CAA section 209(b)(1)(B), that it may not grant a preemption waiver for a California state vehicle emissions program if California does not ''need'' that program ''to meet compelling and extraordinary conditions,'' to condition the issuance of a waiver on a *state-specific* pollution problem that maps on to the elements as laid out in CAA section 202(a): [1] Emissions of pollutants; [2] resulting air pollution; [3] health and welfare effects from that resulting air pollution. EPA concludes that the interpretation of CAA section 209(b)(1)(B) it adopts in this document is the best, if not the only, reading of that provision.

The Supreme Court's opinion in *UARG,* 134 S. Ct. 2427 (2014), instructs that Clean Air Act provisions cannot necessarily rationally be applied identically to GHG as they are to traditional pollutants.[260] For the reasons set forth in this subsection, it is appropriate to consider the application of the second waiver prong, CAA section 209(b)(1)(B), to California's ''need'' *vel non* for its own GHG and ZEV programs, separate and apart from its ''need'' for its own criteria pollutant program. EPA determines, based on the application of the second waiver prong, that California does not ''need'' its own GHG and ZEV programs ''to meet compelling and extraordinary conditions,'' notwithstanding EPA's historical determinations that California does so ''need'' its own criteria pollutant programs.

Furthermore, the fact that GHG emissions may affect criteria pollutant concentrations (*e.g.,* increases in ambient temperature are conducive to ground-level ozone formation) does not satisfy this requirement for a particularized nexus, because to allow such attenuated effects to fill in the gaps would eliminate the function of requiring such a nexus in the first place and would elide the distinction between national and local pollution problems which EPA discerns as underlying the text, structure, and purpose of the waiver provision. EPA departs in this regard from the position it took in the 2009 reversal of the 2008 waiver denial, 74 FR at 32763, where it determined that ''[t]here is a logical link between the local air pollution problem of ozone and California's desire to reduce GHGs as one way to address the adverse impact that climate change may have on local ozone conditions.''

EPA further notes that elsewhere in the 2009 waiver denial reversal, EPA took the position that *Massachusetts* v. *EPA* supports the view that, because ''every small reduction is helpful in reducing [climate] concerns. . . . [A] reduction in domestic automobile emissions would slow the pace of global emissions increase no matter what happens with regard to other emissions,'' and therefore ''opponents [of the waiver] have not met their burden of demonstrating that California's motor vehicle program, or its GHG standards, does not have a *rational relationship* to contributing to amelioration of the air pollution problems in California.'' *Id.* at 32766 (emphasis added). EPA now departs from this prior position in several important respects.

First, to the extent that its 2009 waiver denial reversal was guided by an interpretation of the teachings of *Massachusetts* under which any reduction in GHG gives warrant for regulatory action (to include EPA's waiver approvals), that must now be weighed against the Supreme Court's subsequent 2014 *UARG* opinion, which stands for the proposition that particular CAA provisions will not necessarily apply identically in the case of GHG emissions as they do to criteria pollutant emissions.

Second, to the extent that EPA's 2009 waiver denial reversal framed the question under CAA section 209(b)(1)(B) as whether there is a ''rational relationship'' between California's programs and California's air pollution problems, that conflated the ''arbitrary and capricious'' test in CAA section 209(b)(1)(A) with the unique and distinct term ''need[ed] to meet compelling and extraordinary conditions'' in CAA section 209(b)(1)(B); EPA's position in this document gives that term a distinct and appropriate meaning and application.

Third, whereas the 2009 waiver denial reversal also noted in this passage that ''there is some evidence in the record that proffers a specific level of reduction in temperature resulting from California's regulations,'' this action notes elsewhere that the 2012 joint rule record reflected that even standards much more stringent than either the 2012 Federal standards or California's ACC program would only reduce global temperature by 0.02 degrees Celsius in 2100. As discussed elsewhere in this action, EPA concludes that this does not constitute a showing

[260] CARB is wrong to suggest in its comments that EPA's interpretation in this action of CAA section 209(b)(1)(B) is inconsistent with the Supreme Court's opinion in *Massachusetts* v. *EPA.* CARB comments at 360. *Massachusetts* held that the general, CAA-wide definition of ''air pollutant'' at CAA section 302(g) encompasses carbon dioxide, and that the text of CAA section 202(a)(1), which provides that EPA shall regulate standards for emissions of ''any air pollutant'' from new motor vehicles if EPA makes certain predicate findings (referred to colloquially as ''endangerment findings''), also encompasses carbon dioxide. 549 U.S. at 528. But CAA section 209, as a whole, in its preemption provision in 209(a), in the waiver provision in 209(b), and most specifically in the second waiver prong under CAA 209(b)(1)(B), does not contain the term ''pollutant,'' and EPA does not in this document interpret section 209 as simply establishing a distinction between criteria and GHG pollutants. Rather, for the reasons stated in this document, EPA interprets CAA section 209(b), and its extraordinary treatment afforded to one state, as requiring, in its provision in CAA section 209(b)(1)(B) that no waiver shall issue where a state does not need its own standards ''to meet compelling and extraordinary conditions,'' as requiring a state-specific, particularized nexus between the elements of a pollution problem—*i.e.,* pollutants, pollution, and impacts—as set forth in CAA section 202(a). CARB asserts that ''[t]here is no reason Section 209(b)(1)(B) should be interpreted more narrowly than Section 202(a),'' CARB comments at 360. One such reason is perfectly evident: They have different text. Another, as discussed in this action, is that CAA 209(b)(1)(B) must be read against the principle that extraordinary treatment afforded one state must be justified by ''extraordinary conditions'' in that state. Here, CARB misses the mark when it invokes *Massachusetts*'s observation that ''without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete,'' quoting 549 U.S. at 532. CARB comments at 360. The Supreme Court there was discussing evolution of scientific understanding of what pollutants may pose harm. Nothing in *Massachusetts* suggests that scientific developments can alter the fundamental relationship between the States among themselves and vis-à-vis the federal government.

that California ''needs'' its standards to ''meet'' climate change, separate from the question whether climate change and its impacts on California constitute ''compelling and extraordinary conditions'' within the meaning of the statute. Further, the claim by some commenters that ''incremental progress is progress nonetheless'' does not meaningfully address the reality that the waiver would result in an indistinguishable change in global temperatures and, based on geographic variability and measurement sensitivity, likely no change in temperatures or physical impacts resulting from anthropogenic climate change in California.

EPA proposed to determine that the balance of textual, contextual, structural, and legislative history evidence supports the conclusion that the statute is ambiguous in one particular respect: Whether CAA section 209(b)(1)(B) refers to an individual standard or the California standards as a whole when referring to the Administrator's review of state standards submitted for a waiver, to determine whether the state ''needs such State standards to meet compelling and extraordinary conditions.'' We explained that ''such State standards'' in CAA section 209(b)(1)(B) is ambiguous with respect to the scope of EPA's analysis. For example, it is unclear whether EPA is meant to evaluate either the standard or standards at issue in the waiver request or all of California's standards in the aggregate. We also explained that CAA section 209(b)(1)(B) does not specifically employ terms that could only be construed as calling for a standard-by-standard analysis or each individual standard. For example, it does not contain phrases such as ''each State standard'' or ''the State standard.'' Nor does the use of the plural term ''standards'' definitively answer the question of the proper scope of EPA's analysis, given that the variation in the use of singular and plural form of a word in the same law is often insignificant and a given waiver request typically encompasses multiple ''standards.'' Thus, we explained that while it is clear that ''such State standards'' refers at least to all of the standards that are the subject of the particular waiver request before the Administrator, that phrase could reasonably be considered as referring either to the standards in the entire California program, the program for similar vehicles, or the particular standards for which California is requesting a waiver under the pending request.[261]

We did explain, however, that there are reasons to doubt that ''such State standards'' is intended to refer to all standards in California's program, including all standards that it has previously adopted and obtained waivers for, because this would limit EPA's ability to consider and act on standards that are the subject of particular waiver applications, even where that individualized consideration is reasonable or the only rational approach. Specifically, given that the term ''extraordinary'' should refer to circumstances that are specific to California, such as thermal inversions resulting from local geography and wind patterns, and primarily responsible for causing the air pollution problems that the standards are designed to address, standards which address pollution problems that lack that type of particularized nexus to California are particularly appropriate candidates for an individualized consideration. EPA affirms this view as it relates to the review of GHG standards, given that GHG emissions from in California cars, and their consequences for California, bear no particular relation to these California-specific circumstances—*i.e., global* GHG emissions in the aggregate are what present problems for California, not California-specific ones.

The waiver under CAA section 209(b) is a waiver of, and is logically dependent on and presupposes the existence of, the prohibition under CAA section 209(a), which forbids (absent a waiver) any State to ''adopt or attempt to enforce any *standard* [singular] relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.'' States are forbidden from adopting a standard, singular; California requests waivers seriatim by submitting a standard or package of standards to EPA; it follows that EPA considers those submissions as it receives them, individually, not in the aggregate with all standards for which it has previously granted waivers. Further, reading the phrase ''such State standards'' as requiring EPA always and only to consider California's entire program in the aggregate would limit the application of this waiver prong in a way that EPA does not believe Congress intended. We explained that, under the interpretation where EPA is constrained to the aggregate approach, once EPA had determined that California needed its very first set of submitted standards to meet extraordinary and compelling conditions, EPA would never have the discretion to determine that California did not need any subsequent standards for which it sought a successive waiver—unless EPA is authorized to consider a later submission separate from its earlier finding. Moreover, as also explained at proposal, up until the ACC program waiver request, California's waiver request involved individual standards or particular aspects of California's new motor vehicle program. For example, only GHG standards were at issue in the 2008 GHG waiver request denial.[262] [263]

Several commenters disagreed with our view of ambiguity and the proposal to construe ''such state standards,'' in the context of our reconsideration and proposal to withdraw the January 2013 waiver for California's GHG and ZEV provisions, as applying to those provisions themselves, rather than California's entire, aggregate program consisting of *all* California's motor vehicle emission standards, when considering whether California needs its

[261] California suggests in its comments that EPA is ''logically inconsistent'' in that it said at proposal, 83 FR at 43246, that the CAA section 209(b)(1)(B) phrase ''such State standards'' ''refers at least to all of the standards that are the subject of the particular waiver request before the Administrator,'' while at the same time proposing to reconsider and withdraw the January 2013 grant of a waiver with respect to some, but not all, of the components of the ACC program (*i.e.,* with respect to GHG and ZEV, but not LEV). EPA disagrees that this is inconsistent. The question of how to interpret ''such state standards'' refers to the determination of what the total set of standards is with regard to which EPA will consider whether California ''needs'' those standards ''to meet compelling and extraordinary conditions.'' It is reasonable to assign that total set at the level of the waiver-request package before the Agency, rather than all the state-specific emission standards that California has ever adopted. If the consideration reveals that, within that set, California does not need *particular* subsets ''to meet compelling and extraordinary conditions''—here, because the GHG and ZEV programs lack a particularized, California-specific nexus between pollutant, pollution, and impacts, a rationale that does not apply to the LEV program, for which EPA did not propose to withdraw the waiver and is not in this document withdrawing the waiver—that is nothing unusual. And it is consistent with EPA's prior practice, as discussed in subsection III.B, of only partially granting aspects of, in combination with denial or deferral of action on other aspects of, some previous waivers. The ultimate analysis whether a waiver is appropriate is not limited to a binary, all-or-nothing determination.

[262] 73 FR 12156 (March 6, 2008).

[263] EPA determines in this document that GHG emissions, with regard to the lack of a nexus between their State-specific sources and their State-specific impacts, and California's GHG standard program, are sufficiently distinct from criteria pollutants and traditional, criteria pollutant standards, that it is appropriate for EPA to consider whether California needs its own GHG vehicle emissions program. EPA does not determine in this document and does not need to determine today how this determination may affect subsequent reviews of waiver applications with regard to criteria pollutant control programs.

GHG and ZEV provisions to meet compelling and extraordinary conditions within the meaning of CAA section 209(b)(1)(B). One commenter argued that this reading would require EPA to consider the protectiveness of California's standards by looking at them in the aggregate while also allowing EPA to consider California's ''need'' on an individual, standard-by-standard basis. Commenters also argued that EPA's historical or traditional interpretation was correct. They argued that EPA could not apply a different interpretation of ''such State standards'' given that ''such State standards'' in CAA section 209(b)(1)(B) does not relate back to the singular ''any standard'' in CAA section 209(a). They cast this reading as ''implausible,'' given that under the rule of last antecedent ''such'' should properly refer to standards in (b)(1) and not 209(a). We disagree. As explained earlier above, reading the phrase ''such State standards'' as requiring EPA always and only to consider California's entire program in the aggregate would limit the application of this waiver criterion. Specifically, it would mean that once EPA determines that California needed its very first set of submitted standards to meet extraordinary and compelling conditions, EPA would never have the discretion to determine that California did not need any subsequent standards for which it sought a successive waiver—unless EPA is authorized to consider a later submission separate from its earlier finding. Instead, it is reasonable to read CAA section 209(b) as articulating, first, that EPA shall consider the standards in the aggregate to determine if the State's determination that they are sufficiently protective is arbitrary and capricious (CAA section 209(b)(1)(A)). But, even if this first criterion for denying a waiver is not triggered, nevertheless, such a waiver shall not be granted as to such standards that are not needed to meet compelling and extraordinary conditions, under the second waiver denial criterion (CAA section 209(b)(1)(B)). Commenters' argument, in effect, inserts the word ''every'' (or ''all'') into CAA section 209(b)(1)(B) in between the words ''need'' and ''such.''

Additionally, as shown in further detail in section D.2., below, the term ''extraordinary'' refers to circumstances that are specific to California, such as thermal inversions resulting from local geography and wind patterns, and that are primarily responsible for causing the air pollution problems that the standard under waiver review is designed to address. EPA affirms the view that the term ''extraordinary'' refers primarily to factors that tend to produce higher levels of pollution: Geographical and climatic conditions (like thermal inversions) that in combination with large numbers and high concentrations of automobiles, create serious air pollution problems in California (73 FR 12156, 12159–60).

The text, context, and structure of CAA section 209(b) support EPA's reasoning that the relevant ''conditions'' are those conditions present in a particular state and that have a particularized nexus to emissions in that state. The statute calls for an examination of whether the ''State'' needs such ''state standards'' in the context of a prohibition in CAA section 209(a) of a ''state or other political subdivision'' adopting or attempting to enforce alternative standards. It would be inconsistent with the overall structure for a state's own preferred policy approach to addressing national or global—rather than local and state-specific—''conditions'' to permit a waiver from a scheme that otherwise establishes a uniform, national policy.[264]

Notably, pertinent legislative history supports this view of the text and structure of 209(b), insofar as it refers to California's ''peculiar local conditions'' and ''unique problems.'' S. Rep. No. 403, 90th Cong. 1st Sess., at 32 (1967). This legislative history also indicates that California is to demonstrate ''compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards.'' *Id.* EPA views this as evidence of Congressional intent that separate standards in California are to be justified by a showing of circumstances in California that are different from circumstances in the country at large. Additionally, EPA views this legislative history as demonstrating that Congress did not intend for CAA section 209(b)(1)(B) to be based on the need for California to enact separate standards that address pollution problems of a more national or global nature. Relevant legislative history also ''indicates that Congress allowed waivers of preemption for California motor vehicle standards based on the particular effects of local conditions in California on the air pollution problems in California.'' Congress discussed ''the unique problems faced in California as a result of its climate and topography.'' H.R. Rep. No. 728, 90th Cong. 1st Sess., at 21 (1967). See also Statement of Cong. Holifield (CA), 113 Cong. Rec. 30942–43 (1967). Congress also noted the large effect of local vehicle pollution on such local problems. *See, e.g.,* Statement of Cong. Bell (CA) 113 Cong. Rec. 30946. As explained at proposal, Congress focus was on California's ozone problem, which is especially affected by local conditions and local pollution. See Statement of Cong. Smith (CA) 113 Cong. Rec. 30940–41 (1967); Statement of Cong. Holifield (CA), *id.,* at 30942. See also, *MEMA I,* 627 F.2d at 1109 (noting the discussion of California's ''peculiar local conditions'' in the legislative history). In sum and as explained at proposal, conditions that are similar on a global scale are not ''extraordinary,'' especially where ''extraordinary'' conditions are a predicate for a local deviation from national standards, under CAA section 209(b). 83 FR 43247.

As further explained in section D2., below, GHG is a globally distributed pollutant with environmental effects that are different from emissions of criteria pollutants. For example, GHG emissions from the California vehicle fleet bear no more relation to GHG emissions in California than fleet in other parts of the country. As also explained in the SAFE proposal, EPA believes that the GHG and ZEV standards are standards that would not meaningfully address global air pollution problems posed by GHG emissions, in contrast to local or regional air pollution problem with causal ties to conditions in California. Additionally, the impacts of California vehicles' GHG emissions on California are mediated through the context of the global mixture of elevated levels of GHG in the upper atmosphere. As also shown below, EPA finds that while potential conditions in California related to global climate change could be substantial, they are not sufficiently different from the potential conditions in the nation as a whole to justify separate state standards under CAA section

[264] *Cf. Ford Motor Co.* v. *EPA,* 606 F.2d 1293, 1301–02 (D.C. Cir. 1979) (''Ford is asking this court to declare that Congress intended to make standards adopted by California for its own particular problems, and never substantively reviewed for stringency or national protectiveness by federal officials, an option which auto manufacturers can choose in the rest of the country as an alternative to compliance with the federal standards which Congress determined are in the best interests of the nation. We find this reading to be wholly implausible.''). *See also id.* at 1303 (''It was clearly the intent of the Act that that determination focus on local air quality problems . . . that may differ substantially from those in other parts of the nation.'').

209(b)(1)(B).[265] In this action, EPA is reviewing a waiver for motor vehicle standards designed to address a global air pollution problem and its effects, as compared to a local or regional air pollution problem that has causal ties to conditions in California. EPA must therefore, review California's GHG standards in light of the fact that GHG emissions impacts are different from criteria pollutants themselves, and California must address their need for them as it relates to conditions in California. In sum, as explained at proposal, under our reading of ''such state standards'' and ''extraordinary and compelling conditions,'' EPA will examine California's need for GHG standards by considering levels of GHG emissions emitted from motor vehicles in California to determine if they are specific to California and contribute primarily to environmental effects that are specific to California. This review, which calls for a showing of a particularized causal link between the standards under review, emissions in California, and conditions in California, is similar to agency review of California's need for standards designed to address criteria pollutants and is further discussed in section D.2.*d,* below.[266]

CARB argues that what it characterizes as EPA's reading of ''compelling and extraordinary'' as equivalent to ''unique'' or ''sufficiently different from'' the rest of the country ''is inconsistent with Section 209(b)(1)(B), other provisions of the Clean Air Act, and the legislative history.'' CARB also asserts that EPA ''cites no case'' to support this reading. At the same time, CARB claims that EPA has either interpreted legislative history incorrectly or relies entirely on legislative history for the 1967 CAA, which does note California's ''unique problems,'' instead of legislative history for the 1977 amendments; CARB asserts that the latter legislative history is more relevant, given that the addition of section 177 in the 1977 CAA meant that Congress did not intend that Section 209(b)(1)(B) be construed as requiring ''California's problems to be entirely unique or sufficiently different from those in other States.'' CARB also contends that EPA is limiting application of CAA section 209(b)(1)(B) to smog, even though EPA has granted waivers for pollutants that do not contribute to smog, such as particulate matter. In addition, CARB maintains that what it characterizes as EPA's reading ''compelling and extraordinary conditions'' as restricted to ''local'' or ''regional'' pollutants would weaken Congress's intent that California retain its own regulatory program and continue to lead the nation as a ''laboratory of innovation.'' CARB further argues that EPA provides no support for this ''geographic distinction,'' while also casting the reading as ''illusory.'' According to CARB, both local and global pollution cause compelling and extraordinary conditions, as evidenced by provisions of the CAA that address long-range transport of emissions (beyond the state level). In sum, CARB argues that ''compelling and extraordinary conditions'' is expansive enough to be read as including GHG emissions and that EPA's ''exacting and unrealistic'' reading can only be met by ''a rare air pollution problem.'' CARB comments at 360–365.

EPA disagrees. First, as explained at proposal, the 1977 Amendments revised CAA section 209(b)(1) in only one material aspect. Specifically, California is required to determine that standards it seeks a waiver for will be ''in the aggregate, at least as protective of public health and welfare than applicable Federal standards,'' rather than the ''more stringent'' standard under 1967 Clean Air Act. 83 FR 43247 n.579. Second, there is relevant legislative history from the 1977 amendments, which describes EPA's role in reviewing California's protectiveness determination, under CAA section 209(b)(1)(A), as whether ''the State acted unreasonably in evaluating the relative risks of various pollutants in light of air quality, topography, photochemistry and climate in that State.'' This 1977 legislative history further supports a reading requiring a particularized nexus. H. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977), U.S. C.C.A.N. 1977, p. 1381. Third, in support of the proposed reading, EPA cited *MEMA I* as noting the Senate Committee discussion of California's ''peculiar local conditions'' in 1967 legislative history for this provision in upholding the grant of a waiver subsequent to the 1977 CAA amendments. . 627 F.2d at 1109, citing S.Rep. No. 403, 90th Cong., 1st Sess. 33 (1967); *see also Ford Motor Co.* v. *EPA,* 606 F.2d 1293,1303 (D.C. Cir. 1979) (''It was clearly the intent of the Act that that determination focus on local air quality problems . . . that may differ substantially from those in other parts of the nation.''). Fourth, EPA's reading of CAA section 209(b)(1)(B) has never been and is not limited to ''smog''-causing pollutants. Here, CARB's comment glosses over extensive discussion in the SAFE proposal of the phrase ''compelling and extraordinary'' including, for example, legislative history indicating that California is to demonstrate ''compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards.'' 83 FR 23427, *citing* S. Rep. No. 403, 90th Cong. 1st Sess., at 32 (1967). Fifth, as shown in greater detail in section III.D, the phrase ''compelling and extraordinary conditions'' qualifies the ''need'' for California's standards. And in a statute designed to address public health and welfare, it certainly cannot mean standards that allow a state to be ''a laboratory for innovation'' in the abstract, without any connection to a need to address pollution problems. Most notably, legislative history explains that CAA section 209(b)(1) was is intended to recognize California's ''unique problems.'' For example, in originally adopting the provision, the Senate Committee on Public Works explained that ''California's *unique* problems and pioneering efforts justified a waiver of the preemption section to the State of California.'' S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (emphasis added); *see also* 113 Cong. Rec. 30948 (bound ed. Nov. 2,1967), Statement of Representative Harley Staggers, chairman of the House Interstate and Foreign Commerce Committee (explaining that ''overall national interest required administration of controls on motor vehicle emissions, with special recognition given by the Secretary to the unique problems facing California as a result of numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns), ; *id.* at 30950, Remarks of Rep. Corman (''The uniqueness and the seriousness of California's problem is evident–more than 90 percent of the smog in our urban area is caused by automobiles, and in the next 15 years the number of automobiles in the state will almost double.''). Sixth, while it is

[265] *See* Fourth National Climate Assessment, Chapter 25: Southwest, *available at https://nca2018.globalchange.gov/chapter/25/. See also* Intergovernmental Panel on Climate Change (IPCC) Observed Climate Change Impacts Database, available at http://sedac.ipcc- *data.org/ddc/observed_ar5/index.html.*

[266] California argues in its comments that EPA has inappropriately reduced the scope of waiver ability under CAA section 209(b) to be narrower than the scope of express preemption under CAA section 209(a). EPA disagrees. To the extent that CAA section 209(b)(1)(B), as interpreted and applied here, precludes a waiver for California's GHG vehicle emissions and ZEV programs, that effect flows from the text and structure of this statutory section.

true that local and regional pollutants can be transported at greater geographic scales than the state level, the Clean Air Act sets out a comprehensive scheme for addressing air pollution transported to other regions; *see, e.g.,* CAA sections 126 and 110(a)(2)(D)(i). The fact that the Act addresses pollutant transport elsewhere does not expand the scope of the waiver provision. In contrast, in CAA section 209(b), Congress set out a waiver of preemption for California to address automotive pollution that give rise to local and regional air quality problems. Finally, to the extent CARB casts EPA reading as ''exacting and unrealistic,'' it mischaracterizes CAA section 209(a) and (b), which preempts states from adopting and enforcing standards for new motor vehicles and engines, with CAA section 209(b) allowing for a waiver of the preemption in 209(a) only if certain enumerated conditions are met. It is not ''a rare air pollution problem'' that satisfies the particularized nexus interpretation of CAA section 209(b)(1)(B) that EPA adopts in this document. Rather, it is the all-too-well understood and longstanding air pollution problem that California continues to face: Aggravated criteria pollution at the state and local level.

2. It Is Appropriate To Apply This Criterion to California's GHG Standards Separately, Rather Than to California's Motor Vehicle Program as a Whole

Under CAA section 209(b)(1)(B) of the Clean Air Act, the Administrator may not grant a waiver if he finds that the ''State does not need such State standards to meet compelling and extraordinary conditions.'' EPA proposed to find that CARB does not need its own GHG and ZEV standards to meet compelling and extraordinary conditions in California, on the grounds that ''compelling and extraordinary conditions'' mean environmental conditions with causes and effects particular or unique to, California whereas GHG emissions present global air pollution problems. Specifically, EPA proposed to determine that the GHG-related standards are designed to address global air pollution and its consequences, in contrast to local or regional air pollution problems with causal ties to conditions in California. EPA also proposed to find that, while effects related to climate change in California could be substantial, they are not sufficiently different from the conditions in the nation as a whole to justify separate State standards under CAA section 209(b)(1)(B). 83 FR 43248–43250. Lastly, EPA proposed to find that the State's GHG-related standards would not have a meaningful impact on the potential conditions related to global climate change. Because EPA has traditionally interpreted and applied CAA section 209(b)(1)(B) in a manner that examines whether the conditions that Congress identified (*e.g.,* topography number of vehicles, etc.) [267] still give rise to serious air quality problems in California, and thus a need for California's own motor vehicle emission control program, EPA concludes that this causal-link test is the appropriate basis on which to evaluate California's GHG emission standards under the second waiver prong, CAA section 209(b)(1)(B).[268]

In general, EPA has in the past recognized California's unique underlying conditions and serious air pollution problems when reviewing waiver requests.[269] California, and others that oppose the withdrawal of the waiver, assert that the relevant inquiry is merely whether California needs to have some form of a separate State motor vehicle emissions control program to meet compelling and extraordinary conditions, not whether any given standard is needed to meet compelling and extraordinary conditions related to that air pollution problem. On the other hand, several commenters that support a withdrawal of the waiver suggest EPA's determination should be based on whether California needs greenhouse gas standards in particular to meet compelling and extraordinary conditions, asserting that a proposed set of standards must be linked to compelling and extraordinary conditions. These commenters suggest that the Act requires EPA to look at the particular ''standards'' at issue, not the entire State program.

EPA determines that it in this context it is appropriate to review whether California needs its GHG standards to meet compelling and extraordinary conditions separately from the need for the remainder of California's new motor vehicle program, which has historically addressed criteria pollutants with a particular causal link to local and regional conditions both in the nature and quantity of emissions and in the particularized local and regional impacts of the pollution to which those emissions contribute. EPA bases this decision on the fact that California's GHG standards are designed to address global climate change problems that are different from the local pollution conditions and problems that California has addressed previously in its new motor vehicle program. The climate change problems are different in terms of the distribution of the pollutants and the effect of local California factors, including the local effect of motor vehicle emissions as differentiated from other GHG emissions worldwide on the GHG concentrations in California. In

[267] *See, e.g.,* 49 FR 18887, 18890 (May 3, 1984) (waiver decision discussing legislative history of CAA section 209).

[268] It is not appropriate for EPA to defer to California and other outside parties when EPA is interpreting its own statute. By contrast, EPA does defer to California's policy choices when it comes to choosing emissions standards that will best address the serious air quality problems and impacts on public health and welfare in California—*to the extent* that the State standards at issue will actually address pollution and its consequences that are particular to California. But the question whether the State regulations at issue actually do meet the statutory criterion of being necessary ''to meet compelling and extraordinary conditions'' in the meaning of the statute, CAA section 209(b)(1)(B), is one which EPA must answer. In this regard, EPA notes that it has previously taken the position that ''the burden of proof [lies] on the party opposing a waiver,'' and that ''the burden [is] on those who allege, in effect, that EPA's GHG emission standards are adequate to California's needs.'' 78 FR at 2117 (Jan. 2013 waiver grant). EPA notes that this previous discussion is distinguishable from the current context in two key regards. First, EPA was in 2013 analyzing third parties' opposition to a waiver, rather than conducting its own analysis of whether a previously granted waiver was appropriately granted. Second, EPA's change in position in this document does not constitute an assertion that ''EPA's GHG emission standards are [or are not] adequate to California's needs'' as a matter of policy. Rather, EPA is adopting an interpretation of CAA section 209(b)(1)(B), specifically its provision that no waiver is appropriate if California does not need standards ''to meet compelling and extraordinary conditions,'' similar to the interpretation that it adopted in the 2008 waiver denial but abandoned in the 2009 and 2013 waiver grants, and applying that interpretation to determine to withdraw the January 2013 waiver for California's GHG and ZEV program for model years 2021 through 2025. Under that interpretation, the question is not whether existing federal standards are ''adequate to California's needs,'' but whether California's standards are needed under the meaning of CAA section 209(b)(1)(B), which, as set forth in this document, requires a particularized nexus between California-specific pollutant sources, California-specific pollution contributed to thereby, and California-specific pollutants impacts caused thereby. Furthermore, we took comment on burden of proof in the proposal, *see* 83 FR at 43244 n.567. EPA believes it is not necessary to resolve that issue in this action as regardless of whether a preponderance of the evidence or clear and compelling evidence standard is applied, the Agency concludes that withdrawal of the waiver is appropriate.

[269] *See American Trucking Associations, Inc.* v. *Environmental Protection Agency,* 600 F.3d 624, 627 (D.C. Cir. 2010) (''With respect to the statutory language, EPA concluded that 'compelling and extraordinary conditions' refers to the factors that tend to cause pollution—the 'geographical and climate conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.' The expansive and statutory language gives California (and in turn EPA) a good deal of flexibility in assessing California's regulatory needs. We therefore find no basis to disturb EPA's reasonable interpretation of the second criterion. *See Chevron, USA Inc* v. *Natural Res. Def. Council,* 467 U.S. 837, 842–43.'') (citation omitted).

addition, EPA notes that under its traditional interpretation of CAA section 209(b)(1)(B), where EPA evaluates the need for a separate California new motor vehicle program, conditions such as the nature of the air quality problem may change whereby a particular motor vehicle regulation designed for a specific criteria pollutant is no longer needed to address a serious air quality problem (*e.g.,* the underlying air quality problem no longer exists). Therefore, EPA concludes that it is appropriate to examine the need for GHG standards within California's mobile source program to ensure that such standard is linked to local conditions that giving rise to the air pollution problem, that the air pollution problem is serious and of a local nature, and that the State standards at issue will meaningfully redress that local problem.[270]

This waiver decision falls within the context of a few instances of EPA applying the CAA section 209(b)(1)(B) criterion to a California waiver request for a fundamentally global air pollution problem.[271] Although EPA's review of this criterion has typically been cursory due to California needing its motor vehicle emission program due to fundamental factors leading to local and regional air pollution problems that were well established at the time of creation of the waiver provision (as discussed below), it is appropriate in this case to carefully review the purpose of CAA section 209(b)(1)(B) when applying it to the unique circumstance of California's regulation of greenhouse gases. By doing so, EPA gives meaning to Congress's decision to include this provision in CAA section 209(b).[272]

Moreover, because both CAA sections 209(b)(B) and (C) employ the term ''such state standards,'' it is appropriate for EPA to read the term consistently between prongs (B) and (C). Under CAA section 209(b)(1)(C) EPA conducts review of standards California has submitted to EPA for the grant of a waiver to determine if they are consistent with CAA section 202(a).[273] It follows then that EPA must read ''such state standards'' in CAA section 209(b)(1)(B) as a reference to the same standards in subsection (C).[274]

a. EPA Practice in Previous Waivers

In past waivers that addressed local or regional air pollution, EPA has interpreted CAA section 209(b)(1)(B) as requiring it to consider whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions. Under this approach, EPA does not consider whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant. For example, EPA reviewed this issue in detail with regard to particulate matter in a 1984 waiver decision.[275] In that waiver proceeding, California argued that EPA is restricted to considering whether California needs to have its own motor vehicle program to meet compelling and extraordinary conditions, and does not consider whether any given standard is necessary to meet such conditions. Opponents of the waiver in that proceeding argued that EPA was to consider whether California needed these PM standards to meet compelling and extraordinary conditions related to PM air pollution.

The Administrator agreed with California that it was appropriate to look at the program as a whole in determining compliance with CAA section 209(b)(1)(B). One justification of the Administrator was that many of the concerns with regard to having separate State standards were based on the manufacturers' worries about having to meet more than one motor vehicle program in the country, but that once a separate California program was permitted, it should not be a greater administrative hindrance to have to meet further standards in California. The Administrator also justified this decision by noting that the language of the statute referred to ''such state standards,'' which referred back to the use of the same phrase in the criterion looking at the protectiveness of the standards in the aggregate. He also noted that the phrase referred to standards in the plural, not individual standards. He considered this interpretation to be consistent with the ability of California to have some standards that are less stringent than the federal standards, as long as, under CAA section 209(b)(1)(A), in the aggregate its standards were at least as protective as the federal standards.

The Administrator further stated that in the legislative history of CAA section 209, the phrase ''compelling and extraordinary circumstances'' refers to ''certain general circumstances, *unique to California,* primarily responsible for causing its air pollution problem,'' like the numerous thermal inversions caused by its local geography and wind patterns. The Administrator also noted that Congress recognized ''the presence and growth of California's vehicle population, whose emissions were thought to be responsible for ninety percent of the air pollution in certain parts of California.'' [276] EPA reasoned that the term compelling and extraordinary conditions ''does not refer to the levels of pollution directly.'' Instead, the term refers primarily to the

[270] EPA notes in this regard that the position that GHG and climate are no different from criteria pollutants and criteria air pollution in terms of applicability of the CAA section 209(b) waiver regime, and specifically that no particularized nexus between in-state emissions and in-state impacts is necessary in order to meet the CAA section 209(b)(1)(B) ''need[ed] . . . to meet compelling and extraordinary conditions,'' would effectively read the term ''extraordinary'' out of the statute, or reduce it to surplusage with the term ''compelling.'' Whether GHG emissions and attendant climate impacts are, in the colloquial sense, compelling or not is not the relevant question. It is whether they are ''compelling and extraordinary'' within the reasonably interpreted meaning of that term in its context here. Inasmuch as that term in its context requires a particularized nexus between California emissions, California pollution, and California impacts, they are not.

[271] *See generally* California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Notice of Decision, January 9, 2013 Volume 78, Number 6 pp. 2211—2145; California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Emissions from 2014 and Subsequent Model Year Medium- and Heavy-Duty Engines and Vehicles; Notice of Decision; December 29, 2016 Volume 81, Number 250, pp. 95982–95987; California State Motor Vehicle Pollution Control Standards; Heavy-Duty Tractor-Trailer Greenhouse Gas Regulations; Notice of Decision; August 7, 2014 Volume 79, Number 152 pp. 46256–46265; California State Motor Vehicle Pollution Control Standards; Within-the-Scope Determination for Amendments to California's Motor Vehicle Greenhouse Gas Regulations; Notice of Decision; June 14, 2011 Volume 76, Number 114 pp. 34693–34700; California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; July 8, 2009 Volume 74, Number 129 pp. 32744–32784; California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; March 6, 2008 Volume 73, Number 45 pp. 12156–12169.

[272] *See United States* v. *Menashe,* 348 US 528, 538–39 (1955) (courts must give effect to every word, clause, and sentence of a statute).

[273] ''Technology exists with which to achieve California's proposed standards for HC and CO, however, the standards are inconsistent with Section 202(a) of the Clean Air Act because the cost of compliance within the lead time remaining is excessive.'' 38 FR 30136 (November 1, 1973). *See also* 40 FR 30311 (July 18, 1975); 43 FR 998, 1001 (Jan. 5, 1978).

[274] Under CAA section 177 states may adopt and enforce motor vehicle emissions standards if ''such standards are identical to the California standards for which a waiver has been granted.'' *See, e.g., Motor Vehicle Mfrs. Ass'n* v. *NYS Dep. of Envt'l Conservation,* 17 F.3d 521, 532 (2d Cir. 1994). ''Section 177 refers to 'standards relating to control of emissions ... for which a waiver *has been granted.' Id.* In enacting § 209(b), which establishes California's preemption exception, Congress uses the same words as it did when it allowed California to set its own 'standards . . . for the control of emissions,' provided the EPA approves a waiver application. *Id.* § 7543(b)(1). Hence, the most logical reading of § 177 is that New York may adopt only those standards that, pursuant to § 209(b), California included in its waiver application to the EPA.'' (Emphasis in original).

[275] *See* 49 FR 18887 (May 3, 1984).

[276] *Id.* at 18890 (emphasis added).

confluence of factors that tend to produce higher levels of pollution of the type particular to California: ''geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.''

The Administrator summarized that the question to be addressed in the second criterion is whether these ''fundamental conditions'' (*i.e.,* the geographical and climate conditions and large motor vehicle population) that cause air pollution continued to exist, not whether the air pollution levels for PM were ''compelling and extraordinary,'' nor the extent to which these specific PM standards will address the PM air pollution problem.

From this it can be seen that EPA's interpretation in the context of reviewing standards designed to address local or regional air pollution has looked at the local causes of the air pollution problems: Geographic and climatic conditions that turn local emissions into air pollution problems, such as thermal inversions, combined with a large number of motor vehicles in California emitting in the aggregate large quantities of emissions. Under the interpretation EPA adopts in this document, it is the particularized nexus between the emissions from California vehicles, their contribution to local pollution, and the extraordinary impacts that that pollution has on California due to California's specific characteristics, that set California apart from other areas when Congress adopted this provision.

EPA's review of this criterion has usually been cursory and not in dispute, as the fundamental factors leading to these traditional criteria air pollution problems—geography, local climate conditions (like thermal inversions), significance of the motor vehicle population—have not changed over time and over different local and regional air pollutants. These fundamental factors have applied similarly for all of California's air pollution problems that are local or regional in nature. California's circumstances of geography, climate, and motor vehicle population continue to show that it has compelling and extraordinary conditions leading to such local air pollution problems related to traditional pollutants.

California's motor vehicle program has historically addressed air pollution problems that are generally local or regional in nature. The emission standards have been designed to reduce emissions coming from local vehicles, in circumstances where these local emissions lead to air pollution in California that will affect directly the local population and environment in California. The narrow question in this waiver proceeding is whether this interpretation is appropriate when considering motor vehicle standards designed to address a global air pollution problem and its effects, as compared to a local or regional air pollution problem that has particular causal ties to conditions in California.

As EPA observed in the SAFE proposal, the agency has articulated differing interpretations of CAA section 209(b)(1)(B). Historically, EPA has interpreted this provision to require that California needs to have its own separate new motor vehicle program in the aggregate to meet compelling and extraordinary conditions in California, not whether the state needs the specific standards under consideration. In 2008, in contrast, when EPA first considered whether State GHG emission regulations meet the requirements for a CAA section 209(b) waiver, EPA determined that the better reading of CAA section 209(b)(1)(B) would be to consider whether California ''need[s]'' the particular standards at issue ''to meet compelling and extraordinary conditions,'' and the agency denied the waiver on these grounds. Then, when EPA reconsidered that denial in 2009, the agency reverted to the interpretation that it had previously applied for criteria pollutants and granted the waiver.

EPA concludes that the long and contentious history of this question, and the recent measures that California has taken even during the pendency of this administrative action to amend its State regulations beyond the form in which they were granted the waiver in 2013 and, even more recently, to purport to establish ''voluntary'' programs creating yet a third program distinct both from that for which CAA preemption was waived in 2013 and the Federal standards promulgated in 2012 and currently under review by the Federal government, confirm that extension of CAA section 209(b) waivers to State GHG and ZEV programs was inappropriate. Such waivers have led to actions by California increasingly at odds with the clear Congressional design and intent that national standards would be set by the federal government with California having an ability to apply for targeted waivers of preemption to address its own particular problems. EPA therefore views this interpretation and application of CAA section 209(b)(1)(B) set forth here as, at minimum, a reasonable one that gives appropriate meaning and effect to this provision and does not second-guess California's policy judgment notwithstanding assertions to the contrary.

b. The Distinct Nature of Global GHG Pollution as It Relates to CAA Section 209(b)(1)(B)

The air pollution problem at issue here is elevated atmospheric concentrations of greenhouse gases, and the concern is the impact these concentrations have on global climate change and the effect of global climate change on California. In contrast to local or regional air pollution problems, the atmospheric concentrations of these greenhouse gases are substantially uniform across the globe, based on their long atmospheric life and the resulting mixing in the atmosphere. The factors looked at in the past when considering waiver requests for State standards addressing criteria pollutants—the geography and climate of California, and the large motor vehicle population in California, which were considered the fundamental causes of the air pollution levels found in California—cannot form the basis of a meaningful analysis of the causal link between California vehicles' GHG emissions and climate effects felt in California. The concentration of greenhouse gases in the upper atmosphere may affect California, but that concentration is not affected in any particular way by the geography and climate of California. The long duration of these gases in the atmosphere means they are well-mixed throughout the global atmosphere, such that their concentrations over California and the U.S. are, for all practical purposes, the same as the global average. The number of motor vehicles in California, while still a notable percentage of the national total and still a notable source of GHG emissions in the State, bears no more relation to the levels of greenhouse gases in the atmosphere over California than any other comparable source or group of sources of greenhouse gases anywhere in the world. Emissions of greenhouses gases from California cars do not generally remain confined within California's local environment (and, indeed, were they to do so, rather than rise to the upper atmosphere to become well-mixed with other GHG emissions, those locally located emissions would not, by definition, contribute to the ''pollution'' that is at issue here). Instead, those GHG emissions from vehicles operating in California become one part of the global pool of GHG emissions, with this global pool of emissions leading to a relatively homogenous concentration of greenhouse gases over the globe. Thus, the emissions of motor vehicles in

California do not affect California's air pollution problem in any way different from emissions from vehicles and other pollution sources all around the world. Similarly, the emissions from California's cars do not just affect the atmosphere in California, but in fact become one part of the global pool of GHG emissions that affect the atmosphere globally and are distributed throughout the world, resulting in basically a uniform global atmospheric concentration.

Given the different, and global, nature of the pollution at issue, EPA determines that the conceptual basis underlying the practice of considering California's motor vehicle program as a whole (in the context of criteria emission regulations) does not meaningfully apply with respect to elevated atmospheric concentrations of GHGs. Therefore, EPA has considered whether it is appropriate to apply this criterion in a different manner for this kind of air pollution problem; that is, a global air pollution problem.

As previously explained, the text and relevant legislative history of CAA section 209 also supports EPA's decision to examine the application of the second waiver denial criterion (CAA section 209(b)(1)(B)) with regard to California's GHG and ZEV standards specifically in the context of global climate change. It indicates that Congress was moved to allow waivers of preemption for California motor vehicle standards based on the particular effects of local conditions in California on the air pollution problems in California. Congress discussed ''the unique problems faced in California as a result of its climate and topography.'' H.R. Rep. No. 728, 90th Cong. 1st Sess., at 21 (1967). *See also* Statement of Cong. Holifield (CA), 113 Cong. Rec. 30942–43 (1967). Congress also noted the large effect of local vehicle pollution on such local problems. *See, e.g.,* Statement of Rep. Bell (CA), 113 Cong. Rec. 30946. In particular, Congress focused on California's ozone problem, which is especially affected by local conditions and local pollution. *See* Statement of Rep. Smith (CA), 113 Cong. Rec. 30940–41 (1967); Statement of Rep. Holifield (CA), *id.* at 30942. *See also Motor & Equip. Mfrs. Ass'n, Inc.* v. *EPA* (*MEMA*), 627 F. 2d 1095, 1109 (D.C. Cir., 1979) (noting the discussion of California's ''peculiar local conditions'' in the legislative history). Congress clearly did not have in view pollution problems of a more national or global nature in justifying this provision.[277] Moreover, ''the [Clean Air] Act also differentiates between the states, despite our historic tradition that all the States enjoy equal sovereignty. Distinctions can be justified in some cases. 'The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.' But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'' *Nw. Austin Mun. Util. Dist. No. One.* v. *Holder,* 557 U.S. 193, 203 (2009) (some citations and internal quotation marks omitted) (quoting *South Carolina* v. *Katzenbach,* 383 U.S. 301, 328–29 (1966)) (ellipses and emphasis added by *Northwest Austin* Court); *see also Katzenbach,* 383 U.S. at 334 (''*exceptional conditions* can justify legislative measures not otherwise appropriate'') (emphasis added); *cf.* 42 U.S.C. 7543(b)(1)(B) (''No such waiver shall be granted if the Administrator finds that . . . . such State does not need such State standards to meet *compelling and extraordinary conditions.*'') (emphasis added). These principles support our conclusion that Congress did not intend the waiver provision in CAA section 209(b) to be applied to California measures that address pollution problems of a national or global nature, as opposed to conditions that are ''extraordinary'' with respect to California in particular—*i.e.,* those with a particularized nexus to emissions in California and to topographical or other features peculiar to California.''

c. It Is Appropriate To Apply CAA Section 209(b)(1)(B) Separately to GHG Standards

EPA concludes that in the context of reviewing California GHG related standards designed to address global climate change, it is appropriate to apply the second criterion separately for GHG standards.

The intent of Congress, in enacting CAA section 209(b) and in particular Congress's decision to have a separate CAA section 209(b)(1)(B), was to require EPA to specifically review whether California continues to have compelling and extraordinary conditions and the need for State standards to address those conditions. Thus, EPA concludes that it is appropriate to review California's GHG standards separately from the remainder of the State's motor vehicle emission control program for purposes of CAA section 209(b)(1)(B).

In this context it is appropriate to give meaning to this criterion by looking at whether the emissions from California motor vehicles, as well as the local climate and topography in California, are the fundamental causal factors for the air pollution problem—elevated concentrations of greenhouse gases—apart from the other parts of California's motor vehicle program, which are intended to remediate different air pollution concerns.

The appropriate criteria to apply therefore is whether the emissions of California motor vehicles, as well as California's local climate and topography, are the fundamental causal factors for the air pollution problem of elevated concentrations of greenhouse gases.

d. Relationship of California Motor Vehicles, Climate, and Topography to Elevated Concentrations of Greenhouse Gases in California

Under CAA section 209(b)(1)(B), EPA proposed to withdraw the waiver of preemption of the ACC program GHG and ZEV standards for MY 2021–2025 on two alternative grounds. Specifically, (1) California ''does not need'' these standards ''to meet compelling and extraordinary conditions;'' and (2) even if California does have compelling and extraordinary conditions in the context of global climate change, California does not ''need'' these standards because they will not meaningfully address global air pollution problems of the sort associated with GHG emissions. 83 FR 43248.

As previously explained, EPA proposed to determine that the balance of textual, contextual, structural, and legislative history evidence provide reasonable support for the conclusion that the statute is ambiguous in one particular respect: Whether section 209(b)(1)(B) refers to an individual standard or the California standards as a whole when referring to the Administrator's review of state standards submitted for a waiver, to determine whether the state ''needs such State standards to meet compelling and extraordinary conditions,'' and that the approach of examining the need for GHG-related standards separate from the other, traditional aspects of California's program is reasonable given, among other factors, the unique nature of the global pollutant. EPA recognizes that Congress's purpose in establishing the prohibition in CAA section 209(a) and the waiver in CAA section 209(b) was to

[277] In reference to another argument made in the 1984 waiver, while the administrative costs of a program may not increase significantly based on the addition of new standards, there is still cost in the implementation of new standards, particularly in terms of changes in design necessitated by the new standards. In any case, this issue does not appear to be relevant to the issue of whether California needs its standards to meet compelling and extraordinary conditions.

balance the benefit of allowing California significant discretion in deciding how to protect the health and welfare of its population with the burden imposed on the manufacturers of being subject to two separate motor vehicle programs and the overarching policy judgment that uniform national standards are appropriate. S. Rep. No. 403, 90th Cong. 1st Sess., at 32–33 (1967). It is clear that Congress intended this balance to be premised on a situation where California needs the State standards to meet compelling and extraordinary conditions. Thus, if EPA determines that California does not need its State GHG standards to meet compelling and extraordinary conditions, a waiver of preemption for those State standards is not permitted under the statute.

Commenters supportive of EPA's proposal to withdraw the waiver commented that California should not continue to enjoy a waiver for separate State GHG standards because those State standards are not needed to meet compelling and extraordinary conditions because there is no link between California-based motor vehicle GHG emissions and any alleged extraordinary conditions in California. These commenters state that while California spends a great deal of time discussing the effects of climate change in California, California does not link its GHG standards to those effects. They note that GHGs are not localized pollutants that can affect California's local climate, or that are problematic due to California's specific topography. Instead, emissions from vehicles in California become mixed with the global emissions of GHG and affect global climate (including California's climate) in the same way that any GHG from around the world affect global (and California) climate conditions. They claim that Congress authorized EPA to grant a waiver of preemption only in cases where California standards were necessary to address peculiar local air quality problems. They claim that there can be no need for separate California standards if the standards are not aimed at, and do not redress, a California-specific problem.

In previous waiver decisions, EPA was asked to waive preemption of standards regulating emissions that were local or regional in effect. Local air pollution problems are affected directly by local conditions in California, largely the emissions from motor vehicles in California in the context of the local climate and topography. As a result, State standards regulating such local motor vehicle emissions will have a direct effect on the concentration of pollutants directly affecting California's environment. They are effective mechanisms to reduce the levels of local air pollution in California because local conditions are the primary cause of that kind of air pollution problem. In addition, reductions in emissions from motor vehicles that occur elsewhere in the United States will not have the same impact, and often will have no impact, on reducing the levels of local air pollution in California.

By contrast, GHGs emitted by California motor vehicles become part of the global pool of GHG emissions that affect concentrations of GHGs on a uniform basis throughout the world. The local climate and topography in California have no significant impact on the long-term atmospheric concentrations of greenhouse gases in California. Greenhouse gas emissions from vehicles or other pollution sources in other parts of the country and the world will have as much effect on California's environment as emissions from California vehicles. As a result, reducing emissions of GHGs from motor vehicles in California has the same impact or effect on atmospheric concentrations of GHGs as reducing emissions of GHGs from motor vehicles or other sources elsewhere in the U.S., or reducing emissions of GHGs from other sources anywhere in the world. California's motor vehicle standards for GHG emissions do not affect only California's concentration of GHGs, but affect such concentrations globally, in ways unrelated to the particular topography in California. Similarly, emissions from other parts of the world affect the global concentrations of GHGs, and therefore concentrations in California, in exactly the same manner as emissions from California's motor vehicles.

Further, as explained in the SAFE proposal, California's claims that it is uniquely susceptible to certain risks because it is a coastal State does not differentiate California from other coastal States such as Massachusetts, Florida, and Louisiana, much less that conditions in California are any more ''extraordinary'' as compared to any other coastal States, particularly those coastal States that may possess a greater percentage of low-lying territory than California. Any effects of global climate change (*e.g.* water supply issues, increases in wildfires, effects on agriculture) could certainly affect California. But those effects would also affect other parts of the United States.[278] Many parts of the United States, especially western States, may have issues related to drinking water (*e.g.,* increased salinity) and wildfires, and effects on agriculture; these occurrences are by no means limited to California. These are among the types of climate change effects that EPA considered in the 2009 CAA section 202(a) endangerment finding which is the predicate for its authority to issue national motor vehicle GHG standards. But EPA's evaluation of whether California's standards are ''need[ed] to meet compelling and extraordinary conditions'' is not identical to its prior determination, pursuant to CAA section 202(a) whether GHG emissions from the national motor vehicle fleet contribute to pollution that may reasonably be anticipated to endanger public health or welfare. In order for a waiver request to pass muster under CAA section 209(b)(1)(B), as set forth in this document, a particularized, state-specific nexus must exist between sources of pollutants, resulting pollution, and impacts of that pollution. This is analogous to but distinct from the more abstract or general predicate finding for regulation under CAA section 202(a); if it were not distinct, then California would, under CAA section 209(b)(1)(B), *always* ''need'' a waiver for a state-specific program to ''meet'' any pollution problem that it experienced once EPA had found under CAA section 202(a) that motor vehicle emissions contribute to that pollution problem (without particular reference to that pollution problem's impact on California). This would effectively nullify the second waiver denial prong, CAA section 209(b)(1)(B).[279] California

[278] Some commenters made this same point. *See, e.g.,* Fiat Chrysler Automobiles, Docket No. EPA–HQ–OAR–2018–0283–4406 at 89; American Fuel & Petrochemical Manufacturers, Docket No. E_A–HQ–OAR–2018–0283–5648 at 34, 36. At least one recent analysis, cited by a number of commenters, has produced estimates of climate change damage that project that with respect to such matters as coastal damage, agricultural yields, energy expenditures, and mortality, California is not worse-positioned in relation to certain other areas of the U.S., and indeed is estimated to be better-positioned, particularly as regards the Southeast region of the country. *See* S. Hsiang, *et al.* ''Estimating Economic Damage from Climate Change in the United States,'' 356 Science 1362 (2017).

[279] *Cf. Ford,* 606 F.2d at 1303 n.68 (affirming EPA's refusal to allow nationwide sale of cars that meet California standards that, due to the waiver predicate that California's standards only need be as stringent as federal standards in the aggregate, were not certified as meeting national standards with respect to all pollutants) (''[Appellants] suggest to varying degrees that California is a microcosm of the entire nation and, as such, has no particularized problems the resolution of which would require emission control standards inappropriate to the rest of the country. This may or may not be completely true. The fact remains, however, that Congress expected California to be putting its interests first and there is no guarantee that those interests are congruent with the interests

would have it that the 2009 CAA section 202(a) GHG endangerment finding necessarily means California ''needs'' its own GHG program ''to meet compelling and extraordinary conditions.'' That does not follow.[280] *Cf. Utility Air Regulatory Group* v. *EPA,* 134 S. Ct. 2427 (2014) (partially reversing the GHG ''Tailoring'' Rule on grounds that the CAA section 202(a) endangerment finding for GHG emissions from motor vehicles did not compel regulation of all sources of GHG emissions under the Prevention of Significant Deterioration and Title V permit programs). 83 FR 43249.

EPA has discussed the reasons for concluding that it is appropriate to consider California's GHGs standards separately in determining whether the State needs those standards to meet compelling and extraordinary conditions, as compared to looking at its need for a motor vehicle program in general. These reasons also lead to the conclusion that California does not need these GHG standards to meet compelling and extraordinary conditions. The text, structure, and legislative history indicates that Congress's intent in the second waiver criterion, CAA section 209(b)(1)(B), was to allow California to adopt new motor vehicle standards because of compelling and extraordinary conditions in California that were causally related to local or regional air pollution levels in California. These factors—including topography and large population of motor vehicles—cause these kinds of local or regional air pollution levels in California and because of this causal link, California's motor vehicle standards can be effective mechanisms to address these local problems. Reductions outside California would lack that causal link to local or regional air quality conditions inside California.

Congress did not indicate any intent to allow California to promulgate local standards to deal with global air pollution like atmospheric concentrations of GHGs. In California's comments on the SAFE proposal, it asserted that it has a need for reductions in GHG atmospheric concentrations and therefore emissions, but the issue is not whether such reductions are needed as a matter of general policy, but whether Congress intended them to be effectuated on a State-specific basis by California through EPA granting a waiver for the GHG aspects of the State's new motor vehicle program. This type of pollution seems ill-fitted to Congress's intent to provide California with a method of handling its local air pollution concentrations and related problems with local emission control measures. EPA determines that standards regulating emissions of global pollutants like greenhouse gases were not part of the compromise envisioned by Congress in passing CAA section 209(b).[281] Moreover, even if California does have compelling and extraordinary conditions in the context of global climate change, California does not ''need'' these standards under CAA section 209(b)(1)(B) because they will not meaningfully address global air pollution problems of the sort associated with GHG emissions. As noted in the SAFE proposal, the most stringent of the regulatory alternatives considered in the 2012 final rule and FRIA (under much more optimistic assumptions about technology effectiveness), which would have required a seven percent average annual fleetwide increase in fuel economy for MYs 2017–2025 compared to MY 2016 standards, was forecast to decrease global temperatures only by 0.02 °C in 2100.[282] This conclusion was further bolstered by multiple commenters.[283] EPA therefore concludes that California's GHG and ZEV regulations do not fulfil the requirement within CAA section 209(b)(1)(B) that such regulations are ''needed'' to ''meet'' the impacts of global climate change in California, even assuming *arguendo* that those impacts do constitute ''compelling and extraordinary conditions'' within the meaning of that statutory phrase (although, to be clear, EPA is determining that those impacts do not in fact fall within that phrase's meaning). Given that Congress enacted CAA section 209(b) to provide California with a unique ability to receive a waiver of preemption, which provides California with authority that it would not otherwise have under CAA section 209, and given the specific language in CAA section 209(b)(2) pointing out the need for extraordinary and compelling conditions as a condition for the waiver, EPA determines that it is not appropriate to waive preemption for California's standards that regulate GHGs. Atmospheric concentrations of greenhouse gases are an air pollution problem that is global in nature, and this air pollution problem does not bear the same causal link to factors local to California as do local or regional air pollution problems. EPA determines that globally elevated atmospheric concentrations of GHGs and their environmental effects are not the kind of local or regional air pollution problem that fall within the scope of the ''compelling and extraordinary conditions'' encompassed by the terms of CAA section 209(b)(1)(B). As such, EPA finds that California does not need its 2021 through 2025 MY GHG-related standards to meet compelling and extraordinary conditions.[284]

of the nation as a whole.''). Here, California offers an inverse reflection of appellants' argument in *Ford,* but it is no more valid: Because it can marshal a list of climate impacts that it is experiencing, California insists it is entitled to a waiver for a state-specific program to address those impacts. *All* of California's problems and corresponding programs, under this logic, are ''particularized.'' If this were the case, no waiver request could ever be denied under CAA section 209(b)(1)(B), and Congress would much more likely have simply afforded California a blanket and automatic waiver. Congress did not do so, its choice not to do so should be respected and given meaning, and EPA in this document sets forth an interpretation and application of CAA section 209(b)(1)(B) that does so by articulating a required particularized nexus to State-specific facts which is present in the case of California's criteria vehicle emissions programs but lacking in the case of its GHG and ZEV ones.

[280] EPA notes in this regard that, even in the 2009 reversal of the 2008 waiver denial, the Agency was careful to distinguish its consideration of the waiver application from ''the issues pending before EPA under section 202(a) of the Act,'' *i.e.,* the then-pending endangerment finding. 74 FR at 32765. While EPA maintains the position that the CAA section 202(a) ''endangerment finding'' inquiry and the CAA section 209(b)(1)(B) inquiry are distinct, EPA notes that the 2009 waiver denial reversal (and the 2008 waiver denial itself) took pains to distinguish the two primarily because the Agency was at that time still considering whether to issue the endangerment finding. As EPA explains in this document, the two provisions are distinct, but the CAA section 202(a) predicate criteria for federal regulation do support the Agency's position that the CAA section 209(b)(1)(B) waiver prong is best interpreted as calling for a consideration whether the pollution problem at issue has a State-specific, particularized nexus between emissions, pollution, and impacts.

[281] Moreover, EPA is mindful that principles of equal sovereignty between the states ordinarily require '' 'exceptional conditions' prevailing in certain parts of the country [to] justif[y] extraordinary legislation otherwise unfamiliar to our federal system.'' *Northwest Austin,* 557 U.S. at 211.

[282] 83 FR 42986, 43216–43217.

[283] The George Washington University Regulatory Studies Center, Docket No. EPA–HQ–OAR–2018–0283–4028; Competitive Enterprise Institute, Docket No. NHTSA–2018–0067–12015.

[284] EPA disagrees with comments that suggest that California ''needs'' its GHG and ZEV programs ''to meet compelling and extraordinary conditions'' in the meaning of CAA section 209(b)(1)(B) because those programs are intended to reduce criteria pollutants emissions, separate and apart from their status as programs designed to address climate change. To take this position would not be in keeping with historical agency practice in reviewing California's waiver requests. Specifically, EPA practice is not to scrutinize California's criteria pollutant emissions reductions projections or air emissions benefits. Rather, EPA's view has been that these are matters left for California's judgments, especially given that Title I of the Clean Air Act imposes the obligation of NAAQS attainment planning on states. *See, e.g.,* 36 FR 17458; 78 FR 2134; 79 FR 46256, 46261 (Aug. 7, 2014). EPA's withdrawal action is premised on CARB's 2012 ACC program waiver request, which, as previously

Continued

e. No Findings Under CAA Section 209(b)(1)(C) Are Finalized at This Time

In the SAFE proposal, EPA proposed to determine, as an additional basis for the waiver withdrawal, that California's ZEV and GHG standards for new MY 2021 through 2025 are not consistent with section 202(a) of the Clean Air Act. That proposed determination was intertwined with the SAFE proposal's assessment with regard to the technological feasibility of the Federal GHG standards for MY 2021 through 2025 and the proposed revisions thereto. Because EPA and NHTSA are not at this time finalizing that assessment or taking final action on the proposal to revise the Federal standards, and because the finalized determinations under CAA section 209(b)(1)(B) and the discussion of the implications of EPCA preemption with regard to the waiver previously granted with respect to those standards set forth above are each independent and adequate grounds for the waiver withdrawal, EPA at this time is not finalizing any determination with respect to CAA section 209(b)(1)(C). EPA may do so in connection with potential future final action with regard to the Federal standards.

E. Withdrawal of Waiver

In this final action, EPA determines that the California Air Resources Board's (CARB's) regulations pertaining to greenhouse gases-related (GHG) emission standards for 2021 through 2025 model year (MY) passenger cars, light-duty trucks, and medium-duty vehicles are not needed to meet compelling and extraordinary conditions. EPA concludes that CAA section 209(b) was intended to allow California to promulgate State standards applicable to emissions from new motor vehicles to address pollution problems that are local or regional, and that have a particular nexus to emissions from vehicles in California.[285] EPA does not believe CAA section 209(b)(1)(B) was intended to allow California to promulgate State standards for emissions from new motor vehicles designed to address global climate change problems.

EPA's 2013 waiver for CARB's Advanced Clean Car Program (as it pertains to its 2021 through 2025 MY relating to greenhouse gas emissions and the ZEV mandate) is withdrawn. This is separate and apart from EPA's determination that it cannot and did not validly grant a waiver with respect to those California State measures which are preempted under NHTSA's determination in this document that EPCA preempts State GHG and ZEV programs, which, as explained above, is effective on the effective date of this joint action.

F. States Cannot Adopt California's GHG Standards Under CAA Section 177

At proposal, EPA explained that CAA section 177 provides that other States, under certain circumstances and with certain conditions, may ''adopt and enforce'' standards that are ''identical to the California standards for which a waiver has been granted for [a given] model year.'' 42 U.S.C. 7507. As a result, EPA proposed to determine that this section does not apply to CARB's GHG standards given that they are intended to address global air pollution. We also noted that the section is titled ''New motor vehicle emission standards in nonattainment areas' and that its application is limited to ''any State which has [state implementation] plan provisions approved under this part''—*i.e.,* under CAA title I part D, which governs ''Plan requirements for nonattainment areas.''

We received comments in support of and against our proposal. Commenters opposing our interpretation argued that CAA section 177 does not contain any text that could be read as limiting its applicability to certain pollutants only. They also argued that EPA has inappropriately relied on the heading for CAA section 177 to construe a statutory provision as well as arrogated authority to implement an otherwise self-implementing provision. We disagree with these commenters, conclude that the text (including both the title and main text), structural location, and purpose of the provision confirm that it does not apply to GHG standards, and are finalizing this determination as proposed.

Under the Clean Air Act, EPA establishes national ambient air quality standards (NAAQS) to protect public health and welfare and has established such ambient standards for the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, and particulate matter. As also explained at proposal, areas are only designated nonattainment with respect to criteria pollutants for which EPA has issued a NAAQS, and nonattainment State Implementation Plan (SIPs) are intended to assure that those areas attain the NAAQS.

Congress added CAA section 177 in the 1977 Clean Air Act amendments cognizant that states might need to address air pollution within their boundaries similar to California but were otherwise preempted under CAA section 209(a) from setting new motor vehicle and engine standards. *See, e.g.,* H.R. Rep. No. 294, 95th Cong., 1st Sess. 309 (1977), 1977 U.S.C.C.A.N. 1077, 1388 (explaining that the Committee ''was concerned that this preemption (section 209(a) of the Act) now interferes with legitimate police powers of States''); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 521, 527 (2d Cir. 1994) (''It was in an effort to assist those states struggling to meet federal pollution standards that Congress, . . . directed in 1977 that other states could promulgate regulations requiring vehicles sold in their state to be in compliance with California's emission standards or to 'piggyback' onto California's preemption exemption.''), *citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 309–10 (1977); *id.* at 531 (''[Section] 177 was inserted into the Act in 1977 so that states attempting to combat their own pollution problems could adopt California's more stringent emission controls.''). Relevant legislative history further identifies CAA section 177 as a means of addressing the NAAQS attainment planning requirements of CAA section 172, including the specific SIPs content and approvals criteria for EPA.[286] H.R.

discussed, only discussed the potential GHG benefits or attributes of CARB's GHG and ZEV standards program (78 FR 2114, 2130–2131). If EPA does not even scrutinize a California program's criteria pollutant emission and benefits projections when California applies for a waiver for that program *presenting it as a criteria program,* then *a fortiori* commenters' retrospective attempt to claim criteria benefits to maintain a waiver for programs that were originally presented to EPA in a waiver request that disclaimed any such benefits is not appropriate.

[285] As noted in the SAFE proposal, ''Attempting to solve climate change, even in part, through the Section 209 waiver provision is fundamentally different from that section's original purpose of addressing smog-related air quality problems.'' 83 FR 42999.

[286] The version of CAA section 172 adopted in 1977 set forth the general requirements for state plans for nonattainment areas and CAA section 172(b) set forth the ''requisite provisions'' of those plans. In drafting the provisions that would become CAA section 172(b), Congress explained that they required the Administrator, after notice and opportunity for a public hearing, to approve ''a State plan which meets the following criteria: It must identify all nonattainment areas for each pollutant. Next it must assure attainment of the national ambient air quality standard in those areas as expeditiously as practicable, but not later than December 31, 1982, for all pollutants other than photochemical oxidants. In respect to photochemical oxidants, the standard must be met as expeditiously as practicable, but not later than December 31, 1987. The plan must include a comprehensive, accurate, up-to-date inventory of actual emissions from all sources of pollutants in the area. This inventory must be revised and resubmitted every 2 years to substantiate that reasonable further progress has been achieved as a condition for permitting additional sources of pollution. Finally, the plan must identify and quantify the actual emissions which must be taken

Rep. No. 294, 95th Cong., 1st Sess. 213 (1977), 1977 U.S.C.C.A.N 1077, 1292 (''Still another element of flexibility for States that is afforded in this section is the authority for States with nonattainment areas for automotive pollutants (other than California) to adopt and enforce California new-car emission standards if adequate notice is given.'').

Contrary to commenters' assertions, therefore, the text, placement in Title I, and relevant legislative history are all indicative that CAA section 177 is in fact intended for NAAQS attainment planning and not to address global air pollution. As further explained in section D.2, GHG is a globally distributed pollutant with environmental effects that are different enough from emissions of criteria pollutants. For example, GHG emissions from fleet in California bear no more relation to GHG emissions in California than fleet in other parts of the country. Where states are now adopting standards for intents and purposes far removed from NAAQS attainment planning or more specifically directed at global air pollution, EPA as the agency charged with implementing the Clean Air Act is acting well within that role in setting out an interpretation that aligns with Congressional intent. *See Chevron U.S.A.* v. *NRDC,* 467 U.S. 837, 843 (1984) (''The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.''). This construct also comports with our reading of CAA section 209(b)(1)(B) as limiting applicability of CAA section 209(b) waiver authority to state programs that address pollutants that affect local or regional air quality and not those relating to global air pollution like GHGs.

G. Severability and Judicial Review

EPA intends that its withdrawal of the January 2013 waiver for California's GHG and ZEV programs on the basis of EPCA preemption, to take effect upon the effective date of this joint action, as set forth in subsection III.C, on the one hand, is separate and severable from its withdrawal of the January 2013 waiver for those programs on the basis of an interpretation and application of CAA section 209(b)(1)(B), beginning in model year 2021, as set forth in subsection III.D, on the other. EPA further intends that its withdrawal of the waiver with regard to California's GHG program is severable from its withdrawal of the waiver with regard to California's ZEV program. The basis for this distinction (*i.e.,* that EPA intends that its withdrawal of the waiver for California's GHG program and for its ZEV program should be severable from one another) is, as follows, twofold: (1) While EPA concludes for the reasons set forth in subsection III.D above that the ZEV program, as subjected to the January 2013 waiver and as presented to EPA by CARB in CARB's waiver application and supporting documents, is a GHG-targeting program and as such is susceptible to the interpretation and application of CAA 209(b)(1)(B) set forth above, EPA acknowledges that there are aspects to the analysis as it affects the state's ZEV program that are not applicable with respect to the state's GHG program; (2) in this final action, NHTSA expresses in section II above its intent that its determination that a State or local law or regulation of tailpipe greenhouse gas emissions from automobiles is related to fuel economy standards is severable from its determination that State or local ZEV mandates are related to fuel economy standards. EPA further intends that its determination with regard to the scope of CAA section 177 as set forth in subsection III.F above be severable from all other aspects of this joint action.

Pursuant to CAA section 307(b)(1), judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. For the reasons explained in this section, this final waiver withdrawal action is nationally applicable for purposes of CAA section 307(b)(1). To the extent a court finds this action to be locally or regionally applicable, for the reasons explained in this section, EPA determines and finds for purposes of CAA section 307(b)(1) that this final waiver withdrawal action is based on a determination of nationwide scope or effect. As also explained at proposal, CAA Section 307(b)(1) of the CAA provides in which Federal courts of appeal petitions of review of final actions by EPA must be filed. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if: (i) The Agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) such action is locally or regionally applicable, but ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.'' Additionally, we proposed to find that any final action resulting from the August 2018 SAFE proposal is based on a determination of ''nationwide scope or effect'' within the meaning of CAA section 307(b)(1). We explained that the withdrawal, when finalized, would affect persons in California and those manufacturers and/or owners/operators of new motor vehicles nationwide who must comply with California's new motor vehicle requirements. For instance, California's program provides that manufacturers may generate credits in CAA section 177 States as a means to satisfy those manufacturers' obligations to comply with the mandate that a certain percentage of their vehicles sold in California be ZEV (or be credited as such from sales in CAA section 177 States). In addition, other States have adopted aspects of California's ACC program; this decision would also affect those States and those persons in such States, which are in multiple EPA regions and federal circuits.

This final action is distinguishable from the situation faced by the D.C. Circuit in *Dalton Trucking Inc.,* v. *EPA,* 808 F.3d 875 (D.C. Cir. 2015), where the Court held that EPA's action on California's waiver request with respect to its nonroad engine program was not nationally applicable, and that EPA had not properly made and published a finding that its action was based on a determination of nationwide scope and effect. First, *Dalton Trucking* noted that no other State had ever adopted California's nonroad program, *id.* at 880; that is not the case here. Second, *Dalton Trucking* noted that the nonroad waiver final action was facially limited to fleets operating in California, *id.* at 881; the nature of the California program at issue here, with its complex credit system connected with sales in other States, is quite different. Third, *Dalton Trucking* noted that EPA in the nonroad waiver

into account by the State for purposes of deciding how to achieve reasonable further progress and assure timely attainment. Thus, the plan must consider the following factors among others: The actual emissions increases which will be allowed to result from the construction and operation of major new or modified stationary sources in the area; the actual emissions of such pollutant from unregulated sources, fugitive emissions and other uncontrolled sources; actual emissions of the pollutant from modified and existing indirect sources; actual emissions resulting from extension or elimination of transportation control measures; *actual emissions of such pollutant resulting from in-use motor vehicles* and emissions of such pollutant resulting from stationary sources to which delayed compliance orders or enforcement orders (pursuant to sec. 121 (pursuant to sec. 121 or sec 113(b)) and compliance date extension (pursuant to sec. 119) have been issued; and actual transported emissions.'' H.R. Rep. No. 294, 95th Cong., 1st Sess. 212 (1977), 1977 U.S.C.C.A.N. 1077, 1291, 1977 WL 16034 (emphasis added).

final action did not actually make and publish a finding that that final action was based on a determination of nationwide scope and effect, *id. Dalton Trucking* expressly did *not* hold, and indeed expressly disclaimed any intent to even suggest, that EPA could not have made and published such a finding in that action. *Id.* at 882. EPA in this document does so with regard to this final action, for the reasons stated above. For these reasons, this final waiver withdrawal action is nationally applicable for purposes of CAA section 307(b)(1), or, in the alternative, EPA determines and finds for purposes of CAA section 307(b)(1) that this final waiver withdrawal action is based on a determination of nationwide scope or effect. Thus, pursuant to CAA section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date such final action is published in the **Federal Register**.

IV. Regulatory Notices and Analyses

As it is relevant to many of the following discussions, it is important to clarify at the outset that this action does not finalize or otherwise affect either EPA's GHG standards or NHTSA's CAFE standards and, thus, the various impacts associated with those standards have not been considered below. Further, consistent with its past practice, EPA's withdrawal of the waiver does not add or amend regulatory text and is, therefore, subject to considerably fewer of the below discussions than NHTSA's final rule establishing regulatory text on preemption.

A. Executive Order 12866, Executive Order 13563

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, Oct. 4, 1993), as amended by Executive Order 13563, ''Improving Regulation and Regulatory Review'' (76 FR 3821, Jan. 21, 2011), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to the Office of Management and Budget (OMB) review and to the requirements of the Executive Order.

Under section 3(f) of Executive Order 12866, NHTSA's final rule has been determined to be a ''significant regulatory action,'' but not an economically significant action. EPA's withdrawal on the waiver, however, is not a rule under E.O. 12866, as consistent with the agency's historical classification of its notices and decisions related to the waiver. However, as part of its commitment to working together with NHTSA to establish a consistent Federal program for fuel economy and GHG emissions, EPA has submitted this action to the OMB for review and any changes made in response to OMB recommendations have been documented in the docket for this action. EPA's action here, however, is not a rule as defined by Executive Order 12866, consistent with its previous actions on waiver requests, and is therefore exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866. *See, e.g.,* 78 FR at 2145 (Jan. 9, 2013); 74 FR at 32784 (July 8, 2009); 73 FR at 12169 (Mar. 6, 2008).

In determining the economic impact of this action, it is important to be clear that the rule establishing new standards for the Model Years within scope of the NPRM is expected to continue to be economically significant and is, thus, anticipated, to include a full FRIA. Moreover, as EPA's action is not a rule and not subject to E.O. 12866, its consideration of costs has been limited to the role costs play under section 209. Accordingly, the following discussion only concerns the economic impact associated with NHTSA's final regulatory text clarifying its views on EPCA preemption.

As a general matter, NHTSA has determined that there may be some nonsignificant economic impact arising out of its clarification, particularly some reduction in costs, to this final rule, but the agency has not quantified any such impact in this rulemaking, which has been determined to be ''significant'' but not ''economically significant'' under Executive Order 12866. This rulemaking merely clarifies the existing statutory provisions relating to preemption that have been in effect since EPCA was enacted and does not modify any Federal requirement. As such, as in the NPRM, the agency has provided a qualitative discussion of the impacts in response to the comments, which themselves raised qualitative issues.

In the NPRM, NHTSA mentioned at a general, qualitative, level that California's currently existing GHG program and ZEV mandate lead to increased compliance costs, with some greater discussion of potential increases in costs due specifically to the ZEV mandate, which constrains an OEMs ability to meet their CAFE and GHG requirements in the most cost-effective way.

The agencies received many comments on the economic analysis as it relates to the CAFE and GHG standards, but only received a small number of comments that specifically dealt with the issue of the economic impact of the regulatory text concerning EPCA preemption. These comments, similar to how the agency addressed the issue in the NPRM, generally made qualitative and general points about the economic impact.

Many of the comments that addressed the economic impacts of preemption did so by stating that one important aspect of the ''One National Program'' established beginning in 2009 was that it would reduce regulatory cost by not allowing for the creation of different Federal and California programs, with different levels of stringency and different compliance regimes. NHTSA agrees with this concern, but this is exactly why Congress provided that any State or local law ''related to'' fuel economy is preempted. This final rule will provide more certainty on this issue than the prior approach, which would always be subject to California removing itself from the program. This is exactly what has occurred in recent months, as the State has taken action to amend the ''deemed to comply'' provision and then announced that it entered into an agreement with several automakers to apply a different set of standards on a national basis.

Various other commenters noted that the GHG program and ZEV mandate would increase compliance costs. Most of these comments only made general statements to this effect and did not provide specific or detailed information about potential costs. One commenter approvingly noted NHTSA's citation of a study that found that the ZEV mandate could potentially lead to increased costs, though the author of the cited study also commented that the cited value did not provide a complete picture of the economic effect. The agency agrees that programs such as these are likely to introduce additional costs, which, of course, was a significant part of Congress's motivation in providing NHTSA with its broad preemptive authority over fuel economy. The agency, though, like commenters, has found calculation of these costs to be challenging, as they constrain the avenues of compliance with the Federal standards without actually altering what must be, ultimately, achieved.

With regard to benefits, some commenters believed that California's GHG program and ZEV mandate could provide additional benefits, but, as with costs, these commenters did not provide detailed information about the benefits of these programs independent of the Federal standards. One commenter argued that a separate State GHG program is unlikely to have any

meaningful benefits, because of ''leakage'' from vehicles in States that adopt the California standards to vehicles in States that do not adopt this standard. Although the comment was in context of supporting the ''One National Program,'' NHTSA believes that the argument that separate State standards will have little benefit has merit. The existence of State or local laws does not in any way alter an OEM's obligation under Federal law. For instance, OEMs would likely produce more efficient vehicles for sale in California and the States that have adopted California's standards, but the increased fuel economy of these vehicles would likely be offset by less efficient vehicles produced for sale in the rest of the U.S., leading to little to no change in either fuel use or GHG emissions at a national level. Some commenters stated that the decision to preempt programs including and similar to the ZEV mandate, to the extent that those programs are related to fuel economy, would have negative benefits related to ozone-forming pollutants, though these commenters did not quantify these concerns. NHTSA notes that, as was discussed in the NPRM, California, in its 2013 waiver request, noted that the ZEV program did not provide for ozone-forming pollutants, acknowledging, ''[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions. The LEV III criteria pollutant fleet standard is responsible for those emission reductions in the fleet; the fleet would become cleaner regardless of the ZEV regulation because manufacturers would adjust their compliance response to the standard by making less polluting conventional vehicles.'' [287] NHTSA continues to believe that preemption of the programs such as the ZEV mandate will not have a significant effect, as California remains free to revise its LEV program to reduce ozone-forming emissions and seek a waiver of Clean Air Act preemption from EPA, as described above, while not violating NHTSA's preemption authority, and other States and local governments would continue to be allowed to take other actions so long as those are not related to fuel economy and are consistent with any other relevant Federal law.

The comments, therefore, reaffirm NHTSA's preliminary determination that State and Local programs including, and similar to, California's GHG and ZEV programs are likely to lead to increased compliance costs and highly uncertain, if any, benefits because they constrain the ability of OEMs to meet the Federal standard without in anyway altering their obligations under that standard. Further, the agency's decision that State or local laws such as the GHG program and ZEV mandate should be preempted is not based on any evaluation of the policy or other merits of either program, but simply the fact that these programs are clearly related to fuel economy.

B. DOT Regulatory Policies and Procedures

The final rule is also significant within the meaning of the Department of Transportation's Order 2100.6, ''Policies and Procedures for Rulemakings.'' Regulatory Policies and Procedures.

C. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

NHTSA's final rule is expected to be an E.O. 13771 deregulatory action, but NHTSA has not estimated any quantifiable cost savings. EPA's withdrawal is not a regulatory action and thus outside the scope of E.O. 13771.

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this action as not a ''major rule'', as defined by 5 U.S.C. 804(2). The EPA and NHTSA will submit a rule report to each House of the Congress and to the Comptroller General of the United States.

E. Executive Order 13211 (Energy Effects)

Executive Order 13211 applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. If the regulatory action meets either criterion, the agencies must evaluate the adverse energy effects of the proposed rule and explain why the proposed regulation is preferable to other potentially effective and reasonably feasible alternatives considered. NHTSA's final rule is not subject to E.O. 13211 because it is not economically significant and is not a significant energy action. As discussed in the E.O. 12866 section, NHTSA's final rule merely clarifies the contours of its existing preemption authority and does not in any way change the existing fuel economy standards. As EPA's withdrawal is not within the scope of E.O. 12866, it is also not within scope of E.O. 13211.

F. Environmental Considerations

1. National Environmental Policy Act

The National Environmental Policy Act (NEPA) [288] directs that Federal agencies proposing ''major Federal actions significantly affecting the quality of the human environment'' must, ''to the fullest extent possible,'' prepare ''a detailed statement'' on the environmental impacts of the proposed action (including alternatives to the proposed action).[289] Concurrently with the NPRM, NHTSA released a Draft Environmental Impact Statement (Draft EIS) pursuant to NEPA and implementing regulations issued by the Council on Environmental Quality (CEQ), 40 CFR part 1500, and NHTSA, 49 CFR part 520. NHTSA prepared the Draft EIS to analyze and disclose the potential environmental impacts of the proposed CAFE standards and a range of alternatives (largely varying in terms of stringency). NHTSA considered the information contained in the Draft EIS as part of developing its proposal and made the Draft EIS available for public comment. For the final rule on the standards for model year 2021 through 2026 automobiles proposed in the NPRM, NHTSA will simultaneously issue a Final EIS and Record of Decision, pursuant to 49 U.S.C. 304a(b) and U.S. Department of Transportation *Guidance on the Use of Combined Final Environmental Impact Statements/ Records of Decision and Errata Sheets in National Environmental Policy Act Reviews* (April 25, 2019),[290] unless it is determined that statutory criteria or practicability considerations preclude simultaneous issuance.

NHTSA has not prepared a separate environmental analysis pursuant to NEPA for this final action on preemption. This final rule provides clarity on the scope of EPCA's preemption provision. Ultimately, the determination of whether a particular State or local law is preempted under EPCA is not determined based upon its environmental impact but solely whether it is ''related to fuel economy standards or average fuel economy standards.'' Any preemptive effect

[287] Docket No. EPA–HQ–OAR–2012–0562, PP. 15–16.

[288] 42 U.S.C. 4321–4347.

[289] 42 U.S.C. 4332. EPA is expressly exempted from the requirements of NEPA for actions under the Clean Air Act. 15 U.S.C. 793(c)(1).

[290] *https://www.transportation.gov/sites/dot.gov/files/docs/mission/transportation-policy/permittingcenter/337371/feis-rod-guidance-final-04302019.pdf.*

resulting from this final action is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute. NHTSA does not have authority to waive any aspect of EPCA preemption no matter the potential environmental impacts; rather, preempted standards are void *ab initio.* Courts have long held that NEPA does not apply to nondiscretionary actions by Federal agencies.[291] As NHTSA lacks discretion over EPCA's preemptive effect, the Agency concludes that NEPA does not apply to this action.

It bears noting that this action only concerns the question of preemption; it does not set CAFE standards. Fundamentally, this action is about which sovereign entity (*i.e.,* the Federal government or State governments) can issue standards that relate to fuel economy. EPCA is clear that this authority is restricted to the Federal government. This action provides guidance on the boundary set by Congress, as well as under principles of implied preemption. NHTSA's regulation concerning EPCA preemption is independent and severable from any particular CAFE standards adopted by NHTSA, and this action, in and of itself, is not expected to have significant environmental impacts on a national scale. As described above, OEMs would likely produce more efficient vehicles for sale in California and the States that have adopted California's standards, but the increased fuel economy of these vehicles would likely be offset by less efficient vehicles produced for sale in the rest of the U.S., leading to little to no change in either fuel use or GHG emissions at a national level. In fact, as NHTSA has not finalized any action to amend the fuel economy standards that were promulgated in 2012, California's ''deemed to comply'' provision remains operative. As OEMs are anticipated to make use of this compliance mechanism, CARB's GHG standards are functionally identical to Federal standards, and their preemption would not result in additional environmental impacts. Furthermore, as was discussed in the NPRM, California, in its 2013 waiver request, noted that the ZEV program did not provide for ozone-forming pollutants, acknowledging, ''[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions. The LEV III criteria pollutant fleet standard is responsible for those emission reductions in the fleet; the fleet would become cleaner regardless of the ZEV regulation because manufacturers would adjust their compliance response to the standard by making less polluting conventional vehicles.'' [292] Ultimately NHTSA will address potential environmental impacts of fuel economy standards in its forthcoming Final EIS that will accompany the final rule on the standards for model year 2021 through 2026 automobiles proposed in the NPRM. This action, however, does not result in significant environmental impacts to the quality of the human environment.

NHTSA intends to fully respond to all substantive comments received on the Draft EIS in the forthcoming Final EIS, consistent with CEQ regulations. NHTSA received numerous public comments on the Draft EIS that related to the revocation of California's waiver and EPCA preemption. The following summarizes and briefly addresses those comments.

Multiple commenters called NHTSA's DEIS inadequate because it did not analyze an alternative that would keep the California waiver and regulations (as well as similar regulations adopted in the District of Columbia and other States pursuant to section 177 of the CAA) in place.[293] On the other hand, one commenter noted its support for the proposition that NHTSA is not obligated under NEPA to consider a scenario that it believes Federal law does not permit.[294] As described above, NHTSA concludes that NEPA does not apply to this final rule regarding preemption. Based on this conclusion, it is immaterial whether NHTSA analyzed an alternative that would keep the California waiver and regulations in place. NHTSA lacks the discretion and authority to select such an alternative as a State or local law or regulation related to automobile fuel economy standards is void *ab initio* under the preemptive force of EPCA.

One commenter criticized NHTSA for failing to consider the criteria pollutant impacts of alternatives that keep the waiver in place and that account for California's specific electricity grid.[295] That commenter also criticized NHTSA for not fully accounting for the impacts to NO_X emissions in the South Coast Air Basin as a result of revoking the waiver.[296] Another commenter noted that the nine areas NHTSA identified as suffering from ''serious'' or ''extreme'' nonattainment conditions for ozone and $PM_{2.5}$ are located in California, even though the agencies proposed to revoke or declare preempted the State's Clean Air Act waiver for GHG emissions and the State's ZEV mandate.[297] One commenter wrote that NHTSA should consider and discuss the local impacts that preempting the ZEV mandate would have on localities where ZEV sales are currently concentrated and where they will likely concentrate in the future, and particularly in California and the other States that have adopted the ZEV mandate pursuant to section 177 of the CAA.[298] While these comments are more specific about identifying potential environmental impacts, these impacts simply do not bear on the question of whether or how preemption applies. Preemption relies solely on whether the State or local law or regulation is ''related to fuel economy standards or average fuel economy standards.'' Therefore, NHTSA is not obligated to analyze or consider these environmental impacts as part of this final rule.

One commenter noted that if California's waiver is revoked, the State would be unable to address pollution issues through adoption of California's or its own standards, making it difficult to attain or maintain compliance with the Clean Air Act.[299] Another State alleged that it depends on the criteria pollutant and air toxic emission reduction co-benefits of the State's use of section 177 motor vehicle emissions standards as a control strategy in its State Implementation Plan to meet its

[291] *See, e.g., Department of Transp.* v. *Public Citizen,* 541 U.S. 752 (2004); *Milo Cmty. Hosp.* v. *Weinberger,* 525 F.2d 144 (1st Cir. 1975); *State of South Dakota* v. *Andrus,* 614 F.2d 1190 (8th Cir. 1980); *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.,* 267 F.3d 1144 (D.C. Cir. 2001); *Sierra Club* v. *Babbitt,* 65 F.3d 1502 (9th Cir. 1995).

[292] Docket No. EPA–HQ–OAR–2012–0562, Pp. 15–16. California's LEV III criteria pollution standard would not be preempted under this action.

[293] Center for Biological Diversity, Earthjustice, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Safe Climate Campaign, Sierra Club, Southern Environmental Law Center, and Union of Concerned Scientists, Docket No. NHTSA–2017–0069–0550; South Coast Air Quality Management District, Docket Nos. NHTSA–2017–0069–0532 and NHTSA–2017–0069–0497; Blanca Luevanos, Docket No. NHTSA–2017–0069–0508; National Coalition for Advanced Transportation, Docket No. NHTSA–2017–0069–0597; California Office of the Attorney General et al., Docket No. NHTSA–2017–0069–0625.

[294] Alliance of Automobile Manufacturers, Docket No. NHTSA–2017–0069–0588.

[295] South Coast Air Quality Management District, Docket No. NHTSA–2017–0069–0497.

[296] South Coast Air Quality Management District, Docket No. NHTSA–2017–0069–0497.

[297] Center for Biological Diversity, Earthjustice, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Safe Climate Campaign, Sierra Club, Southern Environmental Law Center, and Union of Concerned Scientists, Docket No. NHTSA–2017–0069–0550.

[298] New York State Department of Environmental Conservation, NHTSA–2017–0069–0608.

[299] Boulder County Public Health, Docket No. NHTSA–2017–0069–0499.

SIP.[300] NHTSA disagrees with the underlying premise of the comments. States and local governments are able to continue to encourage ZEVs in many different ways, such as through investments in infrastructure and appropriately tailored incentives. States and local governments cannot adopt or enforce regulations related to fuel economy standards, which include ZEV mandates, but they are able to address pollutants regulated by the Clean Air Act in numerous ways that are not preempted by Federal law. Moreover, as noted above, this action does not impact in any way the Federal standards in place for greenhouse gas emissions from automobiles and fuel economy standards. Since California and other section 177 States have ''deemed'' compliance with the Federal standards to be compliance with the State standards, this action does not have significant environmental impacts to the quality of the human environment. Any impacts associated with potential changes to Federal standards are not a result of this action and are purely speculative until the agencies finalize a change.

2. Clean Air Act Conformity Requirements as Applied to NHTSA's Action

The Clean Air Act (42 U.S.C. 7401 *et seq.*) is the primary Federal legislation that addresses air quality. Under the authority of the Clean Air Act and subsequent amendments, EPA has established NAAQS for six criteria pollutants, which are relatively commonplace pollutants that can accumulate in the atmosphere as a result of human activity. The air quality of a geographic region is usually assessed by comparing the levels of criteria air pollutants found in the ambient air to the levels established by the NAAQS (taking into account, as well, the other elements of a NAAQS: Averaging time, form, and indicator). These ambient concentrations of each criteria pollutant are compared to the levels, averaging time, and form specified by the NAAQS in order to assess whether the region's air quality is in attainment with the NAAQS. When the measured concentrations of a criteria pollutant within a geographic area are below those permitted by the NAAQS, EPA designates the region as an attainment area for that pollutant, while areas where concentrations of criteria pollutants exceed Federal standards (or nearby areas that contribute to such concentrations) are designated as nonattainment areas. Former nonattainment areas that come into compliance with the NAAQS and are redesignated as attainment are known as maintenance areas. When EPA revises a NAAQS, each State is required to develop and implement a State Implementation Plan (SIP) to address how it plans to attain and maintain the new standard. Each State with a nonattainment area is also required to submit a SIP documenting how the region will reach attainment levels within time periods specified in the Clean Air Act. For maintenance areas, the SIP must document how the State intends to maintain compliance with the NAAQS.

No Federal agency may ''engage in, support in any way or provide financial assistance for, license or permit, or approve'' any activity in a nonattainment or maintenance area that does not ''conform'' to a SIP or Federal Implementation Plan after EPA has approved or promulgated it.[301] Further, no Federal agency may ''approve, accept or fund'' any transportation plan, program, or project developed pursuant to title 23 or chapter 53 of title 49, U.S.C., in a nonattainment or maintenance area unless the plan, program, or project has been found to ''conform'' to any applicable implementation plan in effect.[302] The purpose of these conformity requirements is to ensure that Federally sponsored or conducted activities do not interfere with meeting the emissions targets in SIPs, do not cause or contribute to new violations of the NAAQS, and do not impede the ability of a State to attain or maintain the NAAQS or delay any interim milestones. EPA has issued two sets of regulations to implement the conformity requirements:

(1) The Transportation Conformity Rule[303] applies to transportation plans, programs, and projects that are developed, funded, or approved under title 23 or chapter 53 of title 49, U.S.C.

(2) The General Conformity Rule[304] applies to all other federal actions not covered under transportation conformity. The General Conformity Rule establishes emissions thresholds, or de minimis levels, for use in evaluating the conformity of an action that results in emissions increases.[305] If the net increases of direct and indirect emissions are lower than these thresholds, then the project is presumed to conform and no further conformity evaluation is required. If the net increases of direct and indirect emissions exceed any of these thresholds, and the action is not otherwise exempt,[306] then a conformity determination is required. The conformity determination can entail air quality modeling studies, consultation with EPA and state air quality agencies, and commitments to revise the SIP or to implement measures to mitigate air quality impacts.

This action is not developed, funded, or approved under title 23 or chapter 53 of title 49, U.S.C. Accordingly, this action is not subject to transportation conformity. Under the General Conformity Rule, a conformity determination is required when a Federal action would result in total direct and indirect emissions of a criteria pollutant or precursor originating in nonattainment or maintenance areas equaling or exceeding the rates specified in 40 CFR 93.153(b)(1) and (2), and the action is not otherwise exempt. As explained below, NHTSA's action results in neither direct nor indirect emissions as defined in 40 CFR 93.152.

The General Conformity Rule defines direct emissions as ''those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.'' [307] NHTSA's action is to promulgate regulatory text and a detailed appendix, in addition to discussing the issue in this preamble to the rule, specifically to provide clarity on EPCA's preemption provision in order to give already established standards meaning, and thus is specifically exempt from general conformity requirements.[308] Moreover, this action would cause no direct emissions consistent with the meaning of the General Conformity Rule.[309] Any changes in emissions that could occur as a result of preemption would happen well after and in a different place from the promulgation of this rule. Furthermore, any such changes in emissions—especially those occurring in specific nonattainment or maintenance areas—are not reasonably foreseeable. Any such changes are

[300] Oregon Department of Environmental Quality, Docket No. NHTSA–2017–0069–0526.

[301] 42 U.S.C. 7506(c)(1) and (5).

[302] 42 U.S.C. 7506(c)(2) and (5).

[303] 40 CFR part 51, subpart T, and part 93, subpart A.

[304] 40 CFR part 93, subpart B.

[305] 40 CFR 93.153(b).

[306] 40 CFR 93.153(c).

[307] 40 CFR 93.152.

[308] 40 CFR 93.153(c)(2)(iii).

[309] *Department of Transp.* v. *Public Citizen,* 541 U.S. 752, 772 (2004) (''[T]he emissions from the Mexican trucks are not 'direct' because they will not occur at the same time or at the same place as the promulgation of the regulations.'').

unlikely because this action does not impact in any way the Federal standards in place for criteria pollutant emissions from automobiles. Further, this action does not impact the Federal standards in place for greenhouse gas emissions from automobiles or fuel economy standards. Since California and other section 177 States have ''deemed'' compliance with the Federal standards to be compliance with the State standards, it is not clear that this action (as it pertains to the State's greenhouse gas emissions standards) would result in changes to the anticipated fleet of vehicles in those States and therefore to criteria pollutant emissions. Any impacts associated with potential changes to Federal standards are not a result of this action and are purely speculative until the agencies finalize a change. Additionally, we note California's statement in its 2013 waiver request that ''[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions. The LEV III criteria pollutant fleet standard is responsible for those emission reductions in the fleet . . . .'' [310] As discussed previously, this action clarifies that criteria pollutant standards are not preempted unless they have a direct or substantial relationship to fuel economy standards. California's LEV III criteria pollution standard would not be preempted under this approach.

Indirect emissions under the General Conformity Rule are ''those emissions of a criteria pollutant or its precursors: (1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action; (2) That are reasonably foreseeable; (3) That the agency can practically control; and (4) For which the agency has continuing program responsibility.'' [311] Each element of the definition must be met to qualify as indirect emissions. NHTSA finds that neither of the first two criteria are satisfied for the same reasons as presented regarding direct emissions.

Furthermore, NHTSA cannot practically control, nor does it have continuing program responsibility for, any emissions that could occur as a result of preemption. ''[E]ven if a Federal licensing, rulemaking, or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a Federal agency can practically control any resulting emissions.'' [312] With regard to preemption, NHTSA lacks the discretion and authority to keep the California waiver and regulations in place, as a State or local law or regulation related to automobile fuel economy standards is void *ab initio* under the preemptive force of EPCA. NHTSA cannot be considered to practically control or have continuing program responsibility for emissions that could result from preemption when that result is required by Federal statute.[313] NHTSA also does not have continuing program responsibility for emissions that occur in California and other section 177 States, are regulated by the Clean Air Act, and for which the States and local governments can continue to address in numerous ways that do not conflict with Federal law.

For the foregoing reasons, this action does not cause direct or indirect emissions under the General Conformity Rule, and a general conformity determination is not required. NHTSA will address any responsibilities under the General Conformity Rule as it pertains to potential changes to the fuel economy standards in the forthcoming final rule for that action.

3. Endangered Species Act

Under Section 7(a)(2) of the Endangered Species Act (ESA), Federal agencies must ensure that actions they authorize, fund, or carry out are ''not likely to jeopardize the continued existence'' of any Federally listed threatened or endangered species or result in the destruction or adverse modification of the designated critical habitat of these species. 16 U.S.C. 1536(a)(2). If a Federal agency determines that an agency action may affect a listed species or designated critical habitat, it must initiate consultation with the appropriate Service—the U.S. Fish and Wildlife Service (FWS) of the Department of the Interior (DOI) and/or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service of the Department of Commerce (together, ''the Services''), depending on the species involved—in order to ensure that the action is not likely to jeopardize the species or destroy or adversely modify designated critical habitat. *See* 50 CFR 402.14. Under this standard, the Federal agency taking action evaluates the possible effects of its action and determines whether to initiate consultation. *See* 51 FR 19926, 19949 (June 3, 1986).

Pursuant to Section 7(a)(2) of the ESA, the agencies have reviewed this action and have considered applicable ESA regulations, case law, and guidance to determine what, if any, obligations the agencies have under the ESA. The agencies have considered issues related to emissions of CO_2 and other GHGs and issues related to non-GHG emissions. Based on this assessment, the agencies have determined that their actions (withdrawal of California's waiver and the final rule regarding preemption) do not require consultation under Section 7(a)(2) of the ESA.

a. The Agencies Lack Discretionary Authority

NHTSA's final rule adopts regulatory text (including a detailed appendix) regarding EPCA's preemption provision, in addition to discussing the issue in this preamble to the rule, specifically to provide needed clarity on that provision. The new regulatory text provides for why any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly and impliedly preempted by EPCA. Any preemptive effect resulting from this final action is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute. NHTSA does not have authority to waive any aspect of EPCA preemption no matter the potential impacts; rather, preempted standards are void *ab initio.*

EPA's action is to withdraw the waiver it had previously provided in January 2013 to California for that State's GHG and ZEV programs under section 209 of the Clean Air Act. This action is being undertaken on two separate and independent grounds. First, EPA has determined EPCA preemption renders its prior grant of a waiver for those aspects of California's regulations that EPCA preempts invalid, null, and void, thereby necessitating withdrawal of the waiver. Second, EPA concludes that CAA section 209(b)(1)(B), which provides that EPA shall not issue a waiver if California does not ''need'' separate state standards ''to meet compelling and extraordinary conditions,'' was not intended to allow California to promulgate State standards for emissions from new motor vehicles designed to address global climate change problems. Therefore, California does not meet the necessary criteria to receive a waiver for these aspects of its program. Similar to NHTSA, these decisions are not discretionary, but rather reflect EPA's conclusion that EPCA preemption and the requirements

[310] Docket No. EPA–HQ–OAR–2012–0562, pp. 15–16.

[311] 40 CFR 93.152.

[312] 40 CFR 93.152.

[313] *See Public Citizen,* 541 U.S. at 772–3.

of the Clean Air Act prohibit the granting of a waiver to California.

The Supreme Court has held that Section 7(a)(2) of the ESA and its implementing regulations apply only to actions in which there is discretionary Federal authority.[314] In *National Association of Home Builders,* EPA considered the requirement of Section 402(b) of the Clean Water Act that EPA transfer certain permitting powers to State authorities upon an application and a showing that nine specified criteria had been met. The Court concluded that the ESA did not operate as a ''tenth criterion.'' [315] According to the Court: ''While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out [the] enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in the text of [the statute] authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.'' [316]

The agencies believe this holding applies to the instant action as well. As this action results from nondiscretionary authorities, the Section 7(a)(2) implementing regulations expressly exclude them from coverage. Neither ECPA nor the Clean Air Act include the protection of threatened or endangered species as a consideration for the application of preemption (which operates by statute) or the prohibition on the granting of a waiver (under the enumerated statutory criterion in CAA section 209(b)(1)(B)). Although there is some judgment in considering the application of EPCA and the CAA, neither action involves the type of discretion that would require a Section 7(a)(2) consultation by the agencies with the Services.

b. Any Effects Resulting From the Agencies' Actions Are too Attenuated for Consultation To Be Required

In addition, the agencies have considered the potential effects of this action to listed threatened or endangered species or designated critical habitat of these species and concludes that any such effects are too attenuated to require Section 7(a)(2) consultation. The agencies base this conclusion both on the language of the Section 7(a)(2) implementing regulations and on the long history of actions and guidance provided by DOI.

The Section 7(a)(2) implementing regulations require consultation if a Federal agency determines its action ''may affect'' listed species or critical habitat.[317] The Services' current regulations define ''effects of the action'' in relevant part as ''the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.'' [318] Further, they define indirect effects as ''those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.'' [319]

The Services' recently published final rule revising the definition of ''effects of the action'' to be ''all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.'' [320] In the preamble to the final rule, the Services emphasized that the ''but for'' test and ''reasonably certain to occur'' are not new or heightened standards.[321] In this context, '''but for' causation means that the consequence in question would not occur if the proposed action did not go forward . . . . In other words, if the agency fails to take the proposed action and the activity would still occur, there is no 'but for' causation. In that event, the activity would not be considered an effect of the action under consultation.'' [322] As the Services do not consider these to be changes in their longstanding application of the ESA, these interpretations apply equally under the existing regulations (which are effective through September 25, 2019) and the new regulations (which are effective beginning September 26, 2019).

Any potential effects of this action to threatened or endangered species or designated critical habitat would be a result of changes to GHG or criteria air pollutant emissions. In the next section, the agencies discuss why this action is not anticipated to result in changes to GHG or criteria air pollutant emissions. However, even if such changes to emissions were to occur, the agencies do not believe resulting impacts to listed species or critical habitat satisfy the ''but for'' test or are ''reasonably certain to occur.''

GHG emissions are relevant to Section 7(a)(2) consultation because of the potential impacts of climate change on listed species or critical habitat. For example, one comment to the NPRM documented the potential impacts of climate change on federally protected species and included a five-page table of species listed during 2006 to 2015 for which the commenters claim climate change was a listing factor.[323] However, the agencies believe this comment inappropriately attributes the entire issue of climate change, including all GHG emissions no matter which sector generated them, to NHTSA and EPA's actions.[324] In fact, the commenter demonstrates the very issue with doing so: There is no ''but for'' causation associated with EPA's revocation of California's waiver and NHTSA's final rule on preemption, as the impacts of climate change will occur regardless of this action. Furthermore, even if this action results in changes to GHG emissions, such changes would be extremely small compared to global GHG emissions. There is no scientific evidence that sufficiently ''connects the dots'' between those changes in emissions and any particular impact to a listed species or critical habitat; thus, any impacts are not ''reasonably certain to occur.'' States (such as California) and local governments may also continue to encourage ZEVs in numerous ways that do not conflict with

[314] *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 551 U.S. 644, 673 (2007) (''Applying *Chevron,* we defer to the Agency's reasonable interpretation of ESA [section] 7(a)(2) as applying only to 'actions in which there is discretionary Federal involvement or control.' '' (quoting 50 CFR 402.03)).

[315] *National Ass'n of Home Builders,* 551 U.S. at 649.

[316] *Id.* at 671.

[317] 50 CFR 402.14(a). The Departments of the Interior and Commerce recently issued a final rule revising the regulations governing the ESA Section 7 consultation process. 84 FR 44966 (Aug. 27, 2019). The new regulations take effect on September 26, 2019. As discussed in the text above, the agencies do not believe that the change in regulations has any effect on the agencies' analysis here.

[318] 50 CFR 402.02.

[319] *Id.*

[320] 50 CFR 402.02, as amended by 84 FR 44976, 45016 (Aug. 27, 2019) (effective Sept. 26, 2019).

[321] 84 FR at 44977 (''As discussed in the proposed rule, the Services have applied the 'but for' test to determine causation for decades. That is, we have looked at the consequences of an action and used the causation standard of 'but for' plus an element of foreseeability (*i.e.,* reasonably certain to occur) to determine whether the consequence was caused by the action under consultation.'').

[322] *Id.*

[323] Center for Biological Diversity, Sierra Club, and Public Citizen, Inc., Docket No. NHTSA–2018–0067–12378.

[324] *See, e.g.,* 78 FR 11766, 11785 (Feb. 20, 2013) (''Without the requirement of a causal connection between the action under consultation and effects to species, literally every agency action that contributes GHG emissions to the atmosphere would arguably result in consultation with respect to every listed species that may be affected by climate change.'').

Federal law, which may also prevent any alleged impact from these actions.

Similarly, with regard to criteria air pollutants, States are still subject to the Clean Air Act, which requires limitations on emissions of those pollutants. Furthermore, since California and other Section 177 States have ''deemed'' compliance with the Federal standards to be compliance with the State standards, it is not clear that this action would result in changes to emissions. Any impacts associated with potential changes to Federal standards are not a result of this action and are purely speculative until the agencies finalize a change. We again note California's statement in its 2013 waiver request that ''[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank-to-wheel or TTW) emissions. The LEV III criteria pollutant fleet standard is responsible for those emission reductions in the fleet . . . .'' [325] As discussed previously, this action clarifies that criteria pollutant standards are not preempted unless they have a direct or substantial relationship to fuel economy standards. California's LEV III criteria pollution standard would not be preempted under this approach, and that program's benefits are anticipated to remain in place.

The agencies have also considered the long history of actions and guidance provided by DOI. To that point, the agencies incorporate by reference Appendix G of the MY 2012–2016 CAFE standards EIS.[326] That analysis relied on the significant legal and technical analysis undertaken by FWS and DOI. Specifically, NHTSA looked at the history of the Polar Bear Special Rule and several guidance memoranda provided by FWS and the U.S. Geological Survey. Ultimately, FWS concluded that a causal link could not be made between GHG emissions associated with a proposed Federal action and specific effects on listed species; therefore, no Section 7(a)(2) consultation would be required.

Subsequent to the publication of that Appendix, a court vacated the Polar Bear Special Rule on NEPA grounds, though it upheld the ESA analysis as having a rational basis.[327] FWS subsequently issued a revised Final Special Rule for the Polar Bear.[328] In that final rule, FWS provided that for ESA section 7, the determination of whether consultation is triggered is narrow and focused on the discrete effect of the proposed agency action. FWS wrote, ''[T]he consultation requirement is triggered only if there is a causal connection between the proposed action and a discernible effect to the species or critical habitat that is reasonably certain to occur. One must be able to 'connect the dots' between an effect of a proposed action and an impact to the species and there must be a reasonable certainty that the effect will occur.'' [329] The statement in the revised Final Special Rule is consistent with the prior guidance published by FWS and remains valid today.[330] Ultimately, EPA and NHTSA are not able to make a causal link for purposes of Section 7(a)(2) that would ''connect the dots'' between this action, vehicle emissions from motor vehicles affected by this action, climate change, and particular impacts to listed species or critical habitats. Therefore, no Section 7(a)(2) consultation is required.

c. The Agencies' Actions Would Have No Effect on Listed Species and Designated Critical Habitat

In addition to the foregoing a Section 7(a)(2) consultation is not required because this action will have no effect on a listed species or designated critical habitat. This notification and final rule only address the issues of California's waiver and preemption; they do not set CAFE standards. Fundamentally, this action is about which sovereign entity (*i.e.,* the Federal government or State governments) can issue standards that relate to fuel economy. EPCA is clear that this authority is restricted to the Federal government. This action provides clarity on the boundary set by Congress, as well as under principles of implied preemption.

As previously described, absent this action, OEMs would likely produce more efficient vehicles for sale in California and the States that have adopted California's standards, but the increased fuel economy of these vehicles would likely be offset by less efficient vehicles produced for sale in the rest of the U.S., leading to little to no change in either fuel use or GHG emissions at a national level. Further, as EPA and NHTSA have not finalized any action to amend the Federal GHG and fuel economy standards that were promulgated in 2012, California's ''deemed to comply'' provision remains operative. As OEMs are anticipated to make use of this compliance mechanism, CARB's GHG standards are functionally identical to Federal standards, and their preemption would not result in additional environmental impacts. Any impacts associated with potential changes to Federal standards are not a result of this action and are purely speculative until the agencies finalize a change.

Finally, we again note California's 2013 waiver request statement that there is no criteria emissions benefit associated with the ZEV program because the LEV III criteria pollution standard is responsible for those emissions reductions. This action clarifies that criteria pollutant standards are not preempted unless they have a direct or substantial relationship to fuel economy standards. California's LEV III criteria pollution standard would not be preempted under this approach. Therefore, those benefits are anticipated to remain in place.

For the foregoing reasons, automobile emissions are not anticipated to change as a result of this action. Even if they do, any change would be so minimal as to be unlikely to pose any effects on a listed species or critical habitat. Because any effect on a listed species or critical habitat is not reasonably certain to occur, the agencies conclude that there will be no effect on listed species or critical habitat under the Section (7)(a)(2) implementing regulations, and no Section 7(a)(2) consultation is required for this action.

4. National Historic Preservation Act (NHPA)

The NHPA (54 U.S.C. 300101 *et seq.*) sets forth government policy and procedures regarding ''historic properties''—that is, districts, sites, buildings, structures, and objects included on or eligible for the National Register of Historic Places. Section 106 of the NHPA requires federal agencies to ''take into account'' the effects of their actions on historic properties.[331] The agencies conclude that the NHPA is not applicable to this action because a rule regarding the preemption of State laws and a decision to revoke California's waiver are not the type of activities that have the potential to cause effects on historic properties. This conclusion is supported by the lack of discretion over

[325] Docket No. EPA–HQ–OAR–2012–0562, pp. 15–16.

[326] Available on NHTSA's Corporate Average Fuel Economy website *https://one.nhtsa.gov/Laws-&-Regulations/CAFE-%E2%80%93-Fuel-Economy/Final-EIS-for-CAFE-Passenger-Cars-and-Light-Trucks,-Model-Years-2012%E2%80%932016.*

[327] *In re: Polar Bear Endangered Species Act Listing and Section 4(D) Rule Litigation,* 818 F. Supp. 2d 214 (D.D.C. Oct. 17, 2011).

[328] 78 FR 11766 (Feb. 20, 2013).

[329] 78 FR at 11784–11785.

[330] *See* DOI Solicitor's Opinion No. M–37017, ''Guidance on the Applicability of the Endangered Species Act Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases'' (Oct. 3, 2008).

[331] Section 106 is now codified at 54 U.S.C. 306108. Implementing regulations for the Section 106 process are located at 36 CFR part 800.

preemption and the underlying justification for the withdrawal of the waiver to California, the fact that any causal relationship between effects on historic properties as a result of emissions from the sale and operation of motor vehicles in California and section 177 States and this action are too attenuated, and the conclusion that impacts are not reasonably foreseeable.[332]

5. Fish and Wildlife Conservation Act (FWCA)

The FWCA (16 U.S.C. 2901 *et seq.*) provides financial and technical assistance to States for the development, revision, and implementation of conservation plans and programs for nongame fish and wildlife. In addition, the Act encourages all Federal departments and agencies to utilize their statutory and administrative authorities to conserve and to promote conservation of nongame fish and wildlife and their habitats. The agencies conclude that the FWCA is not applicable to this action because it does not involve the conservation of nongame fish and wildlife and their habitats.

6. Coastal Zone Management Act (CZMA)

The Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*) provides for the preservation, protection, development, and (where possible) restoration and enhancement of the nation's coastal zone resources. Under the statute, States are provided with funds and technical assistance in developing coastal zone management programs. Each participating State must submit its program to the Secretary of Commerce for approval. Once the program has been approved, any activity of a Federal agency, either within or outside of the coastal zone, that affects any land or water use or natural resource of the coastal zone must be carried out in a manner that is consistent, to the maximum extent practicable, with the enforceable policies of the State's program.[333]

The agencies conclude that the CZMA is not applicable to this action because it does not involve an activity within, or outside of, the nation's coastal zones that affects any land or water use or natural resource of the coastal zone. This conclusion is supported by the lack of discretion over preemption and the underlying justification for the withdrawal of the waiver to California, the fact that any causal relationship between effects on coastal zones as a result of emissions from the sale and operation of motor vehicles in California and section 177 States and this action are too attenuated, and the conclusion that impacts are not reasonably foreseeable.[334]

7. Floodplain Management (Executive Order 11988 and DOT Order 5650.2)

These Orders require Federal agencies to avoid the long- and short-term adverse impacts associated with the occupancy and modification of floodplains, and to restore and preserve the natural and beneficial values served by floodplains. Executive Order 11988 also directs agencies to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains through evaluating the potential effects of any actions the agency may take in a floodplain and ensuring that its program planning and budget requests reflect consideration of flood hazards and floodplain management. DOT Order 5650.2 sets forth DOT policies and procedures for implementing Executive Order 11988. The DOT Order requires that the agency determine if a proposed action is within the limits of a base floodplain, meaning it is encroaching on the floodplain, and whether this encroachment is significant. If significant, the agency is required to conduct further analysis of the proposed action and any practicable alternatives. If a practicable alternative avoids floodplain encroachment, then the agency is required to implement it.

In this action, the agencies are not occupying, modifying and/or encroaching on floodplains. The agencies, therefore, conclude that the Orders are not applicable to this action.

8. Preservation of the Nation's Wetlands (Executive Order 11990 and DOT Order 5660.1a)

These Orders require Federal agencies to avoid, to the extent possible, undertaking or providing assistance for new construction located in wetlands unless the agency head finds that there is no practicable alternative to such construction and that the proposed action includes all practicable measures to minimize harms to wetlands that may result from such use. Executive Order 11990 also directs agencies to take action to minimize the destruction, loss or degradation of wetlands in ''conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.'' DOT Order 5660.1a sets forth DOT policy for interpreting Executive Order 11990 and requires that transportation projects ''located in or having an impact on wetlands'' should be conducted to assure protection of the Nation's wetlands. If a project does have a significant impact on wetlands, an EIS must be prepared.

In this action, the agencies are not undertaking or providing assistance for new construction located in wetlands and conclude that these Orders do not apply to this action.

9. Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act (BGEPA), Executive Order 13186

The MBTA (16 U.S.C. 703–712) provides for the protection of certain migratory birds by making it illegal for anyone to ''pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export'' any migratory bird covered under the statute.[335]

The BGEPA (16 U.S.C. 668–668d) makes it illegal to ''take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import'' any bald or golden eagles.[336] Executive Order 13186, ''Responsibilities of Federal Agencies to Protect Migratory Birds,'' helps to further the purposes of the MBTA by requiring a Federal agency to develop a Memorandum of Understanding (MOU) with the Fish and Wildlife Service when it is taking an action that has (or is likely to have) a measurable negative impact on migratory bird populations.

The agencies conclude that the MBTA, BGEPA, and Executive Order 13186 do not apply to this action because there is no disturbance, take, measurable negative impact, or other covered activity involving migratory birds or bald or golden eagles involved in this rulemaking. This conclusion is supported by the lack of discretion over preemption and the reasons underlying justification for the withdrawal of the waiver to California, the fact that any causal relationship between effects on migratory birds or bald or golden eagles as a result of emissions from the sale

[332] *See* the discussions regarding NEPA, Clean Air Act Conformity, and the ESA.

[333] 16 U.S.C. 1456(c)(1)(A).

[334] *See* the discussions regarding NEPA, Clean Air Act Conformity, and the ESA.

[335] 16 U.S.C. 703(a).

[336] 16 U.S.C. 668(a).

and operation of motor vehicles in California and section 177 States and this action are too attenuated, and the conclusion that impacts are not reasonably foreseeable.[337]

10. Department of Transportation Act (Section 4(f))

Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. 303), as amended, is designed to preserve publicly owned park and recreation lands, waterfowl and wildlife refuges, and historic sites. Specifically, Section 4(f) provides that DOT agencies cannot approve a transportation program or project that requires the use of any publicly owned land from a public park, recreation area, or wildlife or waterfowl refuge of national, State, or local significance, or any land from a historic site of national, State, or local significance, unless a determination is made that:

(1) There is no feasible and prudent alternative to the use of land, and

(2) The program or project includes all possible planning to minimize harm to the property resulting from the use.

These requirements may be satisfied if the transportation use of a Section 4(f) property results in a de minimis impact on the area.

NHTSA concludes that Section 4(f) is not applicable to its final rule here because this rulemaking is not an approval of a transportation program or project that requires the use of any publicly owned land.

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

Executive Order (E.O.) 12898 (59 FR 7629 (Feb. 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.

The agencies have determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not change existing Federal standards. This conclusion is supported by the lack of discretion over preemption and the underlying justification for the withdrawal of the waiver to California, the fact that any causal relationship between effects on minority or low-income populations as a result of emissions from the sale and operation of motor vehicles in California and section 177 States and this action are too attenuated, and the conclusion that impacts are not reasonably foreseeable.[338]

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

This action is not subject to E.O. 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by E.O. 12866, and the agencies have no reason to believe that the environmental health or safety risks related to this action may have a disproportionate effect on children because it does not change existing Federal standards. This conclusion is supported by the lack of discretion over preemption and the underlying justification for the withdrawal of the waiver to California, the fact that any causal relationship between effects on children as a result of emissions from the sale and operation of motor vehicles in California and section 177 States and this action are too attenuated, and the conclusion that impacts are not reasonably foreseeable.[339]

G. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a proposal will not have a significant economic impact on a substantial number of small entities.

This joint action only concern the question of preemption; the joint action does not set CAFE or emissions standards themselves. Further, as the California waiver withdrawal is not a rulemaking, it is not subject to the RFA. Accordingly, only NHTSA's final rule establishing regulatory text related to preemption is at issue in this action. NHTSA has considered the impacts of this document under the Regulatory Flexibility Act and certifies that this rule would not have a significant economic impact on a substantial number of small entities. One commenter, Workhorse Group, Inc. (Workforce), in comments echoed by a trade association, argued that it was a small business and would be affected the preemption provisions because it would no longer be able to earn and sell credits under the ZEV mandates established by California and the other 177 States. This argument is not persuasive, as the preemption regulation has no direct effect on Workforce or any other similar entity because it does not regulate any private entity, but instead clarifies the agency's views on what State or local laws are preempted. Thus, any effect on Workhorse or any other similar entities is, at most, indirect. Any effect is even further attenuated by the fact that small entities such as Workhorse are not even subject to a ZEV mandate, but choose to participate in the program voluntarily.

Additionally, in keeping with previous waiver actions, EPA's action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities. *See* 78 FR at 2145 (Jan. 9, 2013); 74 FR at 32784 (July 8, 2009); 73 FR at 12169 (Mar. 6, 2008).

H. Executive Order 13132 (Federalism)

Executive Order 13132 requires federal agencies 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.'' The Order defines the term ''Policies that have federalism implications'' to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under the Order, agencies may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, unless the Federal government

[337] *See* the discussions regarding NEPA, Clean Air Act Conformity, and the ESA.

[338] *See* the discussions regarding NEPA, the Clean Air Act Conformity, and the ESA.

[339] *See* the discussions regarding NEPA, the Clean Air Act Conformity, and the ESA.

provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agencies consult with State and local officials early in the process of developing the proposed regulation. The agencies complied with Order's requirements and discuss their response to comments in the above sections.

I. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, ''Civil Justice Reform,'' [340] NHTSA has determined that this final rule does not have any retroactive effect.

J. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule will be implemented at the Federal level. Thus, Executive Order 13175 does not apply to this rule. Two commenters raised issues associated with this Executive Order. Issues raised in these comments related to the standards will be addressed that forthcoming rulemaking. One commenter, in an apparent reference to the preemption actions being finalized in this document, argued that the NPRM would weaken tribal abilities to set GHG standards. This is incorrect: The finalization of the EPCA preemption provisions merely clarifies the law that any law or regulation of a State or political subdivision of a State ''related to'' fuel economy is preempted, while EPA's decision in this document only affects a State, not a Tribal government.

K. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of a proposed or final rule that includes a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995). Adjusting this amount by the implicit gross domestic product price deflator for 2016 results in $148 million (111.416/75.324 = 1.48).[341] This final rule will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector of more than $148 million annually.

L. Regulation Identifier Number

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

M. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA and EPA to evaluate and use existing voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law (*e.g.,* the statutory provisions regarding NHTSA's vehicle safety authority, or EPA's testing authority) or otherwise impractical.[342] As this action does not affect the CAFE or GHG standards, it is not subject to the NTTAA.

N. Department of Energy Review

49 U.S.C. 32902(j)(2) requires that ''Before taking final action on a standard or an exemption from a standard under this section, the Secretary of Transportation shall notify the Secretary of Energy and provide the Secretary of Energy a reasonable time to comment.'' As this action does not establish a standard or provide an exemption, it is not subject to this requirement. However, NHTSA has submitted this action to OMB for interagency review and, thus, the Department of Energy has been afforded the opportunity to review.

O. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995, Public Law 104–13,[343] gives the Office of Management and Budget (OMB) authority to regulate matters regarding the collection, management, storage, and dissemination of certain information by and for the Federal government. It seeks to reduce the total amount of paperwork handled by the government and the public. The PRA requires Federal agencies to place a notice in the **Federal Register** seeking public comment on the proposed collection of information. This action includes no information collections. The information collections associated with the CAFE and GHG programs will be discussed in the final rule that will establish CAFE and GHG standards.

P. Privacy Act

In accordance with 5 U.S.C. 553(c), the agencies solicited comments from the public to better inform the rulemaking process. These comments are posted, without edit, to *www.regulations.gov,* as described in DOT's system of records notice, DOT/ALL–14 FDMS, accessible through *www.transportation.gov/privacy.*

Q. Judicial Review

NHTSA and EPA undertake this joint action under their respective authorities pursuant to the Energy Policy and Conservation Act and the Clean Air Act, mindful of the Supreme Court's statement in *Massachusetts* v. *EPA,* 549 U.S. 497, 532 (2007), that ''there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.'' Pursuant to Clean Air Act section 307(b), any petitions for judicial review of this action must be filed in the United States Court of Appeals for the D.C. Circuit by November 26, 2019. Given the inherent relationship between the agencies' actions, any challenges to NHTSA's regulation should also be filed in the United States Court of Appeals for the D.C. Circuit.

List of Subjects in 49 CFR Parts 531 and 533

Fuel economy.

Regulatory Text

In consideration of the foregoing, under the authority of 49 U.S.C. 322, 32901, 32902, and 32903, and delegation of authority at 49 CFR 1.95, NHTSA amends 49 CFR chapter V as follows:

PART 531—PASSENGER AUTOMOBILE AVERAGE FUEL ECONOMY STANDARDS

■ 1. The authority citation for part 531 continues to read as follows:

Authority: 49 U.S.C. 32902, delegation of authority at 49 CFR 1.50.

■ 2. Add § 531.7 to read as follows:

§ 531.7 Preemption.

(a) *General.* When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

[340] 61 FR 4729 (Feb. 7, 1996).

[341] Bureau of Economic Analysis, National Income and Product Accounts (NIPA), Table 1.1.9 Implicit Price Deflators for Gross Domestic Product. *https://bea.gov/iTable/index_nipa.cfm.*

[342] 15 U.S.C. 272.

[343] Codified at 44 U.S.C. 3501 *et seq.*

(b) *Requirements must be identical.* When a requirement under section 32908 of title 49 of the United States Code is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.

(c) *State and political subdivision automobiles.* A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.

Appendix to Part 531 [Designated as Appendix A to Part 531 and Amended]

■ 3. Designate the appendix to part 531 as appendix A to part 531 and in newly designated appendix A, remove all references to ''Appendix'' and add in their place ''Appendix A.''

■ 4. Add appendix B to part 531 to read as follows:

Appendix B to Part 531—Preemption

(a) Express Preemption:

(1) To the extent that any law or regulation of a State or a political subdivision of a State regulates or prohibits tailpipe carbon dioxide emissions from automobiles, such a law or regulation relates to average fuel economy standards within the meaning of 49 U.S.C. 32919.

(A) Automobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide;

(B) Carbon dioxide is the natural by-product of automobile fuel consumption;

(C) The most significant and controlling factor in making the measurements necessary to determine the compliance of automobiles with the fuel economy standards in this part is their rate of tailpipe carbon dioxide emissions;

(D) Almost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide;

(E) Accordingly, as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy.

(2) As a law or regulation related to fuel economy standards, any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly preempted under 49 U.S.C. 32919.

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is a law or regulation related to fuel economy standards and expressly preempted under 49 U.S.C. 32919.

(b) Implied Preemption:

(1) A law or regulation of a State or a political subdivision of a State regulating tailpipe carbon dioxide emissions from automobiles, particularly a law or regulation that is not attribute-based and does not separately regulate passenger cars and light trucks, conflicts with:

(A) The fuel economy standards in this part;

(B) The judgments made by the agency in establishing those standards; and

(C) The achievement of the objectives of the statute (49 U.S.C. Chapter 329) under which those standards were established, including objectives relating to reducing fuel consumption in a manner and to the extent consistent with manufacturer flexibility, consumer choice, and automobile safety.

(2) Any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is impliedly preempted under 49 U.S.C. Chapter 329.

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is impliedly preempted under 49 U.S.C. Chapter 329.

PART 533—LIGHT TRUCK FUEL ECONOMY STANDARDS

■ 5. The authority citation for part 533 continues to read as follows:

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.50.

■ 6. Add § 533.7 to read as follows:

§ 533.7 Preemption.

(a) *General.* When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

(b) *Requirements must be identical.* When a requirement under section 32908 of title 49 of the United States Code is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.

(c) *State and political subdivision automobiles.* A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.

Appendix to Part 533 [Designated as Appendix A to Part 533 and Amended]

■ 7. Designate appendix to part 533 as appendix A to part 533 and in newly redesignated appendix A, remove all references to ''Appendix'' and add in their place ''Appendix A''.

■ 8. Add appendix B to part 533 to read as follows:

Appendix B to Part 533—Preemption

(a) Express Preemption:

(1) To the extent that any law or regulation of a State or a political subdivision of a State regulates or prohibits tailpipe carbon dioxide emissions from automobiles, such a law or regulation relates to average fuel economy standards within the meaning of 49 U.S.C. 32919.

(A) Automobile fuel economy is directly and substantially related to automobile tailpipe emissions of carbon dioxide;

(B) Carbon dioxide is the natural by-product of automobile fuel consumption;

(C) The most significant and controlling factor in making the measurements necessary to determine the compliance of automobiles with the fuel economy standards in this part is their rate of tailpipe carbon dioxide emissions;

(D) Almost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide;

(E) Accordingly, as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide, and regulating the tailpipe emissions of carbon dioxide controls fuel economy.

(2) As a law or regulation of a State or a political subdivision of a State related to fuel economy standards, any state law or regulation regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly preempted under 49 U.S.C. 32919.

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is a law or regulation related to fuel economy standards and expressly preempted under 49 U.S.C. 32919.

(b) Implied Preemption:

(1) A law or regulation of a State or a political subdivision of a State regulating tailpipe carbon dioxide emissions from automobiles, particularly a law or regulation that is not attribute-based and does not separately regulate passenger cars and light trucks, conflicts with:

(A) The fuel economy standards in this part;

(B) The judgments made by the agency in establishing those standards; and

(C) The achievement of the objectives of the statute (49 U.S.C. Chapter 329) under which those standards were established, including objectives relating to reducing fuel consumption in a manner and to the extent consistent with manufacturer flexibility, consumer choice, and automobile safety.

(2) Any law or regulation of a State or a political subdivision of a State regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is impliedly preempted under 49 U.S.C. Chapter 329.

(3) A law or regulation of a State or a political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is impliedly preempted under 49 U.S.C. Chapter 329.

Issued on September 19, 2019 in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.4

Dated: September 19, 2019.

James C. Owens,

Acting Administrator, National Highway Traffic Safety Administration.

Dated: September 19, 2019.

Andrew R. Wheeler,

Administrator, Environmental Protection Agency.

[FR Doc. 2019–20672 Filed 9–26–19; 8:45 am]

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