AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 84 Wednesday,
No. 243 December 18, 2019

Pages 69295–69616

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 84 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**

General online information **202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 84, No. 243

Wednesday, December 18, 2019

Agency for Healthcare Research and Quality
NOTICES
Meetings:
Subcommittees, 69379–69380

Agency for International Development
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69353

Agricultural Marketing Service
RULES
Establishment of a Domestic Hemp Production Program, 69295

Agriculture Department
See Agricultural Marketing Service
See Rural Business-Cooperative Service
RULES
Delegations of Authority by the Secretary of Agriculture and General Officers of the Department; CFR Correction, 69295

Centers for Medicare & Medicaid Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69380–69382

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Income Withholding Order/Notice for Support, 69382–69383

Coast Guard
RULES
Safety Zone:
Tongass Narrows, Ketchikan, AK, 69328–69330
Security Zone:
San Diego Bay, San Diego, CA, 69326–69328
PROPOSED RULES
Safety Zone:
Big Foot Tension Leg Platform, Outer Continental Shelf on the Gulf of Mexico, 69348–69349

Commerce Department
See Foreign-Trade Zones Board
See Industry and Security Bureau
See International Trade Administration
See Patent and Trademark Office

Comptroller of the Currency
RULES
Regulatory Capital Rule:
Capital Simplification for Qualifying Community Banking Organizations; Technical Correction, 69296–69298

Defense Acquisition Regulations System
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Covered Defense Telecommunications Equipment or Services, 69362–69363

Defense Department
See Defense Acquisition Regulations System
NOTICES
Arms Sales, 69363–69367
Privacy Act; Systems of Records, 69367
Termination of the Threat Reduction Advisory Committee, 69365

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Fiscal Operations Report for 2019–2020 and Application to Participate 2021–2022 and Reallocation Form, 69367–69368

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Alaska; Interstate Transport Requirements for the 2015 Ozone Standard, 69331–69335
Global Marine Fuel, 69335–69341
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
West Virginia; Infrastructure Requirements for the 2015 Ozone Standard, 69349–69351

Federal Aviation Administration
PROPOSED RULES
Amendment of Class E Airspace:
Rifle, CO, 69346–69347
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Carbon Offsetting and Reduction Scheme for International Aviation Monitoring, Reporting, and Verification Program, 69448–69449

Federal Communications Commission
RULES
Leased Commercial Access; Modernization of Media Regulation Initiative, 69342–69343
PROPOSED RULES
Petitions for Reconsideration of Action in Proceeding, 69351–69352
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69370–69372
Meetings:
Open Commission; Thursday, December 12, 2019, 69372–69373

Federal Deposit Insurance Corporation
NOTICES
Designated Reserve Ratio for 2020, 69373

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 69368–69370

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Beyond Compliance, 69451–69453
Request for Revocation of Authority Granted, 69450–69451
Training Certification for Drivers of Longer Combination Vehicles, 69449–69450

Federal Railroad Administration
NOTICES
Petition for Waiver of Compliance, 69453–69454

Federal Reserve System
NOTICES
Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 69373

Federal Trade Commission
NOTICES
Analysis to Aid:
Click Labs, Inc., 69375–69376
Proposed Consent Agreement:
Global Data Vault, LLC; Analysis to Aid Public Comment, 69373–69375
Incentive Services, Inc.; Analysis to Aid Public Comment, 69378–69379
TDARX, Inc.; Analysis to Aid Public Comment, 69376–69378

Fish and Wildlife Service
NOTICES
Environmental Impact Statements; Availability, etc.:
National Bison Range, MT; Availability of the Final Record of Decision for the Final Comprehensive Conservation Plan, 69388–69389

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 69456–69457

Foreign-Trade Zones Board
NOTICES
Proposed Production Activity:
Ball Metal Beverage Container Corp.; Foreign-Trade Zone 277; Western Maricopa County, AZ, 69355–69356

Health and Human Services Department
See Agency for Healthcare Research and Quality
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See National Institutes of Health

Homeland Security Department
See Coast Guard
See U.S. Citizenship and Immigration Services

Indian Affairs Bureau
RULES
Tribal Energy Resource Agreements, 69602–69615

Industry and Security Bureau
RULES
Control Policy: End-User and End-Use Based; CFR Correction, 69298

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
RULES
Acquisition Regulation:
Removal of Outdated References, 69343–69345

Internal Revenue Service
RULES
Guidance under Section 355(e) Regarding Predecessors, Successors, and Limitation on Gain Recognition; Guidance under Section 355(f), 69308–69326

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation, 69357–69360
Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea, 69360–69361
Large Diameter Welded Pipe from India, 69356–69357
Silicon Metal from the People's Republic of China, 69361–69362

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Gas Spring Nailer Products and Components Thereof, 69391–69392

Justice Department
NOTICES
Privacy Act; Matching Program, 69392–69393

Land Management Bureau
NOTICES
Plats of Survey:
Eastern States, 69389

Millennium Challenge Corporation
NOTICES
Report on the Selection of Eligible Countries for Fiscal Year 2020, 69393–69395

National Archives and Records Administration
NOTICES
Records Schedules, 69395–69396

National Credit Union Administration
RULES
Investment and Deposit Activities; CFR Correction, 69298

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 69385

National Cancer Institute, 69383–69385
National Center for Complementary and Integrative Health, 69384
National Heart, Lung, and Blood Institute, 69385–69386
National Institute of Neurological Disorders and Stroke, 69383
National Institute of Nursing Research, 69384–69385

National Labor Relations Board
RULES
Representation-Case Procedures, 69524–69600

National Park Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
National Park Service Watercraft Inspection Decontamination Regional Data-sharing for Trailered Recreational Boats, 69389–69390

National Science Foundation
NOTICES
Meetings:
Proposal Review Panel for Ocean Sciences, 69396

Nuclear Regulatory Commission
NOTICES
Environmental Assessments; Availability, etc.:
Holtec Decommissioning International, LLC; Pilgrim Nuclear Power Station, 69396–69400

Patent and Trademark Office
RULES
Changes to the Trademark Rules of Practice to Mandate Electronic Filing, 69330–69331

Postal Regulatory Commission
NOTICES
Market Dominant Products, 69400–69401

Postal Service
NOTICES
Product Change:
Priority Mail Negotiated Service Agreement, 69401

Rural Business–Cooperative Service
NOTICES
Contract Proposals for the 9005 Advanced Biofuel Payment Program for Fiscal Years 2019 and 2020, 69353–69355

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe Exchange, Inc., 69428–69444
Financial Industry Regulatory Authority, Inc., 69402–69405
ICE Clear Europe Ltd., 69421–69424
Nasdaq PHLX LLC, 69405–69412
New York Stock Exchange, LLC, 69415–69421
NYSE Chicago, Inc., 69412–69415
The Depository Trust Co., 69424–69428
The Nasdaq Stock Market, LLC, 69401–69402, 69444–69446

Small Business Administration
NOTICES
Disaster Declaration:
Pennsylvania, 69446

Social Security Administration
RULES
Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 69298–69308

State Department
NOTICES
Performance Review Board Members, 69446–69447

Trade Representative, Office of United States
NOTICES
Modification of Section 301 Action:
China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 69447

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
PROPOSED RULES
Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs, 69466–69521
NOTICES
Solicitation for Annual Combating Human Trafficking in Transportation Impact Award, 69454–69456

Treasury Department
See Comptroller of the Currency
See Foreign Assets Control Office
See Internal Revenue Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Imposition of Special Measure against Banco Delta Asia, 69464
Recordkeeping for Tobacco Products Removed in Bond from a Manufacturer's Premises for Experimental Purposes, 69457–69458
Treasury International Capital Forms CQ–1 and CQ–2, 69464
U.S. Individual Income Tax Return, 69458–69462
IMARA Calculation for Calendar Year 2020 Under the Terrorism Risk Insurance Program, 69462–69464

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Carrier Documentation, 69387
Sponsor Deeming and Agency Reimbursement, 69386–69387

Separate Parts In This Issue

Part II
Transportation Department, 69466–69521

Part III
National Labor Relations Board, 69524–69600

Part IV
Interior Department, Indian Affairs Bureau, 69602–69615

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

7 CFR
2 69295
990 69295

12 CFR
1 69296
5 69296
23 69296
24 69296
32 69296
34 69296
703 69298

14 CFR
Proposed Rules:
71 69346

15 CFR
744 69298

20 CFR
404 69298
416 69298

25 CFR
224 69602

26 CFR
1 69308

29 CFR
102 69524

33 CFR
165 (2 documents) 69326, 69328
Proposed Rules:
147 69348

37 CFR
2 69330
7 69330

40 CFR
52 69331
80 69335
Proposed Rules:
52 69349

47 CFR
76 69342
Proposed Rules:
27 69351

48 CFR
1419 69343

49 CFR
Proposed Rules:
24 69466

Rules and Regulations

Federal Register

Vol. 84, No. 243

Wednesday, December 18, 2019

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

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

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 2

Delegations of Authority by the Secretary of Agriculture and General Officers of the Department

CFR Correction

■ In Title 7 of the Code of Federal Regulations, Parts 1 to 26, revised as of January 1, 2019, on page 197, in § 2.22, paragraphs (xiv) and (xv), between paragraphs (a)(1)(viii)(X) and (a)(1)(viii)(Y) are removed.

[FR Doc. 2019–27405 Filed 12–17–19; 8:45 am]

BILLING CODE 31301–00–D

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 990

[Doc. No. AMS–SC–19–0042; SC19–990–2 IR]

Establishment of a Domestic Hemp Production Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments; extension of comment period due date.

SUMMARY: The United States Department of Agriculture's Agricultural Marketing Service (AMS) is extending the comment period due date for an interim final rule published on October 31, 2019, by an additional thirty (30) days from December 30, 2019 to January 29, 2020. The interim final rule establishes a domestic hemp production program pursuant to the Agriculture Improvement Act of 2018. The rule outlines provisions for the Department of Agriculture (USDA) to approve plans submitted by States and Indian Tribes for the domestic production of hemp. It also establishes a Federal plan for producers in States or territories of Indian Tribes that do not have their own USDA-approved plan. The program includes provisions for maintaining information on the land where hemp is produced, testing the levels of delta-9 tetrahydrocannabinol, disposing of plants not meeting necessary requirements, licensing requirements, and ensuring compliance with the requirements of the new part.

DATES: *Comments due dates:* The comment period for the interim final rule published on October 31, 2019 (84 FR 58522), is extended. Comments received by January 29, 2020, will be considered prior to issuance of a final rule. Additionally, pursuant to the Paperwork Reduction Act (PRA), comments on the information collection burden must also be received by January 29, 2020.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule and the proposed information collection. Comments should be submitted via the Federal eRulemaking portal at *www.regulations.gov.* Comments may also be filed with Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; or Fax: (202) 720–8938. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: *www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public.

FOR FURTHER INFORMATION CONTACT: Bill Richmond, Chief, U.S. Domestic Hemp Production Program, Specialty Crops Program, AMS, USDA; 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *William.Richmond@usda.gov* or Patty Bennett, Director, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA at the same address and phone number above or Email: *Patty.Bennett@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule (84 FR 58522) was issued under Section 10113 of Public Law 115–334, the Agriculture Improvement Act of 2018 (2018 Farm Bill). Section 10113 amended the Agricultural Marketing Act of 1946 (AMA) by adding Subtitle G (sections 297A through 297D of the AMA). Section 297B of the AMA requires the Secretary of Agriculture (Secretary) to evaluate and approve or disapprove State or Tribal plans regulating the production of hemp. Section 297C of the AMA requires the Secretary to establish a Federal plan for producers in States and territories of Indian Tribes not covered by plans approved under section 297B. Lastly, section 297D of the AMA requires the Secretary to promulgate regulations and guidelines relating to the production of hemp in consultation with the U.S. Attorney General. USDA is committed to issuing the final rule expeditiously after reviewing public comments and obtaining additional information during the initial implementation. USDA may request more comments after the 2020 growing season has ended. In response to requests by commenters to AMS and executive departments and agencies that the public comment due date for this rule be extended, AMS is extending the comment period by an additional thirty (30) days to January 29, 2020.

Dated: December 10, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–27245 Filed 12–17–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 1, 5, 23, 24, 32, and 34

[Docket ID OCC–2018–0040]

RIN 1557–AE59

Regulatory Capital Rule: Capital Simplification for Qualifying Community Banking Organizations; Technical Correction

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule; correction.

SUMMARY: The OCC is making technical corrections to the Capital Simplification for Qualifying Community Banking Organizations final rule that appeared in the **Federal Register** on November 13, 2019. The technical corrections align the rule text in the final rule with changes made by other final rules. The technical corrections also include a conforming edit.

DATES: This correction is effective January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Carl Kaminski, Special Counsel, or Daniel Perez, Senior Attorney, Chief Counsel's Office, (202) 649–5490, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Description of Technical Corrections

On November 13, 2019, the OCC, together with the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (collectively, the agencies), published in the **Federal Register** a final rule titled ''Regulatory Capital Rule: Capital Simplification for Qualifying Community Banking Organizations'' (the CBLR final rule).[1]

Under the CBLR final rule, qualifying community banking organizations that opt into the community bank leverage ratio framework are not required to calculate tier 2 capital. The Supplementary Information section of the final rule stated, ''[C]ertain of the agencies' non-capital rules refer to 'capital stock and surplus' (or similar items)[,] which is generally defined as tier 1 capital and tier 2 capital plus the amount of allowances for loan and lease losses not included in tier 2 capital. The final rule amends standards referencing 'capital stock and surplus' (or similar items) so that an electing banking organization uses tier 1 capital plus allowances for loan and lease losses (or adjusted allowance for credit losses, as applicable).''[2]

In separate final rules titled ''Regulatory Capital Rule: Implementation and Transition of the Current Expected Credit Losses Methodology for Allowances and Related Adjustments to the Regulatory Capital Rule and Conforming Amendments to Other Regulations'' (CECL final rule)[3] and ''Other Real Estate Owned and Technical Amendments'' (OREO final rule),[4] the OCC made further revisions to the defined term ''capital and surplus.'' These final rules became effective or will become effective before the effective date for the CBLR final rule. Due to the specific phrasing of its amendatory instructions, the CBLR final rule as currently published would have inadvertently reversed certain changes made by the CECL and OREO final rules. In one instance, for example, the CBLR final rule would have reinserted a definition for ''capital and surplus'' that was removed by the OREO final rule. Accordingly, the OCC is correcting sections of the CBLR final rule that would have revised the term ''capital and surplus'' to re-incorporate the intended changes made in the CECL final rule and OREO final rule. The OCC is also making certain stylistic edits to these sections of the CBLR final rule to align them with the CECL final rule.

The term ''total capital'' includes tier 2 capital and therefore was revised by the CBLR final rule for the same reasons described above. The Supplementary Information section of the final rule stated, ''The final rule amends standards referencing total capital so that an electing banking organization uses tier 1 capital instead of total capital.''[5] The CBLR final rule would have amended an instance of the term ''total capital'' in paragraph (h)(2) of 12 CFR 5.58 but not a similar instance of the term in paragraph (h)(3). Accordingly, the OCC is also making a conforming edit to 12 CFR 5.58(h)(3) to incorporate the change made to paragraph (h)(2).

II. Regulatory Analysis

A. Administrative Procedure Act and Effective Date

Under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. As described above in this Supplementary Information section, this **Federal Register** notice makes non-substantive, technical corrections to the CBLR final rule. For that reason, the OCC has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary.

The effective date of these corrections is January 1, 2020. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. The OCC has concluded that these technical corrections are not substantive within the meaning of the APA's delayed effective date provision. Moreover, the OCC finds that there is good cause for dispensing with the delayed effective date requirement, even if it applied, because OCC-supervised institutions, from review of the CBLR final rule, CECL final rule, and OREO final rule, were given sufficient notice as to the effects and purposes of those rules and would not have reasonably relied on the errors addressed by these technical corrections.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking when a general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the OCC has determined that it is unnecessary to publish a general notice of proposed rulemaking for technical corrections. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

C. Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC has determined that these technical corrections do not create any new, or revise any existing,

[1] 84 FR 61776.

[2] 84 FR 61787.

[3] 84 FR 4222 (Feb. 14, 2019). The CECL final rule is effective as of April 1, 2019.

[4] 84 FR 56369 (Oct. 22, 2019). The OREO final rule was originally effective as of December 1, 2019, but is now effective as of January 1, 2020. *See* 84 FR 64193 (Nov. 21, 2019).

[5] 84 FR 61787.

collections of information pursuant to the Paperwork Reduction Act. Consequently, no information collection request will be submitted to the OMB for review.

D. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), 2 U.S.C. 1532, requires the OCC to prepare a budgetary impact statement before promulgating any final rule for which a general notice of proposed rulemaking was published. As discussed above, the OCC has determined that the publication of a general notice of proposed rulemaking is unnecessary. Accordingly, these technical corrections are not subject to section 202 of the Unfunded Mandates Act.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) (12 U.S.C. 4802) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[6] In addition, new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[7]

Because these technical corrections do not impose additional reporting, disclosure, or other requirements on IDIs, section 302 of RCDRIA does not apply.

F. Congressional Review Act

The OMB has determined that these technical corrections are not a ''major rule'' within the meaning of the Congressional Review Act.

[6] 12 U.S.C 4802(a).

[7] 12 U.S.C 4802(b).

Corrections

In the final rule published on November 13, 2019, at 84 FR 61776, the following corrections are made:

§ 1.2 [Corrected]

■ 1. On page 61792, in the second column, in amendment 2, in § 1.2, paragraphs (a)(1)(ii) and (a)(2)(ii), ''allowances for loan and lease losses'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable,'' in both instances where it appears.

§ 5.3 [Corrected]

■ 2. a. On page 61793, in the third column, in amendment 9, in § 5.3, paragraph (e)(1)(ii), ''allowances for loan and lease losses or allowance'' is corrected to read ''allowance for loan and lease losses or adjusted allowances'';

■ b. On page 61794, in the first column, in amendment 9, in § 5.3, paragraph (e)(2)(i), ''bank's or savings association's Consolidated Reports of Condition and Income (Call Reports) filed under 12 U.S.C. 161 or 12 U.S.C. 1464(v), respectively'' is corrected to read ''Call Report'';

■ c. On page 61794, in the first column, in amendment 9, in § 5.3, paragraph (e)(2)(ii), ''allowances for loan and lease losses'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable,''; and ''reported in the institution's Call Reports, described in paragraph (e)(2)(i) of this section'' is corrected to read ''described in paragraph (e)(2)(i) of this section, as reported in the Call Report''.

§ 5.37 [Corrected]

■ 3. a. On page 61794, in the first column, in amendment 10, in § 5.37, paragraph (c)(3)(i)(B), ''allowances for loan and lease losses or allowance'' is corrected to read ''allowance for loan and lease losses or adjusted allowances''; and ''national bank's or Federal savings association's Call Report'' is corrected to read ''Consolidated Reports of Condition and Income (Call Report)'';

■ b. On page 61794, in the first column, in amendment 10, in § 5.37, paragraph (c)(3)(ii)(A), ''national bank's or Federal savings association's Consolidated Reports of Condition and Income (Call Reports) filed under 12 U.S.C. 161 or 12 U.S.C. 1464(v), respectively'' is corrected to read ''Call Report'';

■ c. On page 61794, in the first column, in amendment 10, in § 5.37, paragraph (c)(3)(ii)(B), ''allowances for loan and lease losses'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable,'' and ''national bank's or Federal savings association's Call Reports filed under 12 U.S.C. 161 or 1464(v), respectively'' is corrected to read ''Call Report''.

§ 5.58 [Corrected]

■ 4. a. On page 61794, in the first column, in amendment 11, the instruction ''Section 5.58 is amended by revising paragraph (h)(2) to read as follows:'' is corrected to read ''Section 5.58 is amended by revising paragraphs (h)(2) and (3) to read as follows:''; and

■ b. On page 61794, in the second column, in amendment 11, in § 5.58, the revised rule text is amended by adding paragraph (h)(3) to read as follows:

§ 5.58 Pass-through investments by a Federal savings association.

* * * * *

(h) * * *

(3) The book value of the Federal savings association's aggregate non-controlling investments does not exceed 25 percent of its total capital (or, in the case of a Federal savings association that is a qualifying community banking organization that has elected to use the community bank leverage ratio framework, 25 percent of its tier 1 capital, as used under § 3.12 of this chapter) after making the investment;

* * * * *

§ 23.2 [Corrected]

■ 5. a. On page 61795, in the first column, in amendment 15, in § 23.2, paragraph (b)(1)(ii), ''allowances for loan and lease losses or allowance for credit losses, as applicable, as reported in the national bank's Call Report'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the Consolidated Reports of Condition and Income (Call Report)'';

■ b. On page 61795, in the first column, in amendment 15, in § 23.2, paragraph (b)(2)(i), ''the bank's Consolidated Reports of Condition and Income (Call Report) filed under 12 U.S.C. 161'' is corrected to read ''the Call Report'';

■ c. On page 61795, in the first column, in amendment 15, in § 23.2, paragraph (b)(2)(ii), ''allowances for loan and lease losses'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable,''; and ''the bank's Consolidated Report of Condition and Income filed under 12 U.S.C. 161'' is corrected to read ''the Call Report''.

§ 24.2 [Corrected]

■ 6. a. On page 61795, in the first column, in amendment 17, in § 24.2, paragraph (b)(1)(ii), ''allowances for loan and lease losses or allowance for credit losses, as applicable, as reported in the national bank's Call Report'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the Consolidated Reports of Condition and Income (Call Report)'';

■ b. On page 61795, in the second column, in amendment 17, in § 24.2, paragraph (b)(2)(i), ''the bank's Consolidated Reports of Condition and Income (Call Report) filed under 12 U.S.C. 161'' is corrected to read ''the Call Report'';

■ c. On page 61795, in the second column, in amendment 17, in § 24.2, paragraph (b)(2)(ii), ''allowances for loan and lease losses'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable,''; and ''the bank's Call Report as filed under 12 U.S.C. 161'' is corrected to read ''the Call Report''.

§ 32.2 [Corrected]

■ 7. a. On page 61795, in the second column, in amendment 19, in § 32.2, paragraph (c)(1)(ii), ''allowances for loan and lease losses or allowance for credit losses, as applicable, as reported in the national bank's or Federal savings association's Call Report'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the Consolidated Reports of Condition and Income (Call Report)'';

■ b. On page 61795, in the second column, in amendment 19, in § 32.2, paragraph (c)(2)(i), ''the bank's or savings association's Consolidated Reports of Condition and Income (Call Report)'' is corrected to read ''the Call Report''; and

■ c. On page 61795, in the second column, in amendment 19, in § 32.2, paragraph (c)(2)(ii), ''allowances for loan and lease losses'' is corrected to read ''allowance for loan and lease losses or adjusted allowances for credit losses, as applicable,''.

§ 34.81 [Corrected]

■ 8. On page 61795, in the second and third columns, remove heading ''PART 34—REAL ESTATE LENDING AND APPRAISALS,'' remove amendments 20 and 21, and renumber the subsequent amendments to reflect the removal.

Dated: November 27, 2019.

Jonathan V. Gould,

Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–27168 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–33–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 703

Investment and Deposit Activities

CFR Correction

■ In Title 12 of the Code of Federal Regulations, Parts 600 to 899, revised as of January 1, 2019, on page 700, in § 703.114, remove paragraph (3) that appears below paragraph (d).

[FR Doc. 2019–27403 Filed 12–17–19; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

Control Policy: End-User and End-Use Based; Correction

CFR Correction

■ In Title 15 of the Code of Federal Regulations, Parts 300 to 799, revised as of January 1, 2019, on page 412, in part 744, supplement no. 4, in the table under ''AFGHANISTAN'', the entry for Ibrahim Haqqani is correctly revised to read as follows:

SUPPLEMENT NO. 4 TO PART 744—ENTITY LIST

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	*	*	*	*
AFGHANISTAN	*	*	*	*
	Ibrahim Haqqani, a.k.a., the following two aliases: —Hajji Sahib; *and* —Maulawi Haji Ibrahim Haqqani Afghanistan	For all items subject to the EAR. (See § 744.11 of the EAR)	Presumption of denial	77 FR 25057, 4/27/12.
*	*	*	*	*

[FR Doc. 2019–27402 Filed 12–17–19; 8:45 am]

BILLING CODE 1301–00–D

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2017–0015]

RIN 0960–AI09

Setting the Manner for the Appearance of Parties and Witnesses at a Hearing

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are publishing a final rule we proposed in November 2018 regarding setting the time, place, and manner of appearance for hearings at the administrative law judge (ALJ) level of our administrative review process, with modifications. Our final rule states that we (the agency) will determine how parties and witnesses will appear at a hearing before an ALJ, and that we will set the time and place for the hearing accordingly. We will schedule the parties to a hearing to appear by video teleconference (VTC), in person, or, in limited circumstances, by telephone. Under this final rule, we will decide how parties and witnesses will appear at a hearing based on several factors, but the parties to a hearing will continue to have the ability to opt out of appearing by VTC at the ALJ hearings level. Finally, we are revising our rule to state that, at the ALJ hearing level, if we need to send an amended notice of hearing, or if we need to schedule a supplemental hearing, we will send the amended notice or notice of supplemental hearing at least 20 days

before the date of the hearing. The date of hearing indicated in the amended notice or notice of supplemental hearing will be at least 75 days from the date we first sent the claimant a notice of hearing, unless the claimant has waived his or her right to advance notice.

DATES: This rule is effective January 17, 2020.

FOR FURTHER INFORMATION CONTACT: Susan Swansiger, Office of Hearings Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–8500. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

To provide better customer service and most efficiently manage our workloads, while maintaining accuracy and fundamental fairness in our hearing process, we seek to maximize the case processing efficiencies and flexibility allowed by all appropriate manners of appearance at hearings. Available manners of appearance for hearings include in person, by VTC, and in limited circumstances, by telephone. In support of these goals, our Office of the Inspector General and the Administrative Conference of the United States (ACUS) have repeatedly recommended that we increase use of VTC technology to conduct administrative hearings. As well, the Social Security Advisory Board (SSAB) has commented that the use of VTC ''obviously meets the requirements of due process and it is in widespread use in other types of adjudications.'' [1]

To achieve the increased efficiency and reduced processing delays of hearings referenced by ACUS and the SSAB, we published a notice of proposed rulemaking (NPRM) in the **Federal Register** on November 15, 2018.[2] In the NPRM, we proposed clarifications and revisions to our rule for setting the manner of appearance for parties and witnesses at a hearing. To the extent that we already discussed at length the reasons for and details of the proposed changes, we will not repeat that information here.

The changes that we proposed and are now adopting will provide us with the flexibility we need to address service challenges by allowing us to balance our hearing workloads in a way that we expect will reduce overall wait and processing times across the country, and the processing time disparities among offices. However, in response to the overwhelming preference expressed by public commenters in response to the NPRM, we are retaining the existing option for a party to a hearing to opt out of appearing by VTC at the ALJ hearing level. If the AC exercises removal authority for a case, it will continue to follow all the rules that apply to the ALJ level of adjudication.[3]

Besides the changes we proposed for setting the time, place, and manner of appearance for hearings, we also proposed one clarification to our rule regarding the notice of hearing at the ALJ hearing level. Under our current rule, we send a notice of hearing at least 75 days prior to the date of the scheduled hearing to all parties and their representative, if any.[4] In addition to the time and place of a hearing, the notice has other information, including the issues to be decided, the right to representation, how to request a change in the time of the hearing, and how appearances will be made. We proposed to clarify that when we send an amended notice of hearing or notice of supplemental hearing, we would send the amended notice or notice of supplemental hearing at least 20 days prior to the hearing. If we need to change the date of a hearing, the date we choose will always be at least 75 days from the date we first sent the claimant a notice of hearing, unless the claimant has waived his or her right to advance notice.

Finally, we also proposed in the NPRM to make changes to our rule about scheduling hearings before disability hearing officers (DHO) in §§ 404.914 and 416.1414. Our proposed changes to those sections generally tracked our proposed changes to the regulations that regard scheduling hearings before ALJs, including our proposal to not allow a party to a hearing to opt out of appearing by VTC. We are not pursuing changes to §§ 404.914 and 416.1414 at this time.

We made changes from the proposed rule in the final rule.

- We removed the proposed revisions to §§ 404.914 and 416.1414.
- We changed ''them'' to ''witnesses'' for clarity in final §§ 404.936(c)(4) and 416.1436(c)(4).
- We retained existing §§ 404.936(d) and 416.1436(d), which allow a party to a hearing before an ALJ to object to appearing by VTC, and we moved and re-ordered the proposed text from the NPRM paragraphs (d) and (e) to (e) and (f) respectively.
- We added ''or notice of supplemental hearing'' to the paragraph heading in final §§ 404.938(d) and 416.1438(d) to ensure readers understand the breadth of the paragraphs.

In response to the NPRM, we received and posted 244 public comments that addressed issues within the scope of our proposed rule, and we received one comment that we did not post because an individual made it in his or her official capacity as a Social Security Administration (SSA) employee. Below we respond to the significant concerns that public commenters raised that are within the scope of the final rule.

Public Comments and Discussion

Authorizing the Agency To Set the Time, Place, and Manner of Appearance for Hearings

Comment: Some commenters opposed our proposal to allow the agency, rather than an ALJ, to set the time, place, and manner of appearance for the hearing. They maintained that our proposed changes are inconsistent with longstanding rule providing that ALJs set the time, place, and manner of appearance at hearings, and that ALJs should continue to do so as a fundamental function of their authority.

Response: Because the agency, rather than any individual adjudicator, is responsible for managing our nationwide hearing process, we are best placed to appropriately balance the overriding concerns that have animated our hearing process since it began in 1940: Our hearing process provides due process for each claimant and works efficiently and uniformly across the country.[5] We intend to balance concerns about due process, efficiency, and uniformity under this final rule and implement a standard, uniform scheduling process nationwide, while keeping maximum flexibility. By managing the process of scheduling hearings, maximizing our ability to transfer workloads, and exercising flexibility to determine the manner of appearance, we intend to promote a more timely hearing process that

[1] SSAB, *Improving the Social Security Administration's Hearing Process,* at 21 (Sep. 2006), available at: *http://www.ssab.gov/Portals/0/OUR_WORK/REPORTS/HearingProcess_2006.pdf.*

[2] 83 FR 57368, available at *https://www.federalregister.gov/documents/2018/11/15/2018–24711/setting-the-manner-for-the-appearance-of-parties-and-witnesses-at-a-hearing.*

[3] 20 CFR 404.956, 416.1456.

[4] 20 CFR 404.938(a), 416.1438(a).

[5] *See, e.g., Barnhart* v. *Thomas,* 540 U.S. 20, 28–29 (2003); *Richardson* v. *Perales,* 402 U.S. 389, 399 (1971).

provides greater consistency between the length of time a claimant requests a hearing and the date a hearing can be held. We expect that shifting the administrative task of scheduling hearings from individual ALJs to the agency will allow us to increase the overall efficiency of our hearing process and provide more consistent service to the public.

Further, allowing the agency to set the claimant's manner of appearance is an administrative, logistical function that does not affect an ALJ's qualified decisional independence or significantly alter the functioning of our hearing process. Under this final rule, our current policy of generally assigning cases to ALJs on a rotational basis with the earliest hearing requests receiving priority will remain the same. We will also continue to make scheduling decisions in conjunction and consultation with our ALJs. Our ALJs will continue to provide their availability for hearings, decide necessary participants to the hearing, and evaluate the sufficiency of a record in determining when a hearing should be held. As part of this evaluation, the ALJ will have the opportunity to raise any factors in a particular case that would assist us in choosing the most appropriate time, place, and manner of appearance for the parties and witnesses.

Comment: Some commenters expressed concern that the rule does not define any standards to determine whether a VTC hearing is less efficient than conducting a hearing in-person, nor does the rule include any standards for determining if there is good reason to conduct a hearing by VTC or in person.

Response: When we consider whether it would be less efficient to schedule a party to appear by VTC, we will consider the overall efficiency of our hearing process. As we explained above and in our NPRM, we expect the final rule to help us reduce imbalances in the wait time among hearing offices by making it easier for us to shift cases from overburdened hearing offices to hearing offices with fewer requests for hearing pending per ALJ. Leveraging VTC technology to better balance our workloads is key to addressing our oldest pending cases, and it also allows us to act quickly when service needs arise from unanticipated emergencies, *e.g.,* by transferring cases to a hearing office not in close geographical proximity to the claimant. All of these efficiencies will promote our ultimate goal of decreasing the total number of cases pending at the hearing level, and giving each claimant a more timely hearing and hearing decision.

Moreover, due to advances in video technology and our investments in VTC technology, our adjudicators are able to hear, see, and interact with the parties to a hearing as effectively through VTC as they would during an in-person appearance. Accordingly, we do not believe there are categorical circumstances that will always provide a good reason to schedule an individual to appear by VTC or in person. The overall efficiency of the hearing process and the need to provide fair, timely hearings to each claimant will continue to guide our decisions on how we schedule the manner of appearance under the final rule.

Not Allowing the Parties to a Hearing To Opt Out of or Object To Appearing by VTC

Comment: Multiple commenters stated that claimants should continue to have the option to opt out of or object to appearing by VTC in favor of appearing in person. Some commenters noted that when we revised our rule related to VTC hearings in the past, we specifically declined to require claimants to appear by VTC. The commenters maintained that our current policy works well and should not be changed.

Response: We acknowledge the commenters' near-universal preference for our current policy, which allows a party to a hearing before an ALJ to opt out of appearing by VTC. In response to this expressed preference, in the final rule we retained the regulatory provision allowing a party to a hearing before an ALJ to opt out of appearing by VTC, as it currently appears in §§ 404.936(d) and 416.1436(d). The AC will continue to follow all the rules that apply to ALJs when they remove a case.[6] However, we maintain our position, which we stated in the NPRM, that an individual's decision to decline appearing by VTC can adversely affect the efficiency of our hearing process, and may result in a longer wait time for the individual's in-person hearing.

While we are retaining the opt out provision, we note that VTC technology is expected to help us reduce imbalances in the wait time among hearing offices. As well, the use of VTC technology allows us to shift cases in which the claimant did not object to appearing by VTC from overburdened hearing offices to hearing offices with fewer requests for hearing pending per ALJ. We anticipate that the effect of these process improvements will be to improve the balance across the country and decrease the total number of cases pending at the ALJ hearing level, thereby providing claimants with more timely hearing decisions and benefit payments to individuals whom we find entitled to disability benefits.

Comment: A commenter also expressed that we should retain the ability to opt out of appearing by VTC based on the commenter's assertion that not all individuals with disabilities have access, nor can they arrange access, to the internet to appear by VTC.

Response: As previously mentioned, under this final rule, a party to a hearing before an ALJ will still have an opportunity to opt out of appearing by VTC. Nevertheless, we note that this comment appears to reflect a misunderstanding of our intent and how we conduct VTC hearings. We conduct VTC hearings in our facilities or at those representative's offices that are suitably equipped. We do not require any individual to have internet access at their home when we conduct a VTC hearing.

Section 504 of the Rehabilitation Act of 1973

Comment: Many commenters said that our proposed rule would violate section 504 of the Rehabilitation Act of 1973 (section 504).[7] These comments primarily regarded our proposal to remove the option for parties to opt out of or object to appearing at a hearing by VTC.

Response: As noted above, we are not proceeding with our proposal to remove the option for parties to opt out of or object to appearing at a hearing by VTC. Moreover, we have pre-existing procedures for handling section 504 accommodation requests that we will continue to follow after the effective date of this final rule.

Evaluating Subjective Complaints and Activities of Daily Living When the Parties to a Hearing Appear by VTC

Comment: Some commenters alleged that there are substantive differences between VTC hearings and in-person hearings when the adjudicator has to make findings about the intensity, persistence, and limiting effects of the individual's symptoms. The commenters opined that when an individual appears by VTC, the adjudicator may not be able to evaluate the intensity, persistence, and limiting effects of his or her symptoms in a policy compliant manner. Other commenters also asserted that only an

[6] 20 CFR 404.956, 416.1456.

[7] 29 U.S.C. 794, Public Law 93–112, title V, Sec. 504, Sept. 26, 1973, 87 Stat. 394.

in-person appearance can adequately convey some aspects of a claimant's presence, such as odor. These commenters noted that grooming and hygiene are among the activities of daily living that an adjudicator considers when deciding some claims such that a claimant may reasonably prefer to appear in person to permit the adjudicator to smell him or her. Several commenters also expressed concerns about technological issues and variability in the quality of VTC hearings.

Response: We are committed to ensuring all hearings are conducted in a consistent and fair manner using modern technology, and because of the efforts we have made to ensure this happens, we disagree that an appearance by VTC may adversely affect the adjudicator's ability to evaluate the intensity, persistence, and limiting effects of an individual's symptoms. Due to advances in video technology and our investment in VTC technology, our adjudicators are able to hear, see, and interact with the parties to a hearing as effectively through VTC as they would during an in-person appearance. Our video network infrastructure allows us to conduct daily business in a reliable and stable manner, including holding over 1.7 million video hearings since we began conducting video hearings [8] and opened five National Hearing Centers that exclusively use video technology in their business process. Moreover, as we explained in the NPRM, over the past three years we have refreshed all VTC equipment and infrastructure, resulting in better technological quality and experience for users. All SSA-owned video units on our network use the Real Presence Group platform, which is designed for large enterprise-wide usage necessary for a national network of our size. Our video platform provides clear picture and audio for all participants. Desktop video units have been replaced with new larger Convene desktops with a 27-inch flat panel monitor and Eagle Eye camera, ideal for smaller spaces. Hearing rooms are also equipped with a 65-inch monitor and Eagle Eye camera. We will continue to refresh our video inventory to keep pace with new technology and industry standards, including consulting ACUS's recommendations. Our ALJs and staff are properly trained to operate the VTC equipment and to alert management of any technical issues, which can be dealt with on a case-by-case basis by support personnel.

The high quality of our VTC hearings, and the essential parity in quality between VTC and in-person hearings, is further evidenced by a study conducted by our Office of Quality Review (OQR) in 2017 (which we included in the rulemaking docket when we published the NPRM). This study found that there was no statistically significant difference in the quality rates of fully favorable or unfavorable decisions, regardless of whether the hearings were conducted in person or by VTC.

We also disagree with the comments that claimants must be in the same room as adjudicators to detect aspects of the claimant's presence that can only be discerned in person, such as odor. We note that when an adjudicator evaluates an individual's symptoms, he or she is required to limit the evaluation to the individual's statements about symptoms and the evidence in the record that is relevant to the individual's impairments and activities of daily living.[9] An adjudicator does not assess the individual's overall character or truthfulness in the manner typically used during an adversarial proceeding.[10] Instead, when relevant, the adjudicator receives testimony from the claimant about his or her activities of daily living, and evaluates whether the claimant's statements are consistent with the objective and other evidence of record. Moreover, although an adjudicator cannot make firsthand observations about an individual's body odor when the individual appears by VTC, the distance between the adjudicator and the individual during an in-person appearance may similarly render the adjudicator unable to make firsthand observations about body odor.

Objection To Scheduling Expert Witnesses To Appear by Telephone

Comment: Some commenters also objected to our proposal to schedule expert witnesses to appear by telephone, stating that we should remove this option (which already exists). These commenters cited concerns regarding assumed technical difficulties with telephone connections, concerns that expert witnesses appearing via telephone would not adequately pay attention to the hearing proceedings, and concerns about the security of personally identifiable information (PII) if the expert witness is not in a private location. Commenters also stated that experts appearing via telephone may not be able to view the electronic file during the hearing to review evidence submitted at or shortly after the hearing.

Response: We disagree with these comments, and note that under our existing procedures, we already use telephone hearings for expert witnesses without experiencing the projected technical difficulties cited by the commenters. Under our current rule, expert witnesses frequently appear at hearings by telephone. Experts conducted 21 percent of hearing testimony via telephone in FY 2018 and 37 percent thus far in 2019.[11]

In the past, we have encountered some complications when a hearing office did not place calls to expert witnesses through the video units, but instead used desk phones or teleconference lines. In such situations, the participants at the other video site may have had difficulty hearing the expert witness. To avoid this problem, we issued reminder instructions to all hearing office managers to place calls to experts using the video equipment. Additionally, we require expert witnesses to have a landline telephone connection, which should minimize any connection issues that may be associated with wireless calls. If an expert witness did not comply with our expectations and requirements for hearings testimony, we would address those compliance issues as we do now, in a manner separate and apart from this final rule. Similarly, we already require expert witnesses to properly protect PII,[12] and any issues related to this concern would not be affected by this final rule.

Moreover, our subregulatory guidance provides procedures for ALJs to follow to ensure all participants are able to hear the ALJ and other participants, if multiple participants appear by different means.[13] Our subregulatory guidance also provides procedures for ALJs to ensure that expert witnesses review any additional evidence received between the time the expert reviewed the file and the time of the hearing and to summarize on the record any pertinent testimony for expert witnesses

[8] *See* the Supporting Document ''Number of administrative law judge hearings held by video teleconferencing since 2005,'' under Docket No. SSA–2017–0015 at: *www.regulations.gov.*

[9] Social Security Ruling 16–3p.

[10] *Id.*

[11] *See* the Supporting Document ''Telephone Appearances by Vocational Expert (VE) Witnesses and Medical Expert (ME) Witnesses,'' under Docket No. SSA–2017–0015 at: *www.regulations.gov.*

[12] *https://www.ssa.gov/appeals/public_experts/Medical_Experts_(ME)_Handbook-508.pdf; https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf; https://www.fedconnect.net/FedConnect/PublicPages/PublicSearch/Public_Opportunities.aspx* (Reference number SSA–RFQ–15–0214); and *https://www.fedconnect.net/FedConnect/PublicPages/PublicSearch/Public_Opportunities.aspx* (Reference number SSA–RFQ–15–0182).

[13] Hearings, Appeals, and Litigation Law (HALLEX) Manual I–2–6–15.

who do not attend the entire hearing.[14] We do not plan to modify those existing procedures under the final rule.

Sending an Amended Notice of Hearing or Notice of Supplemental Hearing 20 days Before the Date of the Hearing

Comment: A number of commenters opposed our proposal to clarify that when we need to update the information in a notice of hearing at the ALJ hearing level, we will send an amended notice of hearing or notice of supplemental hearing at least 20 days, rather than 75 days, in advance of the date of the scheduled hearing. Noting that we generally allow 5 days mailing time for notices to arrive, these commenters stated that claimants and appointed representatives may receive the amended notice fewer than 20 days, and possibly only 15 days, before the hearing. Observing that claimants often need to arrange transportation (*e.g.,* paratransit, a ride from a friend or relative, etc.), arrange childcare, reschedule medical appointments, or meet other needs, these commenters further stated that it would be inappropriate and insufficient for us to provide only 20 or fewer days' notice about a change to the date or time of a hearing. The commenters additionally stated that if claimants receive an amended notice only 15 calendar days before the scheduled hearing, these claimants may be unable to meet other requirements that apply at the ALJ hearing level, such as: (1) Requesting a subpoena at least 10 business days in advance of a scheduled hearing, or (2) informing the ALJ about or submitting written evidence at least 5 business days before the date of the scheduled hearing.

Another commenter stated that our proposal to reduce the amount of advance notice that we must provide when updating ''critical facts'' about a scheduled hearing is problematic. This commenter stated that our current practice, which allows a party to a hearing to waive the right to advance notice of the hearing, is sufficient, and that the proposed changes will lead to inefficiencies and fewer policy-compliant decisions.

Response: We disagree with the commenters. As we explained in our NPRM, if we need to change the date of a scheduled hearing, the new date will always be at least 75 days from the date we first sent the claimant a notice of hearing, unless the claimant has waived the right to advance notice. With this safeguard in place, we expect that the vast majority of claimants will be able to meet other requirements that apply at the ALJ hearing level.[15] However, if a claimant is unable to comply with relevant timeframes based on his or her receipt of an amended notice of hearing, the claimant can inform us of that difficulty and request an exception based on an unusual, unexpected, or unavoidable circumstance beyond the claimant's control that prevented him or her from complying with the applicable timeframe.[16]

Further, we frequently send amended hearing notices to update information other than the time or date of the hearing. For example, we send an amended notice of hearing when we change the name of the medical or vocational expert who will testify, add a new witness, change the manner of appearance, or change the ALJ assigned to the case. As explained in the NPRM, under our current rule, these changes required us to send a notice 75 days in advance, resulting in rescheduled hearings and unnecessary delays in many cases. By changing the timeframe to 20 days, we are able to make these types of changes with less impact to our hearings workload and without unnecessarily delaying the hearing.

If we need to change the time or date of a scheduled hearing, we will continue to work with both claimants and representatives to accommodate schedules, including following our standard business process of requesting potential dates and times that the representative will be available for hearing.[17] In this regard, we understand that a representative's schedule of availability, once provided to a hearing office, may change. We remain committed to working with both claimants and representatives when we need to reschedule a hearing and will make every effort to provide adequate advance notice that will not impede the claimant's ability to comply with deadlines like the 10-day deadline for submitting subpoena requests and the 5-day deadline for submitting or informing us of written evidence. Additionally, we will continue to consider good cause for changing the time of the hearing due to issues including, but not limited to, the availability of transportation.

VTC as a Tool To Improve Efficiency

Comment: Some commenters expressed that we failed to demonstrate VTC hearings are more efficient than in-person hearings, or that they reduce processing times. These commenters further stated that we did not provide adequate data to justify the proposed changes, and that we relied on outdated data to support our rationale that more VTC appearances will result in more timely hearings. Some commenters criticized the quality of the data we relied on, and provided studies they asserted refute our conclusions.

Response: We disagree with these commenters. In the preamble to our NPRM, we provided an extensive discussion about our historical and ongoing experience using VTC technology and the flexibility it provides to manage our hearing workloads. We also explained that the number of ALJs available to conduct in-person hearings is generally limited to those ALJs stationed at, or geographically close to, the assigned hearing office or within travel distance to one of our permanent remote sites. As we explained, requiring an ALJ to travel to a remote hearing site for an in-person hearing reduces the amount of time the ALJ can devote to holding other hearings and issuing decisions from his or her assigned hearing office.

We further explained that prior studies, both internal and external, have found that utilizing VTC technology to conduct administrative hearings provides multiple benefits, including improved processing times and additional flexibility with respect to aged and backlogged hearing requests.

We stand by the quality of the data we relied on in the 2017 study by our OQR, which found there was no statistically significant difference in the quality rates of fully favorable or unfavorable decisions, regardless of whether the hearings were held in person or via VTC. The data used in the study represented a national random sample of recent cases. The data sample also fully accounts for improved technological changes that we implemented in the past three years.

Several commenters said that a 2018 Government Accountability Office (GAO) study refutes our findings, and supports the conclusion that individuals who had in-person hearings received favorable decisions at a higher rate than claimants who had VTC hearings.[18] However, unlike our studies, the GAO study was not designed to study the effects of VTC on allowance rates, and it did not account for all factors that

[14] HALLEX I–2–6–70 and I–2–6–74.

[15] *See, e.g.,* 20 CFR 404.935(a), 404.939, 404.949, 404.950(d)(2), 416.1435(a), 416.1439, 416.1449, 416.1450(d)(2).

[16] *See* 20 CFR 404.935(b)(3), 404.939, 404.949, 404.950(d)(2), 416.1435(b)(3), 416.1439, 146.1449, 416.1450(d)(2).

[17] *See* 20 CFR 404.1740(b)(3)(iii) and 416.1540(b)(3)(iii).

[18] GAO, *Social Security Disability, Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions,* GAO–18–37 (December 2017), available at: *https://www.gao.gov/assets/690/688824.pdf.*

could affect this relationship. Further, GAO's study covered cases from 2007 to 2015, the earlier of which did not benefit from technological enhancements that we fully accounted for in the more recent OQR study. GAO studied variances in allowance rates, but not the accuracy of the decisions. Notably, the GAO study found there was no meaningful difference in allowance rates between similar claims decided by adjudicators at our National Hearing Centers, which exclusively conduct VTC hearings, and traditional hearing offices.

Many of the studies and articles cited by commenters in support of their statements that VTC will impact the fairness of hearings do not account for technological enhancements that occurred after the respective studies were conducted, or the non-adversarial nature of our proceedings. For example, one commenter relied on a study from the 1970s that found differences between video testimony and live testimony, particularly with regard to the perception of honesty.[19] However, that study does not reflect the significant technological advancements that have occurred since the 1970s; these advancements enable the fact finder to see, hear, and interact with individuals as easily by VTC as in person. A 2007 article, also cited by commenters, that examined eviction hearings held by VTC, and that analyzed the impact of the conclusions in the criminal proceedings, is also not directly relevant to our VTC hearings.[20] SSA hearings are non-adversarial and have the benefit of technological enhancements over the past 12 years. Another commenter cited the Advisory Committee Notes to Rule 43 of the Federal Rules of Civil Procedure regarding testimony at trial, which is distinguishable because our hearings are not trials, and adjudicators are not bound by the procedures set forth in the Federal Rules of Evidence.

As we previously explained, we expect that we will be able to better balance our workloads by increasing our use of VTC technology. Specifically, we expect that we will be able to decrease the total number of cases pending at the ALJ hearing level by shifting cases from overburdened hearing offices to hearing offices with fewer requests for hearing pending per ALJ. In addition, as we discussed earlier, we are retaining the existing option allowing a claimant to decline a video hearing, which already exists at the ALJ hearing level, and the AC will continue to apply ALJ hearing rules for cases they remove for a hearing.

Discussion of Our Use of the ACUS and SSAB Studies

Comment: Some commenters stated that we mischaracterized the findings of a study from ACUS to justify our proposed changes. Specifically, commenters stated that we implied that ACUS's report endorses mandatory appearances by VTC.

Response: We disagree that we mischaracterized ACUS's study, as evidenced by the fact that when ACUS submitted a comment on our proposed rule, ACUS merely stated that its views were already reflected in its reports and recommendations, and ACUS thanked us for considering its views and drawing upon its research studies. Moreover, in the NPRM, we explained that ACUS: Has identified a number of advantages to using VTC at administrative hearings; has noted that agencies with high volume caseloads are likely to receive the most benefit, cost savings, or both from using VTC; published a Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings;[21] documented that VTC has been widely accepted as an important tool that increases our ability to hold hearings and improve public service; and has repeatedly recommended that we increase our use of VTC hearings to achieve greater efficiency. Thus, we did not state or imply that ACUS supported our specific proposal to disallow the parties to a hearing to opt out of or object to appearing by VTC.

We recognize that ACUS specifically recommended expansion of VTC on a voluntary basis, while allowing a party to have an in-person hearing or proceeding if he or she selected that option.[22] However, as set forth in our NPRM, we based our proposed rule not solely on the ACUS study, but also on: Our own extensive experience with VTC hearings; multiple internal and external studies that have documented the benefits of VTC hearings; technological advances that enable an adjudicator to see, hear, and interact with individuals as easily by VTC as in person; our need to balance workloads and address service challenges while maintaining fairness and participant satisfaction; and SSAB's specific recommendation that we eliminate the ability to opt-out of VTC hearings. Regardless, we reiterate that we are retaining the existing option for a party to a hearing to opt out of appearing by VTC at the ALJ hearing level and AC hearing removal.

Objections to the Rule Based on the Regulatory Flexibility Act and Paperwork Reduction Act

Comment: One commenter objected to the NPRM based on the assertion that the NPRM, and thus this final rule, require a Regulatory Flexibility Act (RFA) analysis. The commenter made several claims to support this view, including, ''[s]ome claimants will withdraw hearing requests rather than go through with a VTC hearing'' which, the commenter contends, will affect experts and representatives. The commenter also contended ''[r]epresentatives with disabilities that require the reasonable modification of an in-person hearing will have to stop or curtail their work on Social Security cases if they can no longer choose to represent only claimants who have opted out of video hearings.'' Finally, the commenter stated, ''The proposed changes to notice rules may also require additional travel costs or hiring of supplemental staff for representatives if hearings are changed with only 20 days' notice.''

Response: We disagree with this commenter. In our NPRM, we explained that our proposed rule would not have a significant economic impact on a substantial number of small entities because they would affect individuals only. Accordingly, we certified that an analysis as provided in the RFA, as amended, was not required. We certify the same with respect to this final rule.

We note that the commenter's assertion that an RFA analysis is required is predicated, in part, on our proposal to disallow a party to a hearing to opt out of, or object to, appearing by VTC. As previously mentioned, in this final rule, we are retaining the existing option for a party to a hearing before an ALJ to object to appearing by VTC. Additionally, at this time, we are not pursuing changes to our rule about scheduling hearings before DHOs.

While the commenter also asserted that our proposal to send an amended notice of hearing or notice of supplemental hearing at least 20 days before the date of the hearing would

[19] Gerald R. Williams, et al., *Juror Perceptions of Trial Testimony as a Function of the Method of Presentation: A comparison of Live, Color Video, Black-and-White Video, Audio, and Transcript Presentations,* 1975 BYU L. Rev. (1975).

[20] Sossin, Lorne and Yetnikoff, Zimra, *I Can See Clearly Now: Videoteleconference Hearings and the Legal Limit on How Tribunals Allocate Resources.* Windsor Yearbook of Access to Justice, 2007 (August 5, 2007), available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1205123.*

[21] The ACUS Handbook is available at: *https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings.*

[22] ACUS Recommendation 2011–4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 FR 48789, 48796 (2011), available at: *https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion.*

require additional travel or supplemental staff costs, the commenter did not explain why. Furthermore, as explained above, if we need to change the date of a hearing, the date we choose will always will be at least 75 days from the date we first sent the claimant a notice of hearing, unless the claimant has waived his or her right to advance notice. Additionally, if we need to change the date or time of a hearing, or schedule a supplemental hearing, we will continue to work with claimants and representatives to accommodate schedules.

Comment: The same commenter stated our NPRM was invalid because we stated in the preamble that the proposed rule did not impose any new or significantly revise existing public reporting requirements under the Paperwork Reduction Act (PRA), and the commenter did not believe this to be correct.

Response: The rationale the commenter provided to support this assertion reflected a misunderstanding of the PRA. When we published the NPRM, our PRA characterization was accurate: We were not creating, nor were we revising, any public information collection tools. The public already uses existing form HA–55 (Objection to Appearing by Video Teleconferencing (OMB No. 0960–0671)) to request a change in time, place, or manner of hearing. We will not be substantively changing this form, particularly since we are retaining the opt-out provision. We will be adding very minor language changes in the supplemental explanation section of this form; this language will clarify that if one declines the VTC option, there is a chance a delay in hearing will result. This change is considered non-substantive under the PRA because it does not add or remove any questions, nor does it provide new information that is needed to complete the form. Accordingly, although we are submitting a non-substantive change request for this modification, we do not need to undergo full PRA approval, nor do we need to seek public comment on the change.

As well, we are making a minor change to form HA–510 (Waiver of Written Notice of Hearing (Form HA–510, OMB No. 0960–0671)) to reflect that we will now be providing a notice of amended or supplemental hearing 20, not 75 days, in advance of the hearing. Because we already solicited comment on this change through the proposed rule (*i.e.,* the form language change is simply a reflection of the policy change), we do not need to seek additional comment under the PRA. We are thus clearing this change as well through the non-substantive change request process.

Regulatory Procedures

Executive Order 12866 as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule did not meet the requirements for a significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563. Thus, OMB did not conduct formal review of this final rule.

Executive Order 13771 and Cost Information

This rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature, and it will result in no more than de minimis, if any, costs in any one year after implementation.

At this time, the Office of the Chief Actuary estimates that this final rule will have a negligible effect on scheduled old-age, survivors, and disability insurance benefits and Federal Supplemental Security Income payments.

The Office of Budget, Finance, and Management estimates administrative savings of less than 15 work years and $2 million annually.

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities because it only affects individuals. Accordingly, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

SSA already has existing OMB PRA-approved information collection tools relating to this final rule: Objection to Appearing by Video Teleconferencing (Form HA–55, OMB No. 0960–0671), and Waiver of Written Notice of Hearing (Form HA–510, OMB No. 0960–0671). Because we are retaining the opt-out provision for video teleconference (VTC) in this final rule, we are only adding minor instructional changes to Form HA–55 to caution claimants that by opting out of appearing by VTC, they may experience a delay in being scheduled for a hearing. In addition, due to the change in timing for amended or continued hearing notices, we are also making a minor change to Form HA–510 to show the change in timing for requesting the waiver for those affected by this change. However, because these modifications are minor in nature, and either reflect existing policy (HA–55), or have already been presented for public comments through rulemaking (HA–510), we will obtain OMB approval for these changes through a non-substantive change request, which does not require public notice and comment under the PRA. Thus, this final rule does not create or significantly alter any existing information collections under the PRA.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, blind, disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Andrew Saul,

Commissioner of Social Security.

For the reasons set out in the preamble, we are amending 20 CFR chapter III, parts 404 and 416, as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Revise § 404.929 to read as follows:

§ 404.929 Hearing before an administrative law judge-general.

If you are dissatisfied with one of the determinations or decisions listed in § 404.930, you may request a hearing. The Deputy Commissioner for Hearings

Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 404.936(c)(1)(i) through (iii), and in the limited circumstances described in § 404.936(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 404.935), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 404.935, any new evidence that may have been submitted for consideration.

■ 3. Revise § 404.936 to read as follows:

§ 404.936 Time and place for a hearing before an administrative law judge.

(a) *General.* We set the time and place for any hearing. We may change the time and place, if it is necessary. After sending you reasonable notice of the proposed action, the administrative law judge may adjourn or postpone the hearing or reopen it to receive additional evidence any time before he or she notifies you of a hearing decision.

(b) *Where we hold hearings.* We hold hearings in the 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the United States Virgin Islands. The ''place'' of the hearing is the hearing office or other site(s) at which you and any other parties to the hearing are located when you make your appearance(s) before the administrative law judge by video teleconferencing, in person or, when the circumstances described in paragraph (c)(2) of this section exist, by telephone.

(c) *Determining manner of hearing to schedule.* We will generally schedule you or any other party to the hearing to appear either by video teleconferencing or in person.

(1) When we determine whether you will appear by video teleconferencing or in person, we consider the following factors:

(i) The availability of video teleconferencing equipment to conduct the appearance;

(ii) Whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person; and

(iii) Any facts in your particular case that provide a good reason to schedule your appearance by video teleconferencing or in person.

(2) Subject to paragraph (c)(3) of this section, we will schedule you or any other party to the hearing to appear by telephone when we find an appearance by video teleconferencing or in person is not possible or other extraordinary circumstances prevent you from appearing by video teleconferencing or in person.

(3) If you are incarcerated and video teleconferencing is not available, we will schedule your appearance by telephone, unless we find that there are facts in your particular case that provide a good reason to schedule your appearance in person, if allowed by the place of confinement, or by video teleconferencing or in person upon your release.

(4) We will generally direct any person we call as a witness, other than you or any other party to the hearing, including a medical expert or a vocational expert, to appear by telephone or by video teleconferencing. Witnesses you call will appear at the hearing pursuant to § 404.950(e). If they are unable to appear with you in the same manner as you, we will generally direct them to appear by video teleconferencing or by telephone. We will consider directing witnesses to appear in person only when:

(i) Telephone or video teleconferencing equipment is not available to conduct the appearance;

(ii) We determine that use of telephone or video teleconferencing equipment would be less efficient than conducting the appearance in person; or

(iii) We find that there are facts in your particular case that provide a good reason to schedule this individual's appearance in person.

(d) *Objecting to appearing by video teleconferencing.* Prior to scheduling your hearing, we will notify you that we may schedule you to appear by video teleconferencing. If you object to appearing by video teleconferencing, you must notify us in writing within 30 days after the date you receive the notice. If you notify us within that time period and your residence does not change while your request for hearing is pending, we will set your hearing for a time and place at which you may make your appearance before the administrative law judge in person.

(1) Notwithstanding any objections you may have to appearing by video teleconferencing, if you change your residence while your request for hearing is pending, we may determine how you will appear, including by video teleconferencing, as provided in paragraph (c)(1) of this section. For us to consider your change of residence when we schedule your hearing, you must submit evidence verifying your new residence.

(2) If you notify us that you object to appearing by video teleconferencing more than 30 days after the date you receive our notice, we will extend the time period if you show you had good cause for missing the deadline. To determine whether good cause exists for extending the deadline, we use the standards explained in § 404.911.

(e) *Objecting to the time or place of the hearing.* (1) If you wish to object to the time or place of the hearing, you must:

(i) Notify us in writing at the earliest possible opportunity, but not later than 5 days before the date set for the hearing or 30 days after receiving notice of the hearing, whichever is earlier; and

(ii) State the reason(s) for your objection and state the time or place you want the hearing to be held. If the administrative law judge finds you have good cause, as determined under paragraph (e) of this section, we will change the time or place of the hearing.

(2) If you notify us that you object to the time or place of hearing less than 5 days before the date set for the hearing or, if earlier, more than 30 days after receiving notice of the hearing, we will consider this objection only if you show you had good cause for missing the deadline. To determine whether good cause exists for missing this deadline, we use the standards explained in § 404.911.

(f) *Good cause for changing the time or place.* The administrative law judge will determine whether good cause exists for changing the time or place of your scheduled hearing. If the administrative law judge finds that good cause exists, we will set the time or place of the new hearing. A finding that good cause exists to reschedule the time or place of your hearing will generally not change the assignment of the administrative law judge or how you or another party will appear at the hearing, unless we determine a change will promote efficiency in our hearing process.

(1) The administrative law judge will find good cause to change the time or place of your hearing if he or she determines that, based on the evidence:

(i) A serious physical or mental condition or incapacitating injury makes it impossible for you or your representative to travel to the hearing, or a death in the family occurs; or

(ii) Severe weather conditions make it impossible for you or your representative to travel to the hearing.

(2) In determining whether good cause exists in circumstances other than those set out in paragraph (f)(1) of this section, the administrative law judge will consider your reason(s) for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to, the effect on the processing of other scheduled hearings, delays that might occur in rescheduling your hearing, and whether we previously granted you any changes in the time or place of your hearing. Examples of such other circumstances that you might give for requesting a change in the time or place of the hearing include, but are not limited to, the following:

(i) You unsuccessfully attempted to obtain a representative and need additional time to secure representation;

(ii) Your representative was appointed within 30 days of the scheduled hearing and needs additional time to prepare for the hearing;

(iii) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;

(iv) A witness who will testify to facts material to your case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained;

(v) Transportation is not readily available for you to travel to the hearing; or

(vi) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

■ 4. Amend § 404.938 by revising paragraphs (b)(3) and (5) and (c) and adding paragraph (d) to read as follows:

§ 404.938 Notice of a hearing before an administrative law judge.

* * * * *

(b) * * *

(3) How to request that we change the time or place of your hearing; * * *

(5) Whether your appearance or that of any other party or witness is scheduled to be made by video teleconferencing, in person, or, when the circumstances described in § 404.936(c)(2) exist, by telephone. If we have scheduled you to appear by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

* * * * *

(c) *Acknowledging the notice of hearing.* The notice of hearing will ask you to return a form to let us know that you received the notice. If you or your representative do not acknowledge receipt of the notice of hearing, we will attempt to contact you for an explanation. If you tell us that you did not receive the notice of hearing, an amended notice will be sent to you by certified mail.

(d) *Amended notice of hearing or notice of supplemental hearing.* If we need to send you an amended notice of hearing, we will mail or serve the notice at least 20 days before the date of the hearing. Similarly, if we schedule a supplemental hearing, after the initial hearing was continued by the assigned administrative law judge, we will mail or serve a notice of hearing at least 20 days before the date of the hearing.

■ 5. Amend § 404.950 by revising paragraphs (a) and (e) to read as follows:

§ 404.950 Presenting evidence at a hearing before an administrative law judge.

(a) *The right to appear and present evidence.* Any party to a hearing has a right to appear before the administrative law judge, either by video teleconferencing, in person, or, when the conditions in § 404.936(c)(2) exist, by telephone, to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative, who may make the appearance by video teleconferencing, in person, or, when the conditions in § 404.936(c)(2) exist, by telephone.

* * * * *

(e) *Witnesses at a hearing.* Witnesses you call may appear at a hearing with you in the same manner in which you are scheduled to appear. If they are unable to appear with you in the same manner as you, they may appear as prescribed in § 404.936(c)(4). Witnesses called by the administrative law judge will appear in the manner prescribed in § 404.936(c)(4). They will testify under oath or affirmation unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witness any questions material to the issues and will allow the parties or their designated representatives to do so.

* * * * *

■ 6. Amend § 404.976 by revising paragraph (b) to read as follows:

§ 404.976 Procedures before the Appeals Council on review.

* * * * *

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. You will appear before the Appeals Council by video teleconferencing or in person, or, when the circumstances described in § 404.936(c)(2) exist, we may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 404.936(c)(4).

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 7. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 8. Revise § 416.1429 to read as follows:

§ 416.1429 Hearing before an administrative law judge-general.

If you are dissatisfied with one of the determinations or decisions listed in § 416.1430, you may request a hearing. The Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear

by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 416.1436(c)(1)(i) through (iii), and in the limited circumstances described in § 416.1436(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 416.1435), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 416.1435, any new evidence that may have been submitted for consideration.

■ 9. Revise § 416.1436 to read as follows:

§ 416.1436 Time and place for a hearing before an administrative law judge.

(a) *General.* We set the time and place for any hearing. We may change the time and place, if it is necessary. After sending you reasonable notice of the proposed action, the administrative law judge may adjourn or postpone the hearing or reopen it to receive additional evidence any time before he or she notifies you of a hearing decision.

(b) *Where we hold hearings.* We hold hearings in the 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the United States Virgin Islands. The ''place'' of the hearing is the hearing office or other site(s) at which you and any other parties to the hearing are located when you make your appearance(s) before the administrative law judge by video teleconferencing, in person or, when the circumstances described in paragraph (c)(2) of this section exist, by telephone.

(c) *Determining manner of hearing to schedule.* We will generally schedule you or any other party to the hearing to appear either by video teleconferencing or in person.

(1) When we determine whether you will appear by video teleconferencing or in person, we consider the following factors:

(i) The availability of video teleconferencing equipment to conduct the appearance;

(ii) Whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person; and

(iii) Any facts in your particular case that provide a good reason to schedule your appearance by video teleconferencing or in person.

(2) Subject to paragraph (c)(3) of this section, we will schedule you or any other party to the hearing to appear by telephone when we find an appearance by video teleconferencing or in person is not possible or other extraordinary circumstances prevent you from appearing by video teleconferencing or in person.

(3) If you are incarcerated and video teleconferencing is not available, we will schedule your appearance by telephone, unless we find that there are facts in your particular case that provide a good reason to schedule your appearance in person, if allowed by the place of confinement, or by video teleconferencing or in person upon your release.

(4) We will generally direct any person we call as a witness, other than you or any other party to the hearing, including a medical expert or a vocational expert, to appear by telephone or by video teleconferencing. Witnesses you call will appear at the hearing pursuant to § 416.1450(e). If they are unable to appear with you in the same manner as you, we will generally direct them to appear by video teleconferencing or by telephone. We will consider directing witnesses to appear in person only when:

(i) Telephone or video teleconferencing equipment is not available to conduct the appearance;

(ii) We determine that use of telephone or video teleconferencing equipment would be less efficient than conducting the appearance in person; or

(iii) We find that there are facts in your particular case that provide a good reason to schedule this individual's appearance in person.

(d) *Objecting to appearing by video teleconferencing.* Prior to scheduling your hearing, we will notify you that we may schedule you to appear by video teleconferencing. If you object to appearing by video teleconferencing, you must notify us in writing within 30 days after the date you receive the notice. If you notify us within that time period and your residence does not change while your request for hearing is pending, we will set your hearing for a time and place at which you may make your appearance before the administrative law judge in person.

(1) Notwithstanding any objections you may have to appearing by video teleconferencing, if you change your residence while your request for hearing is pending, we may determine how you will appear, including by video teleconferencing, as provided in paragraph (c)(1) of this section. For us to consider your change of residence when we schedule your hearing, you must submit evidence verifying your new residence.

(2) If you notify us that you object to appearing by video teleconferencing more than 30 days after the date you receive our notice, we will extend the time period if you show you had good cause for missing the deadline. To determine whether good cause exists for extending the deadline, we use the standards explained in § 416.1411.

(e) *Objecting to the time or place of the hearing.* (1) If you wish to object to the time or place of the hearing, you must:

(i) Notify us in writing at the earliest possible opportunity, but not later than 5 days before the date set for the hearing or 30 days after receiving notice of the hearing, whichever is earlier; and

(ii) State the reason(s) for your objection and state the time or place you want the hearing to be held. If the administrative law judge finds you have good cause, as determined under paragraph (e) of this section, we will change the time or place of the hearing.

(2) If you notify us that you object to the time or place of hearing less than 5 days before the date set for the hearing or, if earlier, more than 30 days after receiving notice of the hearing, we will consider this objection only if you show you had good cause for missing the deadline. To determine whether good cause exists for missing this deadline, we use the standards explained in § 416.1411.

(f) *Good cause for changing the time or place.* The administrative law judge will determine whether good cause exists for changing the time or place of your scheduled hearing. If the administrative law judge finds that good cause exists, we will set the time or place of the new hearing. A finding that good cause exists to reschedule the time or place of your hearing will generally not change the assignment of the administrative law judge or how you or another party will appear at the hearing, unless we determine a change will promote efficiency in our hearing process.

(1) The administrative law judge will find good cause to change the time or place of your hearing if he or she determines that, based on the evidence:

(i) A serious physical or mental condition or incapacitating injury makes it impossible for you or your representative to travel to the hearing, or a death in the family occurs; or

(ii) Severe weather conditions make it impossible for you or your representative to travel to the hearing.

(2) In determining whether good cause exists in circumstances other than those set out in paragraph (f)(1) of this section, the administrative law judge will consider your reason(s) for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to, the effect on the processing of other scheduled hearings, delays that might occur in rescheduling your hearing, and whether we previously granted you any changes in the time or place of your hearing. Examples of such other circumstances that you might give for requesting a change in the time or place of the hearing include, but are not limited to, the following:

(i) You unsuccessfully attempted to obtain a representative and need additional time to secure representation;

(ii) Your representative was appointed within 30 days of the scheduled hearing and needs additional time to prepare for the hearing;

(iii) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;

(iv) A witness who will testify to facts material to your case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained;

(v) Transportation is not readily available for you to travel to the hearing; or

(vi) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

■ 10. Amend § 416.1438 by revising paragraphs (b)(3) and (5) and (c) and adding paragraph (d) to read as follows:

§ 416.1438 Notice of a hearing before an administrative law judge.

* * * * *

(b) * * *

(3) How to request that we change the time or place of your hearing;

* * * * *

(5) Whether your appearance or that of any other party or witness is scheduled to be made by video teleconferencing, in person, or, when the circumstances described in § 416.1436(c)(2) exist, by telephone. If we have scheduled you to appear by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

* * * * *

(c) *Acknowledging the notice of hearing.* The notice of hearing will ask you to return a form to let us know that you received the notice. If you or your representative do not acknowledge receipt of the notice of hearing, we will attempt to contact you for an explanation. If you tell us that you did not receive the notice of hearing, an amended notice will be sent to you by certified mail.

(d) *Amended notice of hearing or notice of supplemental hearing.* If we need to send you an amended notice of hearing, we will mail or serve the notice at least 20 days before the date of the hearing. Similarly, if we schedule a supplemental hearing, after the initial hearing was continued by the assigned administrative law judge, we will mail or serve a notice of hearing at least 20 days before the date of the hearing.

■ 11. Amend § 416.1450 by revising paragraphs (a) and (e) to read as follows:

§ 416.1450 Presenting evidence at a hearing before an administrative law judge.

(a) *The right to appear and present evidence.* Any party to a hearing has a right to appear before the administrative law judge, either by video teleconferencing, in person, or, when the conditions in § 416.1436(c)(2) exist, by telephone, to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative, who may make the appearance by video teleconferencing, in person, or, when the conditions in § 416.1436(c)(2) exist, by telephone.

* * * * *

(e) *Witnesses at a hearing.* Witnesses you call may appear at a hearing with you in the same manner in which you are scheduled to appear. If they are unable to appear with you in the same manner as you, they may appear as prescribed in § 416.1436(c)(4). Witnesses called by the administrative law judge will appear in the manner prescribed in § 416.1436(c)(4). They will testify under oath or affirmation unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witness any questions material to the issues and will allow the parties or their designated representatives to do so.

* * * * *

■ 12. Amend § 416.1476 by revising paragraph (b) to read as follows:

§ 416.1476 Procedures before the Appeals Council on review.

* * * * *

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. You will appear before the Appeals Council by video teleconferencing or in person, or, when the circumstances described in § 416.1436(c)(2) exist, we may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 416.1436(c)(4).

[FR Doc. 2019–27172 Filed 12–17–19; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9888]

RIN 1545–BN18

Guidance Under Section 355(e) Regarding Predecessors, Successors, and Limitation on Gain Recognition; Guidance Under Section 355(f)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide guidance regarding the distribution by a distributing corporation of stock or securities of a controlled corporation without the recognition of income, gain, or loss. In particular, the final regulations provide guidance in determining whether a corporation is a predecessor or successor of a distributing or controlled corporation for purposes of the exception under section 355(e) of the Internal Revenue Code (Code) to the nonrecognition treatment afforded qualifying distributions. In addition, the final regulations provide certain limitations on the recognition of gain in certain cases involving a predecessor of a distributing corporation. The final

regulations also provide rules regarding the extent to which section 355(f) causes a distributing corporation (and in certain cases its shareholders) to recognize income or gain on the distribution of stock or securities of a controlled corporation. These regulations affect corporations that distribute the stock or securities of a controlled corporation and the shareholders or security holders of those distributing corporations.

DATES: *Effective date:* These final regulations are effective on December 16, 2019.

Applicability dates: For dates of applicability, see § 1.355–8(i).

FOR FURTHER INFORMATION CONTACT: W. Reid Thompson, (202) 317–5024, or Richard K. Passales, (202) 317–5024 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Corporate Divisions Under Sections 355 and 368(a)(1)(D)

Congress enacted section 355 ''to permit the tax-free division of existing business arrangements among existing shareholders.'' *See* S. Rep. No. 105–33, at 139 (1997) (Senate Report). Under section 355(a)(1), if certain requirements are met, a corporation (Distributing) may distribute stock, or stock and securities, of a controlled corporation (Controlled) to Distributing's shareholders, or to its shareholders and security holders, without recognition of gain or loss to, or inclusion of any amount in income of, the distributees upon receipt (Distribution). Section 355(c) generally provides that no gain or loss is recognized to Distributing upon a Distribution of qualified property which is not in pursuance of a plan of reorganization. Section 355(c)(2)(B) refers to Controlled stock and Controlled securities as ''qualified property.'' If Distributing distributes property other than qualified property in a Distribution and the fair market value of such property exceeds its adjusted basis, gain is recognized to Distributing as if the property were sold to the distributee at its fair market value. *See* section 355(c)(2)(A).

Taxpayers also may carry out a Distribution as part of a ''divisive reorganization'' under section 368(a)(1)(D). A divisive reorganization is a transfer by Distributing of part of its assets to Controlled if, immediately after the transfer, one or more of the shareholders of Distributing (including persons who were shareholders immediately before the transfer) have control, as defined in section 368(c), of Controlled, but only if, in pursuance of the plan, stock or securities of Controlled are distributed in a Distribution. Section 361(c) generally provides that no gain or loss is recognized to Distributing upon a Distribution of qualified property in pursuance of a plan of reorganization. Section 361(c)(2)(B) defines ''qualified property'' as (i) any stock, right to acquire stock, or obligation (including a security) of Distributing, or (ii) any stock, right to acquire stock, or obligation (including a security) of Controlled received by Distributing as part of the divisive reorganization. If Distributing distributes property other than qualified property in a Distribution as part of a divisive reorganization and the fair market value of such property exceeds its adjusted basis, gain is recognized to Distributing as if the property were sold to the distributee at its fair market value. *See* section 361(c)(2)(A).

II. Section 355(e)

Although a Distribution is generally tax-free under sections 355 and 361, Congress has determined that recognition of corporate-level gain by Distributing is appropriate ''[i]n cases in which it is intended that new shareholders will acquire ownership of a business in connection with a [Distribution],'' because the overall transaction ''more closely resembles a corporate level disposition of the portion of the business that is acquired.'' Senate Report at 139–140. Accordingly, the enactment of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788 (1997)), added section 355(e) to the Code. Under section 355(e), stock or securities of Controlled generally will not be treated as qualified property for purposes of section 355(c)(2) or section 361(c)(2) if the stock or securities are distributed as part of a plan or series of related transactions (Plan) pursuant to which one or more persons acquire directly or indirectly stock representing a ''50-percent or greater interest'' in the stock (Planned 50-percent Acquisition) of Distributing or Controlled. The term ''50-percent or greater interest,'' as defined in section 355(e)(4)(A) by reference to section 355(d)(4), means stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock. Section 1.355–7(b) provides detailed guidance regarding the meaning and determination of the existence of a Plan.

Section 355(e)(4)(D) provides that, for purposes of section 355(e), ''any reference to [Controlled] or [Distributing] shall include a reference to any predecessor or successor of such corporation.'' However, Section 355(e) does not define the terms ''predecessor'' and ''successor.'' To provide definitions for the terms ''predecessor'' and ''successor'' for purposes of section 355(e), as well as guidance regarding their application, the Department of the Treasury (Treasury Department) and the IRS issued proposed regulations in 2004 (2004 Proposed Regulations) and temporary and proposed regulations in 2016 (2016 Regulations).

III. The 2004 Proposed Regulations and the 2016 Regulations

The general theory underlying the 2004 Proposed Regulations and the 2016 Regulations was that section 355(e) should apply if a Distribution is used to combine a tax-free division of the assets of a corporation other than Distributing or Controlled (Divided Corporation) with a Planned 50-percent Acquisition of the Divided Corporation. The Treasury Department and the IRS view this type of transaction as a ''synthetic spin-off'' of the assets that are transferred by the Divided Corporation to Distributing and then to Controlled. For example, a synthetic spin-off could be achieved through the following series of transactions occurring pursuant to a Plan (Base Case Example): (1) A corporation (P) merges into Distributing in a reorganization described in section 368(a)(1)(A), (2) Distributing contributes some (but not all) of P's assets to Controlled in a reorganization described in section 368(a)(1)(D), and (3) Distributing distributes all of the stock of Controlled in a Distribution.

In the Base Case Example, the Divided Corporation (that is, P) could have separated its assets in its own Distribution. In that case, the Divided Corporation would have been a Distributing itself, and section 355(e) clearly would have applied to the Distribution if it were combined with a Planned 50-percent Acquisition of the Divided Corporation. However, the Treasury Department and the IRS observed that if a Distribution by a Distributing is used as the vehicle for a synthetic spin-off by the Divided Corporation, the synthetic spin-off would not be subject to section 355(e) unless the Divided Corporation is treated as a predecessor of Distributing under section 355(e)(4)(D) (Predecessor of Distributing, or POD). Accordingly, the Treasury Department and the IRS issued the 2004 Proposed Regulations and the 2016 Regulations to treat the Divided Corporation in the Base Case Example as a POD.

A. 2004 Proposed Regulations

On November 22, 2004, the Treasury Department and the IRS published in the **Federal Register** (69 FR 67873) the 2004 Proposed Regulations (REG–145535–02). In general, the 2004 Proposed Regulations would have defined a Predecessor of Distributing as any corporation the assets of which a Distributing has acquired in a transaction to which section 381(a) applies (Section 381 Transaction) and then divided tax-free through a Distribution. The 2004 Proposed Regulations referred to the Section 381 Transaction and the contribution to Controlled of some (but not all) of the assets of the POD prior to the Distribution as a ''combining transfer'' and a ''separating transfer,'' respectively. The Treasury Department and the IRS drafted the 2004 proposal primarily to address combining and separating transfers carried out to effect transactions similar to the Base Case Example (in other words, synthetic spin-offs effectuated through Section 381 Transactions).

B. 2016 Regulations

After considering all comments received regarding the 2004 Proposed Regulations, on December 19, 2016, the Treasury Department and the IRS published temporary regulations (TD 9805) in the **Federal Register** (81 FR 91738) (2016 Temporary Regulations), which adopted the 2004 Proposed Regulations with significant modifications. On the same day, the Treasury Department and the IRS published in the **Federal Register** (81 FR 91888) a notice of proposed rulemaking (REG–140328–15) (2016 Proposed Regulations), which cross-referenced the 2016 Temporary Regulations. A correction to the 2016 Temporary Regulations was published in the **Federal Register** (82 FR 8811) on January 31, 2017. (References to § 1.355–8T in this preamble refer to the text of the 2016 Temporary Regulations as contained in 26 CFR part 1 revised as of April 1, 2019.)

Although the 2016 Regulations generally retained the synthetic spin-off theory underlying the 2004 Proposed Regulations, the Treasury Department and the IRS significantly broadened the scope of the POD definition (but also significantly narrowed its potential application, as described later in this part III.B). Commenters on the 2004 Proposed Regulations noted that a corporation could have been a POD only if the corporation transferred property to Distributing in a Section 381 Transaction (such as the merger in the Base Case Example) and questioned whether that approach was under-inclusive. In particular, one commenter explained that a taxpayer could structure a series of transactions to achieve many of the same tax and economic objectives as the Base Case Example without using a Section 381 Transaction.

To illustrate that point, the commenter described the following series of transactions, all of which occur as part of the same Plan (2016 Preamble Example). First, Distributing (the common parent of a consolidated group) acquires all of the stock of P. P then contributes some (but not all) of its assets to a wholly owned subsidiary of Distributing (Internal Distributing) in a transaction to which section 351 applies. *See* § 1.1502–34. Thereafter, Internal Distributing (i) contributes one of the P assets to Controlled, and (ii) distributes all of the stock of Controlled to Distributing in a Distribution. Finally, Distributing distributes all of the stock of Controlled in a Distribution.

In response to these comments, the Treasury Department and the IRS broadened the POD definition in the 2016 Regulations by removing the requirement of a Section 381 Transaction from the definition. Under the 2016 Regulations, no particular transactional form was required; rather, the 2016 Regulations focused on the tax-free division of the POD's property (however effected). The Treasury Department and the IRS revised the POD definition in this manner to ensure that section 355(e) would apply to the Base Case Example, the 2016 Preamble Example, and more generally to any synthetic spin-off that is combined with a Planned 50-percent Acquisition of the Divided Corporation. Importantly, however, the 2016 Regulations significantly limited POD treatment to transactions in which *all* of the steps involved in the tax-free division of property of the POD occur as part of a Plan. *See* section 355(e)(2)(A)(ii).

Because of these revisions to the 2004 Proposed Regulations, a variety of new transactional structures resulted in POD treatment under the 2016 Regulations. For instance, as illustrated in § 1.355–8T(h), *Example 5* (Example 5), a corporation was treated as a POD as a result of the following transactions, each of which occurs pursuant to the same Plan. First, P transfers some (but not all) of its assets to Distributing in exchange for 10 percent of the stock of Distributing in a transaction to which section 351 applies (leaving Distributing's other shareholder, Y, with 90 percent of Distributing's stock). Distributing then (i) contributes some (but not all) of the P assets to Controlled in a reorganization described in section 368(a)(1)(D), and (ii) distributes all of the stock of Controlled to P and Y pro rata. Finally, individual Z acquires 51 percent of the P stock. Because the assets of P were divided tax-free as part of a Plan, the 2016 Regulations treated P as a POD. As described in part II of the Summary of Comments and Explanation of Revisions, in response to comments, the Treasury Department and the IRS have further limited the scope of the POD definition in the final regulations to ensure that P will not be treated as a POD in Example 5.

In expanding the definition of a Predecessor of Distributing, the 2016 Regulations introduced the term ''Potential Predecessor.'' *See* § 1.355–8T(b)(2)(ii). Under the POD definition in the 2016 Regulations, only a Potential Predecessor could be a POD. *See* § 1.355–8T(b)(1)(i). Thus, if a corporation were not a Potential Predecessor, it could not have been a POD under the 2016 Regulations. The 2016 Regulations defined a Potential Predecessor as any corporation other than Distributing or Controlled. *See* § 1.355–8T(b)(2)(ii).

Summary of Comments and Explanation of Revisions

Comments were received regarding the 2016 Regulations, but no public hearing was requested or held. After consideration of these comments, this Treasury decision adopts the 2016 Proposed Regulations with limited modifications, and it removes the 2016 Temporary Regulations. In general, the final regulations follow the approach of the 2016 Regulations while incorporating certain requested clarifications and minor revisions.

I. Predecessor of Distributing Definition

The Treasury Department and the IRS are promulgating the final regulations with the same goal as the 2004 Proposed Regulations and the 2016 Regulations: To ensure that section 355(e) applies properly to synthetic spin-offs of a Divided Corporation's assets. As noted in part II of the Background, Congress has determined that corporate-level gain should be recognized by a Distributing ''[i]n cases in which it is intended that new shareholders will acquire ownership of a business in connection with a [Distribution],'' because the overall transaction ''more closely resembles a corporate level disposition of the portion of the business that is acquired.'' Senate Report at 139–140. Consistent with this policy, the final regulations provide that a corporation cannot qualify as a POD unless the

corporation's assets are divided through a Distribution (that is, unless the corporation is a Divided Corporation).

The Treasury Department and the IRS have determined that, by limiting POD treatment to Divided Corporations, the final regulations will further the policy of section 355(e) while continuing to permit tax-free divisions of existing business arrangements among existing shareholders. *See* Senate Report at 139. In particular, the Treasury Department and the IRS have sought to avoid definitions that would cause section 355(e) to apply to transactions that do not resemble sales. For example, starting with the 2004 Proposed Regulations, the Treasury Department and the IRS have rejected a POD definition that would include any corporation that, without more, transfers assets to a Distributing in a Section 381 Transaction.

The following example illustrates how that rejected POD definition would have run contrary to the policies of section 355 and section 355(e). As part of a Plan, P merges tax-free into Distributing in a reorganization described in section 368(a)(1)(A), with the P shareholders receiving 40 percent of the stock of Distributing. Distributing then distributes all of the stock of Controlled (which holds none of the P assets) in a Distribution. If P were treated as a POD, the Distribution would result in gain recognition under section 355(e), because it occurred as part of the same Plan as an acquisition of a 50-percent or greater interest in P (that is, a Planned 50-percent Acquisition). *See* section 355(e)(3)(B). However, the Treasury Department and the IRS have determined that the policy of section 355(e) does not warrant the recognition of gain in this case, because the assets of P have not been divided and neither Distributing nor Controlled has undergone a Planned 50-percent Acquisition. Rather, the Distribution effected a division of existing business arrangements among existing shareholders, and Congress intended section 355 to afford tax-free treatment to such a transaction. *See* Senate Report at 139.

II. Scope of the Potential Predecessor Definition

Commenters criticized the breadth of the POD definition in the 2016 Regulations. Although commenters generally supported the treatment of P as a POD in the 2016 Preamble Example, commenters questioned the policy of treating P as a POD in Example 5. *See* part III.B of the Background section (describing the 2016 Preamble Example and Example 5). After considering all comments received on this issue, and as discussed further in the remainder of this part II, the Treasury Department and the IRS have determined that the series of transactions set forth in Example 5 should not be viewed as a synthetic spin-off, and that P therefore should not be treated as a POD in Example 5.

A. Example 5 Reduces Neither the Total Value nor the Total Built-In Gain Inside P

When a corporation distributes an appreciated asset with respect to its stock, the corporation disposes of the asset for no consideration, reducing both the total value and the total built-in gain inside the corporation. In this regard, the synthetic spin-off by P in the Base Case Example resembles an actual Distribution by P of stock of a controlled corporation holding the P assets actually held by Controlled. Both transactions reduce the total value and built-in gain of P (which, in the Base Case Example, becomes part of Distributing) by the value of, and built-in gain in, the P assets held by Controlled.

By contrast, Example 5 involves a section 351 exchange by P, which reduces neither the total value nor the total built-in gain inside P. In the section 351 exchange, P exchanges assets for Distributing stock of equal value. Under section 358, P's basis in this Distributing stock is determined by reference to P's basis in the assets exchanged therefor, and is then allocated between P's Distributing stock and the Controlled stock P receives in the Distribution. Therefore, upon the conclusion of Example 5, P holds Distributing stock and Controlled stock with an aggregate value and built-in gain equal to the aggregate value of, and built-in gain in, the assets P transferred to Distributing. Rather than disposing of an asset for no consideration (as is the case in an actual distribution of property with respect to a Distributing's stock), P merely has exchanged one asset for another in Example 5. As a result, the Treasury Department and the IRS have determined that the series of transactions set forth in Example 5 does not resemble an actual Distribution by P and should not be viewed as a synthetic spin-off.

B. Ease of Elimination of Built-In Gain in the 2016 Preamble Example

The key distinction between the 2016 Preamble Example and Example 5 is the relative ease with which a subsequent restructuring could be undertaken to eliminate P's substituted built-in gain in the 2016 Preamble Example. The 2016 Preamble Example, like Example 5, involves a section 351 exchange in which P exchanges assets for Internal Distributing stock with the same value and built-in gain. Unlike in Example 5, however, Distributing in the 2016 Preamble Example directly and indirectly owns 100 percent of the stock of both P and Internal Distributing. As a result, in the 2016 Preamble Example, Distributing could unilaterally eliminate the built-in gain preserved in P's Internal Distributing stock through an internal restructuring. The occurrence of such an internal restructuring would make the 2016 Preamble Example difficult to distinguish from the Base Case Example.

By contrast, upon the conclusion of Example 5, P owns only 10 percent of the stock of each of Distributing and Controlled, whereas corporation Y owns 90 percent. Although it may be theoretically possible for P to eliminate its built-in gain in this stock through certain transactions involving Distributing and Controlled, P lacks any meaningful control over either corporation. In addition, the Treasury Department and the IRS note that such built-in gain elimination transactions generally would carry significant non-tax consequences. Therefore, it would be unreasonable to assume that such transactions would occur and that P's built-in gain in the Distributing and Controlled stock would be eliminated after the Distribution.

One commenter asserted that there is little opportunity for P to engage in a subsequent restructuring to eliminate its built-in gain in Distributing or Controlled stock in a case like Example 5 or the 2016 Preamble Example unless P is a member of Distributing's affiliated group (as defined in section 1504 without regard to section 1504(b)) (Expanded Affiliated Group). The Treasury Department and the IRS agree with this comment.

Based on the foregoing, the final regulations define the term Potential Predecessor as any corporation other than Distributing or Controlled, but only if either (i) as part of a Plan, the corporation transfers property to a Potential Predecessor, Distributing, or a member of the same Expanded Affiliated Group as Distributing in a Section 381 Transaction (as in the Base Case Example), or (ii) immediately after completion of the Plan, the corporation is a member of the same Expanded Affiliated Group as Distributing (as in the 2016 Preamble Example). Accordingly, under the final regulations, P in Example 5 is not a Potential Predecessor (and thus cannot be a POD).

III. Pre-Distribution and Post-Distribution Requirements

A. Overview

Under the 2016 Regulations, a Potential Predecessor qualified as a POD only if two pre-Distribution requirements and one post-Distribution requirement were satisfied. The Treasury Department and the IRS intended that these requirements, taken together, (i) composed a technical description of a synthetic spin-off, and (ii) limited POD treatment to Potential Predecessors the assets of which are divided tax-free through a Distribution by Distributing. The following discussion summarizes these requirements.

1. First Pre-Distribution Requirement: Relevant Property

To satisfy the first pre-Distribution requirement, any Controlled stock distributed in the Distribution must have been (i) Relevant Property, the gain on which was not recognized in full as part of a Plan, or (ii) acquired by Distributing for Relevant Property, the gain on which was not recognized in full as part of a Plan, and that was held by Controlled immediately before the Distribution (Relevant Property Requirement). The term ''Relevant Property'' generally referred to any property held by the Potential Predecessor at any point during the Plan Period (that is, the period that ends immediately after the Distribution and begins on the earliest date on which any part of the Plan is agreed to or understood, arranged, or substantially negotiated). *See* § 1.355–8T(b)(2)(iv).

2. Second Pre-Distribution Requirement: Controlled Stock Reflects Basis of Separated Property

To satisfy the second pre-Distribution requirement, any Controlled stock distributed in the Distribution must have reflected the basis of any Separated Property (Reflection of Basis Requirement). In general, the 2016 Regulations defined the term ''Separated Property'' as any Relevant Property relied on to satisfy the Relevant Property Requirement. *See* § 1.355–8T(b)(2)(vii). The 2016 Regulations did not define the phrase reflect the basis.

3. Post-Distribution Requirement: Division of Relevant Property

To satisfy the post-Distribution requirement, immediately following the Distribution, ownership of Relevant Property must have been divided between Controlled, on the one hand, and Distributing or the Potential Predecessor, on the other hand (Division of Relevant Property Requirement).

B. Relevant Property Requirement: Fluctuations in Value

One commenter requested clarification of the Relevant Property Requirement's application to a case in which (i) gain on Relevant Property is fully recognized at some point during the Plan Period, but (ii) the Relevant Property subsequently appreciates so that built-in gain exists at the time of the Distribution. The Treasury Department and the IRS did not intend for fluctuations in value to affect the determination of POD status under the 2016 Regulations. Consequently, the final regulations replace the requirement that gain on Relevant Property not be recognized in full ''as part of a Plan'' with the requirement that gain (if any) on Relevant Property not be recognized in full ''at any point during the Plan Period.''

C. Reflection of Basis Requirement

The Treasury Department and the IRS have received numerous comments requesting clarification of the Reflection of Basis Requirement's scope and purpose. These comments arose from the failure of the 2016 Regulations to define the phrase reflect the basis.

To highlight the potential overbreadth of this undefined phrase, one commenter questioned whether P could qualify as a POD solely through a basis adjustment under § 1.1502–32. In the commenter's example, P and unrelated Distributing (which is the common parent of a consolidated group) form corporation X in a section 351 exchange in which P contributes Asset 1 and Distributing contributes other assets in exchange for X stock, with Distributing receiving at least 80 percent of X's stock by vote and value. Thereafter, Distributing contributes its X stock to Controlled in exchange for Controlled stock. Then, because of items relating to Asset 1, Distributing's basis in its Controlled stock is adjusted under § 1.1502–32. Finally, Distributing distributes all of the stock of Controlled. Based on this illustrative example, the commenter expressed concern that the § 1.1502–32 basis adjustment could cause Distributing's Controlled stock to reflect the basis of Asset 1, and the commenter asserted that treating P as a POD in this case would be inappropriate.

The Treasury Department and the IRS did not intend the Reflection of Basis Requirement in the 2016 Regulations to be satisfied solely by a basis adjustment under § 1.1502–32. The Reflection of Basis Requirement served two related purposes. First, the Treasury Department and the IRS intended the Reflection of Basis Requirement to ensure a connection between the gain in the POD's property held by Controlled and the gain that Distributing must recognize under section 355(e). Second, the Treasury Department and the IRS intended this requirement to avoid improper duplication of gain if Controlled stock is distributed in multiple Distributions as part of the same Plan. *See* § 1.355–8T(h), *Example 7* (concluding with respect to consecutive Distributions that, although P is a POD with respect to the first Distribution, P is not a POD with respect to the second Distribution because the C stock distributed in the second Distribution did not reflect the basis of any Separated Property).

The Treasury Department and the IRS have addressed these concerns in the final regulations by clearly articulating the Reflection of Basis Requirement. The final regulations clarify that the Reflection of Basis Requirement is satisfied only if any Controlled stock that satisfies the Relevant Property Requirement had a basis prior to the Distribution that was determined, in whole or in part, by reference to the basis of Separated Property. The final regulations make the same clarification to the two other provisions that, under the 2016 Regulations, referred to a reflection of basis: § 1.355–8T(b)(2)(vi)(B)(*2*) (regarding the treatment of Controlled stock as a Substitute Asset); and § 1.355–8T(b)(2)(x) (providing a deemed exchange rule for purposes of the Relevant Property Requirement, the Reflection of Basis Requirement, and the Substitute Asset definition).

In addition, the final regulations clarify that the Reflection of Basis Requirement is satisfied only if, during the Plan Period prior to the Distribution, any Controlled stock that satisfies the Relevant Property Requirement (and the first prong of the Reflection of Basis Requirement) was neither distributed in a section 355(e) distribution nor transferred in a transaction in which the gain (if any) on that Controlled stock was recognized in full. This clarification ensures that the final regulations cannot be interpreted in a manner that would give rise to improper duplication of gain, a policy objective of the Treasury Department and the IRS in issuing the 2016 Regulations.

D. Treatment of Property Acquired Not Pursuant to a Plan

One commenter requested that the Treasury Department and the IRS clarify that property acquired by a Potential

Predecessor during the Plan Period would not be treated as Relevant Property if not acquired pursuant to a Plan. In particular, the commenter presented an example in which a Potential Predecessor becomes a member of Distributing's consolidated group pursuant to a Plan. Prior to a Distribution, the Potential Predecessor acquires from other members of Distributing's consolidated group property that had not been transferred directly or indirectly to Distributing pursuant to the Plan. The commenter requested clarification that this property is not Relevant Property.

The commenter's specific concern was already addressed by an exception to the Relevant Property definition in the 2016 Regulations (*see* § 1.355–8T(b)(2)(iv)(B)), and the final regulations retain this exception. This exception provides that property held directly or indirectly by Distributing is Relevant Property of a Potential Predecessor only to the extent that the property (1) was transferred directly or indirectly to Distributing during the Plan Period, and (2) was Relevant Property of the Potential Predecessor before the direct or indirect transfers. This exception exempts the property in the commenter's example from treatment as Relevant Property because the property was not transferred directly or indirectly to Distributing during the Plan Period.

In addition, the final regulations include a Plan limitation in the Division of Relevant Property Requirement. Thus, the Division of Relevant Property Requirement will be satisfied only if ownership of a Potential Predecessor's Relevant Property has been divided as part of a Plan. Both the preamble to the 2016 Regulations and the text of § 1.355–8T(a)(3) (summarizing the POD definition) described the Division of Relevant Property Requirement in the 2016 Regulations as including a Plan limitation, and the Treasury Department and the IRS had intended for § 1.355–8T(b)(1)(iii) (the Division of Relevant Property Requirement) to include this limitation. The Treasury Department and the IRS intend that the Plan limitation in the Division of Relevant Property Requirement will ensure more generally that Relevant Property acquired by a Potential Predecessor during the Plan Period, but not pursuant to a Plan, will not result in an inappropriate application of section 355(e).

E. Stock of Distributing as Relevant Property

One commenter questioned whether a reference in § 1.355–8T(b)(2)(v) (limiting the circumstances under which Distributing stock is treated as Relevant Property) to § 1.355–8T(b)(1)(ii) (the Relevant Property Requirement and the Reflection of Basis Requirement) was intended to refer instead to § 1.355–8T(b)(1)(iii) (the Division of Relevant Property Requirement). The Treasury Department and the IRS intended for § 1.355–8T(b)(2)(v) to reference the Division of Relevant Property Requirement and have incorporated this revision into the final regulations.

IV. Implicit Permission

Although § 1.355–7 generally governs the determination of whether a Distribution and an acquisition of a 50-percent or greater interest in a POD have occurred as part of the same Plan, the 2016 Regulations contained special rules in this regard. *See* § 1.355–8T(a)(4)(ii). In general, references to Distributing in § 1.355–7 included references to a POD. However, any agreement, understanding, arrangement, or substantial negotiations regarding the acquisition of the stock of a POD were analyzed under § 1.355–7 with respect to the actions of officers or directors of Distributing or Controlled, controlling shareholders of Distributing or Controlled, or a person acting with permission of one of those persons. For that purpose, references in § 1.355–7 to Distributing did not include references to a POD. Therefore, the actions of officers, directors, or controlling shareholders of a POD, or of a person acting with the implicit or explicit permission of one of those persons, would not have been considered for this purpose unless those persons otherwise would have been treated as acting on behalf of Distributing or Controlled under § 1.355–7. The final regulations retain these rules.

One commenter expressed concern regarding the potential scope of the ''implicit permission'' concept in § 1.355–7 given that the 2016 Regulations contemplated that actions on behalf of a Potential Predecessor may be taken into account if such actions were carried out with the implicit permission of Distributing. The Treasury Department and the IRS have not addressed this comment in the final regulations because the implicit permission concept is a component of § 1.355–7 and therefore is beyond the scope of this Treasury decision.

V. Successors

Under section 355(e)(4)(D), any reference to Controlled or Distributing includes a reference to any successor of such corporation (Successor). Like the 2004 Proposed Regulations, the 2016 Regulations limited the definition of the term Successor to a corporation to which Distributing or Controlled (as the case may be) transfers property in a Section 381 Transaction after the Distribution. A partnership cannot receive assets in a Section 381 Transaction. Accordingly, a partnership could not have been a Successor under either the 2004 Proposed Regulations or the 2016 Regulations. As noted later in this part V, the final regulations retain this approach.

The 2004 Proposed Regulations and the 2016 Regulations also contained a deemed acquisition rule (*see* § 1.355–8T(d)(2)). Under this rule, after a Section 381 Transaction, an acquisition of stock of the acquiring corporation is treated also as an acquisition of the stock of the distributor or transferor corporation in the Section 381 Transaction. Thus, if the assets of Distributing or any POD are acquired by another corporation in a Section 381 Transaction, then any subsequent acquisition of the stock of the acquiring corporation is treated also as an acquisition of the stock of Distributing or the POD, as the case may be.

As a result of these rules, a corporation's status as a Successor of Distributing or Controlled matters only insofar as an acquisition of its stock is treated as an acquisition of the stock of Distributing or Controlled, respectively, which could result in a Planned 50-percent Acquisition of Distributing or Controlled. Therefore, the only significance of a Planned 50-percent Acquisition of a Successor is its treatment as a deemed Planned 50-percent Acquisition of Distributing or Controlled (as the case may be). Accordingly, if any of the stock of Distributing or Controlled has been acquired in, or prior to, a Section 381 Transaction, the application of section 355(e) will turn on whether a Planned 50-percent Acquisition of Distributing or Controlled has occurred, taking into account acquisitions of the stock of Distributing or Controlled in, and prior to, the Section 381 Transaction, as well as any acquisitions of the stock of the Successor following the Section 381 Transaction.

Commenters supported this approach, and the Treasury Department and the IRS have retained it in the final regulations. Thus, under the final regulations, a Successor of Distributing or of Controlled must be a corporation to which Distributing or Controlled, respectively, transfers property in a Section 381 Transaction after the Distribution. A partnership cannot be a Successor of Distributing or Controlled under the final regulations for purposes of section 355(e). Certain references in

the 2016 Regulations to a Planned 50-percent Acquisition of a Successor have been refined to clarify the significance of Successor status.

VI. Gain Limitation Rules

Taken together, sections 355(e), 355(c), and 361(c) generally require Distributing to recognize any gain in Controlled stock and securities distributed in a Distribution that is part of the same Plan as a Planned 50-percent Acquisition of a POD, Distributing, or Controlled (the amount of such gain, Statutory Recognition Amount). However, the 2016 Regulations contained special rules that limited the amount of gain that section 355(e) causes Distributing to recognize in certain cases involving a POD. In cases involving a Planned 50-percent Acquisition of a POD, § 1.355–8T(e)(2) (POD Gain Limitation Rule) generally limited the amount of gain Distributing was required to recognize to any built-in gain in the POD's Separated Property (generally, POD assets held by Controlled). Similarly, in cases involving a Planned 50-percent Acquisition of Distributing as the result of a transfer by a POD to Distributing in a Section 381 Transaction, § 1.355–8T(e)(3) (Distributing Gain Limitation Rule) generally reduced the amount of gain Distributing was required to recognize by the built-in gain in the POD's Separated Property. In addition, in cases involving multiple Planned 50-percent Acquisitions, § 1.355–8T(e)(1) generally provided that the total gain limitation applicable under § 1.355–8T(e) is determined by adding the Statutory Recognition Amount (subject to the POD Gain Limitation Rule and the Distributing Gain Limitation Rule) with respect to each Planned 50-percent Acquisition. Finally, § 1.355–8T(e)(4) provided that the amount required to be recognized by Distributing under section 355(e) with regard to a single Distribution will not exceed the Statutory Recognition Amount.

Commenters questioned why the 2016 Regulations limited the Distributing Gain Limitation Rule to Section 381 Transactions, and recommended expanding the Distributing Gain Limitation Rule so that it applies to any Planned 50-Percent Acquisition of Distributing. In particular, one commenter asserted that the form of the transaction in which a Planned 50-percent Acquisition of Distributing occurs should not be relevant to the application of the gain limitation rules.

As discussed in the preamble to the 2016 Regulations, the Treasury Department and the IRS intended the Distributing Gain Limitation Rule to minimize the Federal income tax impact of directionality between economically equivalent Section 381 Transactions. In other words, the Distributing Gain Limitation Rule was intended to ensure that the amount of gain required to be recognized under section 355(e) would be the same regardless of whether the smaller or the larger corporation in a Section 381 Transaction acts as the acquiring corporation. The Distributing Gain Limitation Rule was limited to Section 381 Transactions in the 2016 Regulations because the direction of other types of transactions (such as section 351 exchanges) generally cannot be reversed without changing the substance of the transaction, and thus generally do not implicate the policy of directional neutrality. However, upon further study, the Treasury Department and the IRS have determined that the policy underlying the Distributing Gain Limitation Rule should not be limited to directional neutrality.

The POD definition is based on the theory that a Distribution that effects a tax-free division of the assets of a corporation other than Distributing (a POD) may be viewed as two separate Distributions: One by the POD (of a Controlled holding the Separated Property) (POD Distribution), and one by Distributing (of a Controlled holding all of the property held by Controlled in the actual Distribution other than the Separated Property) (Non-POD Distribution). Section 355(e) requires gain recognition when new shareholders acquire ownership of a business in connection with a spin-off. Thus, when a Planned 50-percent Acquisition of a POD occurs in connection with a POD Distribution, the final regulations require gain recognition under section 355(e). However, unless there is also a Planned 50-percent Acquisition of Distributing, the Non-POD Distribution represents a division of existing business arrangements among existing shareholders, to which Congress intended to afford tax-free treatment. *See* Senate Report at 139–140. Accordingly, the POD Gain Limitation Rule limits the amount of gain required to be recognized to the built-in gain on the Separated Property.

The same policy goals justify the expansion of the Distributing Gain Limitation Rule so that it applies to any Planned 50-percent Acquisition of Distributing—however and by whomever effected. If a Distribution involves a POD and occurs in connection with a Planned 50-percent Acquisition of Distributing (but no Planned 50-percent Acquisition of the POD or Controlled), then the POD Distribution should not be subject to gain recognition because it represents a division of existing business arrangements among existing shareholders.

Accordingly, the Distributing Gain Limitation Rule in the final regulations applies if there is a Planned 50-percent Acquisition of Distributing. However, consistent with the policy underlying the Distributing Gain Limitation Rule, a Distribution will benefit from the Distributing Gain Limitation Rule only if a POD exists and does not also undergo a Planned 50-percent Acquisition. If no POD exists, then the limitation under the Distributing Gain Limitation Rule will equal the Statutory Recognition Amount, because there is no Separated Property. If a POD exists but also undergoes a Planned 50-percent Acquisition, then Distributing must recognize the Statutory Recognition Amount with respect to the Planned 50-percent Acquisition of the POD (subject to the POD Gain Limitation Rule) and the Planned 50-percent Acquisition of Distributing (subject to the Distributing Gain Limitation Rule). *See* § 1.355–8(e)(1)(ii) of the final regulations (Multiple Planned 50-percent Acquisitions). Similarly, if there are Planned 50-percent Acquisitions of both Distributing and Controlled, Distributing must recognize the Statutory Recognition Amount with respect to the Planned 50-percent Acquisition of Controlled (which is not eligible for limitation under any gain limitation rule) and the Planned 50-percent Acquisition of Distributing (subject to the Distributing Gain Limitation Rule). Although the multiple Planned 50-percent Acquisition rule just described may deny any benefit under the gain limitation rules, in no event will the final regulations require Distributing to recognize an amount that exceeds the Statutory Recognition Amount with regard to a single Distribution. *See* § 1.355–8(e)(4) of the final regulations (gain recognition limited to Statutory Recognition Amount).

The Treasury Department and the IRS have clarified the gain limitation rules in the final regulations to make them easier to understand and apply. The Treasury Department and the IRS also have refined the calculation of the gain limitation under the Distributing Gain Limitation Rule to account for the possibility of more than one POD with respect to a single Distribution. In addition, to clarify that both built-in gain and built-in loss assets are taken into account in computing any applicable gain limitation, the Treasury Department and the IRS have refined the description of gain in the Relevant

Property Requirement by adding the parenthetical phrase ''(if any),'' and have added a similar clarification to the Separated Property definition.

VII. Relevant Equity

The 2016 Temporary Regulations used the defined term ''Relevant Stock'' (stock that is Relevant Property) in connection with the defined terms ''Separated Property'' and ''Underlying Property'' (property directly or indirectly held by a corporation that is the issuer of Relevant Stock). *See* § 1.355–8T(b)(2)(iv), (vii), and (viii). These terms were used to ensure that gain would not be duplicated in determining the applicable gain limitation amount (if any) if the Relevant Property held by Controlled included stock in a corporation. The potential for duplication existed because the gain limitation is calculated based on the built-in gain in Relevant Property held by Controlled, and the definition of ''Relevant Property'' included assets held directly or indirectly (and thus included both stock of a corporation and any assets held by the corporation).

The Treasury Department and the IRS have determined that a similar risk of duplicated gain exists when Relevant Property includes an interest in a partnership. Accordingly, the final regulations replace the term ''Relevant Stock'' with the term ''Relevant Equity,'' which means Relevant Property that is an equity interest in a corporation or a partnership. This clarification relates only to the determination of the limitation on gain under § 1.355–8(e) of the final regulations (if any).

VIII. Section 336(e)

The 2016 Regulations prohibited a section 336(e) election if the amount of gain required to be recognized by Distributing with respect to the Distribution was less than the Statutory Recognition Amount due to the POD Gain Limitation Rule or the Distributing Gain Limitation Rule. This prohibition applied even if Distributing chose to recognize the Statutory Recognition Amount under § 1.355–8T(e)(4). One commenter criticized this prohibition as ''inequitable as a policy matter and unnecessary as an administrative one.''

Although the final regulations retain this prohibition, the Treasury Department and the IRS continue to study and request comments on the following issues: (1) Whether permitting a section 336(e) election in this context would be consistent with the policy of section 336(e), (2) whether permitting a section 336(e) election in this context could give rise to inappropriate planning opportunities, (3) whether permitting a section 336(e) election in this context only if the Separated Property accounts for a certain minimum percentage of Controlled's value or built-in gain would be appropriate, and (4) whether limiting the deemed asset disposition that results from a section 336(e) election in this context to a deemed disposition of the Separated Property would be appropriate.

IX. Stock Deemed Acquired in a Section 381 Transaction

Section 355(e)(3)(B) provides a special rule for certain asset acquisitions. For purposes of section 355(e), if the assets of Distributing or Controlled are acquired by a successor corporation in a transaction described in section 368(a)(1)(A), (C), or (D), or in any other transaction specified in regulations, the shareholders (immediately before the acquisition) of the successor corporation are treated as acquiring stock in Distributing or Controlled, respectively, except as otherwise provided in regulations. Similarly, the 2016 Regulations provided that any Section 381 Transaction is treated as an acquisition of stock in the distributor or transferor corporation by shareholders of the acquiring corporation. A commenter pointed out a mathematical error in the textual example that followed this rule (in § 1.355–8T(d)(1)). The final regulations correct this error and make minor clarifications to improve the readability of the operative rule.

X. No Step Transaction Implications From Examples

One commenter suggested that the Treasury Department and the IRS clarify that no inference should be drawn from the examples in § 1.355–8T(h) as to the intended application of the step transaction doctrine and other general Federal income tax principles. The Treasury Department and the IRS did not intend for any such inference to be drawn, and have added a specific disclaimer to this effect in the final regulations.

XI. Transition Rule

The 2016 Regulations generally applied to Distributions occurring after January 18, 2017. However, under a transition rule, the 2016 Regulations generally did not apply to a Distribution that was (A) made pursuant to a binding agreement in effect on or before December 16, 2016 and at all times thereafter; (B) described in a ruling request submitted to the IRS on or before December 16, 2016; or (C) described on or before December 16, 2016 in a public announcement or in a filing with the Securities and Exchange Commission. For the transition rule to apply, the agreement, ruling request, public announcement, or filing described in the preceding sentence had to describe all steps relevant to the determination of POD status. *See* § 1.355–8T(i)(2)(ii).

One commenter criticized the ''all relevant steps'' rule in § 1.355–8T(i)(2)(ii) as ''extremely narrow'' and inappropriate for immediately effective regulations. This commenter contended that it is ''unlikely that all such transactions would be described . . . until very late in the long and expensive process of a corporate separation, if at all.''

The Treasury Department and the IRS note that the 2016 Regulations were not immediately applicable; they were published on December 19, 2016, but they generally applied only to Distributions that occurred after January 18, 2017. Moreover, the final regulations do not contain a transition rule, so the commenter's concern is relevant only to transactions that were the subject of an agreement, ruling request, public announcement, or public filing that occurred in 2016 (or before). Finally, despite the commenter's general concern, the Treasury Department and the IRS are unaware of any transactions that failed to qualify for the transition rule due to the ''all relevant steps'' rule in § 1.355–8T(i)(2)(ii). Accordingly, the Treasury Department and the IRS have determined that it is not necessary to reconsider the transition rule in the 2016 Regulations as part of this Treasury decision.

XII. Additional Clarifications

Commenters noted generally that certain aspects of the 2016 Regulations were complicated and difficult to understand. The Treasury Department and the IRS have refined and clarified certain aspects of the 2016 Regulations in the final regulations to make the rules easier to follow and understand. For instance, certain paragraphs in the 2016 Regulations that were long and contained multiple distinct rules have been subdivided in the final regulations. In addition, defined terms have been added for certain rules (such as the Relevant Property Requirement, the Reflection of Basis Requirement, and the Division of Relevant Property Requirement). These defined terms are intended to allow the reader to more intuitively grasp the meaning of the numerous provisions cross-referenced in the final regulations.

Section 1.355–8T(c)(1) defined the term ''Predecessor of Controlled'' and provided certain rules relating to Predecessors of Controlled. One of these rules provided that, for purposes of § 1.355–8T(c)(1), a reference to Controlled included a reference to a Predecessor of Controlled. However, another provision in the 2016 Regulations (§ 1.355–8T(a)(4)(i)) provided more generally that, except as otherwise provided, any reference to Controlled included, as the context may have required, a reference to any Predecessor of Controlled. Accordingly, the rule in § 1.355–8T(c)(1) was unnecessary, and the Treasury Department and the IRS have omitted it in the final regulations.

XIII. Examples

The Treasury Department and the IRS have modified three of the examples contained in the 2016 Regulations (*Examples 5, 7,* and *8*), and omitted one example (*Example 6*), for the reasons described in this part XIII. All of the retained examples have been updated to reflect modifications in the final regulations. For instance, the POD analyses in *Examples 3* and *4* eliminate the statement that Controlled stock is Separated Property, because that fact is no longer relevant under the revised Reflection of Basis Requirement. In some of the examples, the analysis has been clarified to make it easier to follow and understand.

The facts of *Example 5* of the 2016 Regulations have been retained, but the consequences of the example have changed due to the modification the Treasury Department and the IRS have made to the Potential Predecessor definition. As a result of this modification, P in *Example 5* is no longer a Potential Predecessor (and thus is not a POD for that reason).

Example 6 of the 2016 Regulations has been omitted. This example illustrated a variation on *Example 5* that used a forward triangular merger instead of a section 351 exchange. However, due to the modification to the Potential Predecessor definition, P in *Example 6* is no longer a Potential Predecessor (and thus is not a POD for that reason), which eliminates the utility of this example.

Example 7 of the 2016 Regulations has been incorporated into new *Example 6* in the final regulations, which is based on the 2016 Preamble Example.

Example 8 of the 2016 Regulations has been retained as *Example 7* in the final regulations, but has been modified so that P1 and P2 are Potential Predecessors under the final regulations. In particular, the section 351 exchange between P2 and D has been replaced by a Section 381 Transaction in which P2 merges into D.

Applicability Date

Section 7805(b)(1)(A) and (B) of the Code generally provide that no temporary, proposed, or final regulation relating to the internal revenue laws may apply to any taxable period ending before the earliest of (A) the date on which such regulation is filed with the **Federal Register**, or (B) in the case of a final regulation, the date on which a proposed or temporary regulation to which the final regulation relates was filed with the **Federal Register**. In addition, section 7805(e) provides that any temporary regulation shall also be issued as a proposed regulation, and that such temporary regulation shall expire within 3 years after the date of issuance of the temporary regulation.

The final regulations, the substance of which is generally the same as that of the 2016 Regulations, apply to Distributions that occur after December 15, 2019, the day before the expiration date of the 2016 Temporary Regulations.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations would primarily affect large corporations with a substantial number of shareholders, as well as corporations that are members of large corporate groups. Additionally, the Treasury Department and the IRS have determined that no additional burden will be associated with these final regulations. Therefore, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, the 2016 Proposed Regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses, and no comments were received.

Drafting Information

The principal author of these regulations is W. Reid Thompson of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entry for § 1.355–8T and adding an entry in numerical order for § 1.355–8 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.355–8 also issued under 26 U.S.C. 336(e), 355(e)(3)(B), 355(e)(5), and 355(f).

* * * * *

■ **Par. 2.** Section 1.355–0 is amended by revising the introductory text, removing the entries for § 1.355–8T, and adding the entries for § 1.355–8 to read as follows:

§ 1.355–0 Outline of sections.

In order to facilitate the use of §§ 1.355–1 through 1.355–8, this section lists the major paragraphs in those sections as follows:

* * * * *

§ 1.355–8 Definition of predecessor and successor and limitations on gain recognition under section 355(e) and section 355(f).

(a) In general.
(1) Scope.
(2) Overview.
(i) Purposes and conceptual overview.
(ii) References to and definitions of terms used in this section.
(iii) Special rules and examples.
(3) Purposes of section; Predecessor of Distributing overview.
(i) Purposes.
(ii) Predecessor of Distributing overview.
(A) Relevant Property transferred to Controlled.
(B) Relevant Property includes Controlled Stock.
(4) References.
(i) References to Distributing or Controlled.
(ii) References to Plan or Distribution.
(iii) Plan Period.
(5) List of definitions.
(b) Predecessor of Distributing.
(1) Definition.
(i) In general.
(ii) Pre-Distribution requirements.
(A) Relevant Property requirement.
(B) Reflection of basis requirement.
(iii) Post-Distribution requirement.
(2) Additional definitions and rules related to paragraph (b)(1) of this section.
(i) References to Distributing and Controlled.
(ii) Potential Predecessor.
(A) Potential Predecessor definition.

(B) Expanded Affiliated Group definition.
(iii) Successors of Potential Predecessors.
(iv) Relevant Property; Relevant Equity.
(A) In general.
(B) Property held by Distributing.
(C) F reorganizations.
(v) Stock of Distributing as Relevant Property.
(A) In general.
(B) Certain reorganizations.
(vi) Substitute Asset.
(A) In general.
(B) Controlled stock received by Distributing.
(*1*) In general.
(*2*) Exception.
(C) Treatment as Relevant Property.
(vii) Separated Property.
(viii) Underlying Property.
(ix) Multiple Predecessors of Distributing.
(x) Deemed exchanges.
(c) Additional definitions.
(1) Predecessor of Controlled.
(2) Successors.
(i) In general.
(ii) Determination of Successor status.
(3) Section 381 Transaction.
(d) Special acquisition rules.
(1) Deemed acquisitions of stock in Section 381 Transactions.
(i) Rule.
(ii) Example.
(2) Deemed acquisitions of stock after Section 381 Transactions.
(3) Separate counting for Distributing and each Predecessor of Distributing.
(e) Special rules for limiting gain recognition.
(1) Overview.
(i) Gain limitation.
(ii) Multiple Planned 50-percent Acquisitions.
(iii) Statutory Recognition Amount limit; Section 336(e).
(2) Planned 50-percent Acquisition of a Predecessor of Distributing.
(i) In general.
(ii) Operating rules.
(A) Separated Property other than Controlled stock.
(B) Controlled stock that is Separated Property.
(C) Anti-duplication rule.
(3) Planned 50-percent Acquisition of Distributing.
(4) Gain recognition limited to Statutory Recognition Amount.
(5) Section 336(e) election.
(f) Predecessor or Successor as a member of the affiliated group.
(g) Inapplicability of section 355(f) to certain intra-group Distributions.
(1) In general.
(2) Alternative application of section 355(f).
(h) Examples.
(i) Applicability date.

§ 1.355–8T [Removed]

■ **Par. 3.** Section 1.355–8T is removed.

■ **Par. 4.** Section 1.355–8 is added to read as follows:

§ 1.355–8 Definition of predecessor and successor and limitations on gain recognition under section 355(e) and section 355(f).

(a) *In general*—(1) *Scope.* For purposes of section 355(e), this section provides rules under section 355(e)(4)(D) to determine whether a corporation is treated as a predecessor or successor of a distributing corporation (Distributing) or a controlled corporation (Controlled) with respect to a distribution by Distributing of stock (or stock and securities) of Controlled that qualifies under section 355(a) (or so much of section 356 as relates to section 355) (Distribution). This section also provides rules limiting the amount of Distributing's gain recognized under section 355(e) on a Distribution if section 355(e) applies to an acquisition by one or more persons, as part of a Plan, of stock that in the aggregate represents a 50-percent or greater interest (Planned 50-percent Acquisition) of a Predecessor of Distributing, or a Planned 50-percent Acquisition of Distributing. In addition, this section provides rules regarding the application of section 336(e) to a Distribution to which this section applies. This section also provides rules regarding the application of section 355(f) to a Distribution in certain cases.

(2) *Overview*—(i) *Purposes and conceptual overview.* Paragraph (a)(3) of this section summarizes the two principal purposes of this section and sets forth a brief conceptual overview of the scenarios in which a corporation may be a Predecessor of Distributing.

(ii) *References to and definitions of terms used in this section.* Paragraph (a)(4) of this section provides rules regarding references to the terms *Distributing, Controlled, Distribution, Plan,* and *Plan Period* for purposes of section 355(e), § 1.355–7, and this section. Paragraph (a)(5) of this section lists the terms used in this section and indicates where each term is defined. Paragraph (b) of this section defines the term *Predecessor of Distributing* and several related terms. Paragraph (c) of this section defines the terms *Predecessor of Controlled, Successor* (of Distributing or Controlled), and *Section 381 Transaction.*

(iii) *Special rules and examples.* Paragraph (d) of this section provides guidance with regard to acquisitions and deemed acquisitions of stock if there is a Predecessor of Distributing or a Successor of either Distributing or Controlled. Paragraph (e) of this section provides two rules that may limit the amount of Distributing's gain on a Distribution if there is a Predecessor of Distributing, as well as an overall gain limitation. Paragraph (e) of this section also provides guidance with respect to the application of section 336(e). Regardless of whether there is a Predecessor of Distributing, Predecessor of Controlled, or Successor of either Distributing or Controlled, paragraph (f) of this section provides a special rule relating to section 355(e)(2)(C), which provides that section 355(e) does not apply to certain transactions within an Expanded Affiliated Group. Paragraph (g) of this section provides rules coordinating the application of section 355(f) with the rules of this section. Paragraph (h) of this section contains examples that illustrate the rules of this section.

(3) *Purposes of section; Predecessor of Distributing overview*—(i) *Purposes.* The rules in this section have two principal purposes. The first is to ensure that section 355(e) applies to a Distribution if, as part of a Plan, some of the assets of a Predecessor of Distributing are transferred directly or indirectly to Controlled without full recognition of gain, and the Distribution accomplishes a division of the assets of the Predecessor of Distributing. The second is to ensure that section 355(e) applies when there is a Planned 50-percent Acquisition of a Successor of Distributing or Successor of Controlled. The rules of this section must be interpreted and applied in a manner that is consistent with and reasonably carries out the purposes of this section.

(ii) *Predecessor of Distributing overview.* The term Predecessor of Distributing is defined in paragraph (b) of this section. Only a Potential Predecessor can be a Predecessor of Distributing. See paragraph (b)(1)(i) of this section. A Potential Predecessor can be a Predecessor of Distributing only if, as part of a Plan, the Distribution accomplishes a division of the assets of the Potential Predecessor. See paragraph (b)(1)(iii) of this section. Accordingly, in the absence of that Plan, a Predecessor of Distributing cannot exist for purposes of section 355(e). The detailed rules set forth in paragraph (b) of this section provide that a Potential Predecessor the assets of which are divided as part of a Plan may be a Predecessor of Distributing in either of the following two scenarios:

(A) *Relevant Property transferred to Controlled.* As part of the Plan, one or more of the Potential Predecessor's assets were transferred to Controlled in one or more tax-deferred transactions prior to the Distribution.

(B) *Relevant Property includes Controlled Stock.* The Potential Predecessor's assets included Controlled stock that, as part of the Plan, was

transferred to Distributing in one or more tax-deferred transactions prior to the Distribution.

(4) *References*—(i) *References to Distributing or Controlled.* For purposes of section 355(e), except as otherwise provided in this section, any reference to Distributing or Controlled includes, as the context may require, a reference to any Predecessor of Distributing or any Predecessor of Controlled, respectively, or any Successor of Distributing or Controlled, respectively. However, except as otherwise provided in this section, a reference to a Predecessor of Distributing or to a Successor of Distributing does not include a reference to Distributing, and a reference to a Predecessor of Controlled or to a Successor of Controlled does not include a reference to Controlled.

(ii) *References to Plan or Distribution.* Except as otherwise provided in this section, references to a *Plan* in this section are references to a plan within the meaning of § 1.355–7. References to a distribution in § 1.355–7 include a reference to a Distribution and other related pre-Distribution transactions that together effect a division of the assets of a Predecessor of Distributing. In determining whether a Distribution and a Planned 50-percent Acquisition of a Predecessor of Distributing, Distributing (including any Successor thereof), or Controlled (including any Successor thereof) are part of a Plan, the rules of § 1.355–7 apply. In applying those rules, references to Distributing or Controlled in § 1.355–7 generally include references to any Predecessor of Distributing and any Successor of Distributing, or any Successor of Controlled, as appropriate. However, with regard to any possible Planned 50-percent Acquisition of a Predecessor of Distributing, any agreement, understanding, arrangement, or substantial negotiations with regard to the acquisition of the stock of the Predecessor of Distributing is analyzed under § 1.355–7 with regard to the actions of officers or directors of Distributing or Controlled, controlling shareholders (as defined in § 1.355–7(h)(3)) of Distributing or Controlled, or a person acting with permission of one of those parties. For purposes of the preceding sentence, references in § 1.355–7 to Distributing do not include references to a Predecessor of Distributing. Therefore, the actions of officers, directors, or controlling shareholders of a Predecessor of Distributing, or of a person acting with the implicit or explicit permission of one of those parties, are not considered unless those parties otherwise would be treated as acting on behalf of Distributing or Controlled under § 1.355–7 (for example, if a Predecessor of Distributing is a controlling shareholder of Distributing).

(iii) *Plan Period.* For purposes of this section, the term *Plan Period* means the period that ends immediately after the Distribution and begins on the earliest date on which any pre-Distribution step that is part of the Plan is agreed to or understood, arranged, or substantially negotiated by one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders. For purposes of the preceding sentence, references to Distributing and Controlled do not include references to any Predecessor of Distributing, Predecessor of Controlled, or Successor of Distributing or Controlled.

(5) *List of definitions.* This section uses the following terms, which are defined where indicated—

(i) *Acquiring Owner.* Paragraph (d)(1)(i) of this section.

(ii) *Controlled.* Paragraph (a)(1) of this section.

(iii) *Distributing.* Paragraph (a)(1) of this section.

(iv) *Distributing Gain Limitation Rule.* Paragraph (e)(1)(ii) of this section.

(v) *Distribution.* Paragraph (a)(1) of this section.

(vi) *Division of Relevant Property Requirement.* Paragraph (b)(1)(iii) of this section.

(vii) *Expanded Affiliated Group.* Paragraph (b)(2)(ii)(B) of this section.

(viii) *Hypothetical Controlled.* Paragraph (e)(2)(i) of this section.

(ix) *Hypothetical D/355(e) Reorganization.* Paragraph (e)(2)(i) of this section.

(x) *Plan.* Paragraph (a)(4)(ii) of this section.

(xi) *Plan Period.* Paragraph (a)(4)(iii) of this section.

(xii) *Planned 50-percent Acquisition.* Paragraph (a)(1) of this section.

(xiii) *POD Gain Limitation Rule.* Paragraph (e)(1)(ii) of this section.

(xiv) *Potential Predecessor.* Paragraph (b)(2)(ii)(A) of this section.

(xv) *Predecessor of Controlled.* Paragraph (c)(1) of this section.

(xvi) *Predecessor of Distributing.* Paragraph (b)(1) of this section.

(xvii) *Reflection of Basis Requirement.* Paragraph (b)(1)(ii)(B) of this section.

(xviii) *Relevant Equity.* Paragraph (b)(2)(iv)(A) of this section.

(xix) *Relevant Property.* Paragraph (b)(2)(iv)(A) of this section.

(xx) *Relevant Property Requirement.* Paragraph (b)(1)(ii)(A) of this section.

(xxi) *Section 381 Transaction.* Paragraph (c)(3) of this section.

(xxii) *Separated Property.* Paragraph (b)(2)(vii) of this section.

(xxiii) *Statutory Recognition Amount.* Paragraph (e)(1)(i) of this section.

(xxiv) *Substitute Asset.* Paragraph (b)(2)(vi)(A) of this section.

(xxv) *Successor.* Paragraph (c)(2)(i) of this section.

(xxvi) *Successor Transaction.* Paragraph (c)(2)(i) of this section.

(xxvii) *Underlying Property.* Paragraph (b)(2)(viii) of this section.

(b) *Predecessor of Distributing*—(1) *Definition*—(i) *In general.* For purposes of section 355(e), a Potential Predecessor is a predecessor of Distributing (Predecessor of Distributing) if, taking into account the special rules of paragraph (b)(2) of this section—

(A) Both pre-Distribution requirements of paragraph (b)(1)(ii) of this section are satisfied; and

(B) The post-Distribution requirement of paragraph (b)(1)(iii) of this section is satisfied.

(ii) *Pre-Distribution requirements*—(A) *Relevant Property requirement.* The requirement set forth in this paragraph (b)(1)(ii)(A) (Relevant Property Requirement) is satisfied if, before the Distribution, and as part of a Plan, either—

(*1*) Any Controlled stock distributed in the Distribution was directly or indirectly acquired (or deemed acquired under the rules set forth in paragraph (b)(2)(x) of this section) by Distributing in exchange for any direct or indirect interest in Relevant Property—

(*i*) That is held directly or indirectly by Controlled immediately before the Distribution; and

(*ii*) The gain on which (if any) was not recognized in full at any point during the Plan Period; or

(*2*) Any Controlled stock that is distributed in the Distribution is Relevant Property of the Potential Predecessor.

(B) *Reflection of basis requirement.* The requirement set forth in this paragraph (b)(1)(ii)(B) (Reflection of Basis Requirement) is satisfied if any Controlled stock that satisfies the Relevant Property Requirement—

(*1*) Either—

(*i*) Had a basis prior to the Distribution that was determined in whole or in part by reference to the basis of any Separated Property; or

(*ii*) Is Relevant Property of the Potential Predecessor; and

(*2*) During the Plan Period prior to the Distribution, was neither distributed in

a distribution to which section 355(e) applied nor transferred in a transaction in which the gain (if any) on that Controlled stock was recognized in full.

(iii) *Post-Distribution requirement.* The requirement set forth in this paragraph (b)(1)(iii) (Division of Relevant Property Requirement) is satisfied if, immediately after the Distribution, and as part of a Plan, direct or indirect ownership of the Potential Predecessor's Relevant Property has been divided between Controlled on the one hand, and Distributing or the Potential Predecessor (or a successor to the Potential Predecessor) on the other hand. For purposes of this paragraph (b)(1)(iii), if Controlled stock that is distributed in the Distribution is Relevant Property of a Potential Predecessor, then Controlled is deemed to have received Relevant Property of the Potential Predecessor.

(2) *Additional definitions and rules related to paragraph (b)(1) of this section*—(i) *References to Distributing and Controlled.* For purposes of the Relevant Property Requirement, the Reflection of Basis Requirement, and the Division of Relevant Property Requirement, references to Distributing and Controlled do not include references to any Predecessor of Distributing, Predecessor of Controlled, or Successor of Distributing or Controlled.

(ii) *Potential Predecessor*—(A) *Potential Predecessor definition.* The term *Potential Predecessor* means a corporation, other than Distributing or Controlled, if—

(*1*) As part of a Plan, the corporation transfers property to a Potential Predecessor, Distributing, or a member of the same Expanded Affiliated Group as Distributing in a Section 381 Transaction; or

(*2*) Immediately after completion of the Plan, the corporation is a member of the same Expanded Affiliated Group as Distributing.

(B) *Expanded Affiliated Group definition.* The term *Expanded Affiliated Group* means an affiliated group (as defined in section 1504 without regard to section 1504(b)).

(iii) *Successors of Potential Predecessors.* For purposes of the Division of Relevant Property Requirement, if a Potential Predecessor transfers property in a Section 381 Transaction to a corporation (other than Distributing or Controlled) during the Plan Period, the corporation is a successor to the Potential Predecessor.

(iv) *Relevant Property; Relevant Equity*—(A) *In general.* Except as otherwise provided in this paragraph (b)(2)(iv) or in paragraph (b)(2)(v) of this section, the term *Relevant Property* means any property that was held, directly or indirectly, by the Potential Predecessor during the Plan Period. The term *Relevant Equity* means Relevant Property that is an equity interest in a corporation or a partnership.

(B) *Property held by Distributing.* Except as provided in paragraph (b)(2)(iv)(C) of this section, property held directly or indirectly by Distributing (including Controlled stock) is Relevant Property of a Potential Predecessor only to the extent that the property was transferred directly or indirectly to Distributing during the Plan Period, and it was Relevant Property of the Potential Predecessor before the direct or indirect transfer(s). For example, if during the Plan Period a subsidiary corporation of a Potential Predecessor merges into Controlled in a reorganization under section 368(a)(1)(A) and (2)(D), and, as a result, the Potential Predecessor directly or indirectly owns Distributing stock received in the merger, the subsidiary's assets held by Controlled are Relevant Property of that Potential Predecessor.

(C) *F reorganizations.* For purposes of paragraph (b)(2)(iv)(B) of this section, the transferor and transferee in any reorganization described in section 368(a)(1)(F) (F reorganization) are treated as a single corporation. Therefore, for example, Relevant Property acquired during the Plan Period by a corporation that is a transferor (as to a later F reorganization) is treated as having been acquired directly (and from the same source) by the transferee (as to the later F reorganization) during the Plan Period. In addition, any transfer (or deemed transfer) of assets to Distributing in an F reorganization will not cause the transferred assets to be treated as Relevant Property.

(v) *Stock of Distributing as Relevant Property*—(A) *In general.* For purposes of the Division of Relevant Property Requirement, except as provided in paragraph (b)(2)(v)(B) of this section, stock of Distributing is not Relevant Property (and thus is not Relevant Equity) to the extent that the Potential Predecessor becomes, as part of a Plan, the direct or indirect owner of that stock as the result of the transfer to Distributing of direct or indirect interests in the Potential Predecessor's Relevant Property. For example, stock of Distributing is not Relevant Property if it is acquired by a Potential Predecessor as part of a Plan in an exchange to which section 351(a) applies.

(B) *Certain reorganizations.* For purposes of the Division of Relevant Property Requirement, stock of Distributing is Relevant Property (and thus Relevant Equity) to the extent that the Potential Predecessor becomes, as part of the Plan, the direct or indirect owner of that stock as the result of a transaction described in section 368(a)(1)(E).

(vi) *Substitute Asset*—(A) *In general.* Subject to paragraph (b)(2)(vi)(B) of this section, the term *Substitute Asset* means any property that is held directly or indirectly by Distributing during the Plan Period and was received, during the Plan Period, in exchange for Relevant Property that was acquired directly or indirectly by Distributing if all gain on the transferred Relevant Property is not recognized on the exchange. For example, property received by Controlled in exchange for Relevant Property in a transaction qualifying under section 1031 is a Substitute Asset. In addition, stock received by Distributing in a distribution qualifying under section 305(a) or section 355(a) on Relevant Equity is a Substitute Asset.

(B) *Controlled stock received by Distributing*—(*1*) *In general.* Except as provided in paragraph (b)(2)(vi)(B)(*2*) of this section, stock of Controlled received in exchange for a direct or indirect transfer of Relevant Property by Distributing is not a Substitute Asset.

(*2*) *Exception.* If the basis in Controlled stock received or deemed received in an exchange described in paragraph (b)(2)(vi)(B)(*1*) of this section is determined in whole or in part by reference to the basis of Relevant Equity the issuer of which ceases to exist for Federal income tax purposes under the Plan, that Controlled stock constitutes a Substitute Asset. See paragraph (b)(2)(x) of this section.

(C) *Treatment as Relevant Property.* For purposes of this section, a Substitute Asset is treated as Relevant Property with the same ownership and transfer history as the Relevant Property for which (or with respect to which) it was received.

(vii) *Separated Property.* The term *Separated Property* means each item of Relevant Property that is described in the Relevant Property Requirement (regardless of whether the fair market value of the Relevant Property exceeds its adjusted basis). However, if Relevant Equity is Separated Property, Underlying Property associated with that Relevant Equity is not treated as Separated Property. In addition, if Distributing directly or indirectly acquires Relevant Equity in a transaction in which gain is recognized in full, Underlying Property associated with that Relevant Equity is not treated as Separated Property.

(viii) *Underlying Property.* The term *Underlying Property* means property directly or indirectly held by a corporation or partnership any equity interest in which is Relevant Equity.

(ix) *Multiple Predecessors of Distributing.* If there are multiple Potential Predecessors that satisfy the pre-Distribution requirements and post-Distribution requirement of paragraph (b)(1) of this section, each of those Potential Predecessors is a Predecessor of Distributing. For example, a Potential Predecessor that transfers property to a Predecessor of Distributing without full recognition of gain (and that otherwise meets the requirements of paragraph (b)(1) of this section) is also a Predecessor of Distributing if the applicable transfer occurred as part of a Plan that existed at the time of such transfer.

(x) *Deemed exchanges.* For purposes of paragraph (b)(1)(ii) of this section (regarding the Relevant Property Requirement and the Reflection of Basis Requirement) and paragraph (b)(2)(vi) of this section (regarding Substitute Assets), Distributing is treated as acquiring Controlled stock in exchange for a direct or indirect interest in Relevant Property if the basis of Distributing in that Controlled stock, immediately after a transfer of the Relevant Property, is determined in whole or in part by reference to the basis of that Relevant Property immediately before the transfer. For example, if a corporation transfers Relevant Property to Controlled in exchange for Distributing stock in a transaction that qualifies as a reorganization under section 368(a)(1)(C), then, for purposes of paragraphs (b)(1)(ii) and (b)(2)(vi) of this section, Distributing is treated as acquiring Controlled stock in exchange for a direct or indirect interest in Relevant Property. See § 1.358–6(c)(1).

(c) *Additional definitions*—(1) *Predecessor of Controlled.* Solely for purposes of applying paragraph (f) of this section, a corporation is a predecessor of Controlled (Predecessor of Controlled) if, before the Distribution, it transfers property to Controlled in a Section 381 Transaction as part of a Plan. Other than for the purpose described in the preceding sentence, no corporation can be a Predecessor of Controlled. If multiple corporations satisfy the requirements of this paragraph (c)(1), each of those corporations is a Predecessor of Controlled. For example, a corporation that transfers property to a Predecessor of Controlled in a Section 381 Transaction is also a Predecessor of Controlled if the Section 381 Transaction occurred as part of a Plan that existed at the time of such transaction.

(2) *Successors*—(i) *In general.* For purposes of section 355(e), a successor (Successor) of Distributing or of Controlled is a corporation to which Distributing or Controlled, respectively, transfers property in a Section 381 Transaction after the Distribution (Successor Transaction).

(ii) *Determination of Successor status.* More than one corporation may be a Successor of Distributing or Controlled. For example, if Distributing transfers property to another corporation (X) in a Section 381 Transaction, and X transfers property to another corporation (Y) in a Section 381 Transaction, then each of X and Y is a Successor of Distributing. In this case, the determination of whether Y is a Successor of Distributing is made after the determination of whether X is a Successor of Distributing.

(3) *Section 381 Transaction.* The term *Section 381 Transaction* means a transaction to which section 381 applies.

(d) *Special acquisition rules*—(1) *Deemed acquisitions of stock in Section 381 Transactions*—(i) *Rule.* This paragraph (d)(1)(i) applies to each shareholder of the acquiring corporation immediately before a Section 381 Transaction (Acquiring Owner). Each Acquiring Owner is treated for purposes of this section as acquiring, in the Section 381 Transaction, stock representing an interest in the distributor or transferor corporation, to the extent that the Acquiring Owner's interest in the acquiring corporation immediately after the Section 381 Transaction exceeds the Acquiring Owner's direct or indirect interest in the distributor or transferor corporation immediately before the Section 381 Transaction.

(ii) *Example.* The example set forth in this paragraph (d)(1)(ii) illustrates the application of the deemed acquisition rule in paragraph (d)(1)(i) of this section. Assume that A held all of the stock of Distributing, Distributing held a 25-percent interest in a Predecessor of Distributing, and A held no direct interest, or other indirect interest, in the Predecessor of Distributing immediately before a Section 381 Transaction in which the Predecessor of Distributing transfers its assets to Distributing. In the Section 381 Transaction, the Predecessor of Distributing's shareholders (other than Distributing) collectively receive a 10-percent interest in Distributing (reducing A's interest in Distributing to 90 percent). Under paragraph (d)(1)(i) of this section, A is treated as acquiring in the Section 381 Transaction stock representing a 65-percent interest in the Predecessor of Distributing. This is because A's 90-percent interest in Distributing (the acquiring corporation in the Section 381 Transaction) immediately after the Section 381 Transaction exceeds A's 25-percent interest (held indirectly through Distributing) in the Predecessor of Distributing (the transferor corporation in the Section 381 Transaction) immediately before the Section 381 Transaction by 65 percent. Similarly, each Acquiring Owner of a Successor of Distributing is treated as acquiring, in the Successor Transaction, stock of Distributing, to the extent that the Acquiring Owner's interest in the Successor of Distributing immediately after the Successor Transaction exceeds the Acquiring Owner's direct or indirect interest in Distributing immediately before the Successor Transaction.

(2) *Deemed acquisitions of stock after Section 381 Transactions.* For purposes of this section, after a Section 381 Transaction (including a Successor Transaction), an acquisition of stock of an acquiring corporation (including a deemed stock acquisition under paragraph (d)(1)(i) of this section) is treated also as an acquisition of an interest in the stock of the distributor or transferor corporation. For example, an acquisition of the stock of Distributing that occurs after a Section 381 Transaction is treated not only as an acquisition of the stock of Distributing, but also as an acquisition of the stock of any Predecessor of Distributing whose assets were acquired by Distributing in the prior Section 381 Transaction. Similarly, an acquisition of the stock of a Successor of Distributing that occurs after the Successor Transaction is treated not only as an acquisition of the stock of the Successor of Distributing, but also as an acquisition of the stock of Distributing.

(3) *Separate counting for Distributing and each Predecessor of Distributing.* The measurement of whether one or more persons have acquired stock of any specific corporation in a Planned 50-percent Acquisition is made separately from the measurement of any potential Planned 50-percent Acquisition of any other corporation. Therefore, there may be a Planned 50-percent Acquisition of a Predecessor of Distributing even if there is no Planned 50-percent Acquisition of Distributing. Similarly, there may be a Planned 50-percent Acquisition of Distributing even if there is no Planned 50-percent Acquisition of a Predecessor of Distributing.

(e) *Special rules for limiting gain recognition*—(1) *Overview*—(i) *Gain limitation.* This paragraph (e) provides

rules that limit the amount of gain that must be recognized by Distributing by reason of section 355(e) to an amount that is less than the amount that Distributing otherwise would be required to recognize under section 355(c)(2) or section 361(c)(2) (Statutory Recognition Amount) in certain cases involving one or more Predecessors of Distributing.

(ii) *Multiple Planned 50-percent Acquisitions.* If there are Planned 50-percent Acquisitions of multiple corporations (for example, two Predecessors of Distributing), Distributing must recognize the Statutory Recognition Amount with respect to each such corporation, subject to the limitations in paragraph (e)(2) of this section relating to a Planned 50-percent Acquisition of a Predecessor of Distributing (POD Gain Limitation Rule) and paragraph (e)(3) of this section relating to a Planned 50-percent Acquisition of Distributing (Distributing Gain Limitation Rule), if applicable. The POD Gain Limitation Rule and the Distributing Gain Limitation Rule are applied separately to the Planned 50-percent Acquisition of each such corporation to determine the amount of gain required to be recognized.

(iii) *Statutory Recognition Amount limit; Section 336(e).* Paragraph (e)(4) of this section sets forth an overall gain limitation based on the Statutory Recognition Amount. Paragraph (e)(5) of this section clarifies the availability of an election under section 336(e) with regard to certain Distributions.

(2) *Planned 50-percent Acquisition of a Predecessor of Distributing*—(i) *In general.* If there is a Planned 50-percent Acquisition of a Predecessor of Distributing, the amount of gain recognized by Distributing by reason of section 355(e) as a result of the Planned 50-percent Acquisition is limited to the amount of gain, if any, that Distributing would have recognized if, immediately before the Distribution, Distributing had engaged in the following transaction: Distributing transferred all Separated Property received from the Predecessor of Distributing to a newly formed corporation (Hypothetical Controlled) in exchange solely for stock of Hypothetical Controlled in a reorganization under section 368(a)(1)(D) and then distributed the stock of Hypothetical Controlled to the shareholders of Distributing in a transaction to which section 355(e) applied (Hypothetical D/355(e) Reorganization). The computation in this paragraph (e)(2)(i) is applied regardless of whether Distributing actually directly held the Separated Property.

(ii) *Operating rules.* For purposes of applying paragraph (e)(2)(i) of this section, the following rules apply:

(A) *Separated Property other than Controlled stock.* Each of the basis and the fair market value of Separated Property other than stock of Controlled treated as transferred by Distributing to a Hypothetical Controlled in a Hypothetical D/355(e) Reorganization equals the basis and the fair market value, respectively, of such property in the hands of Controlled immediately before the Distribution.

(B) *Controlled stock that is Separated Property.* Each of the basis and the fair market value of the stock of Controlled that is Separated Property treated as transferred by Distributing to a Hypothetical Controlled in a Hypothetical D/355(e) Reorganization equals the basis and the fair market value, respectively, of such stock in the hands of Distributing immediately before the Distribution.

(C) *Anti-duplication rule.* A Predecessor of Distributing's Separated Property is taken into account for purposes of applying this paragraph (e)(2) only to the extent such property was not taken into account by Distributing in a Hypothetical D/355(e) Reorganization with respect to another Predecessor of Distributing. Further, appropriate adjustments must be made to prevent other duplicative inclusions of section 355(e) gain under this paragraph (e) reflecting the same economic gain.

(3) *Planned 50-percent Acquisition of Distributing.* This paragraph (e)(3) applies if there is a Planned 50-percent Acquisition of Distributing. In that case, the amount of gain recognized by Distributing by reason of section 355(e) as a result of the Planned 50-percent Acquisition is limited to the excess, if any, of the Statutory Recognition Amount over the amount of gain, if any, that Distributing would have been required to recognize under paragraphs (e)(1)(ii) and (e)(2) of this section if there had been a Planned 50-percent Acquisition of every Predecessor of Distributing, but not of Distributing or Controlled. For purposes of this paragraph (e)(3), references to Distributing are not references to a Predecessor of Distributing.

(4) *Gain recognition limited to Statutory Recognition Amount.* The sum of the amounts required to be recognized by Distributing under section 355(e) (taking into account the POD Gain Limitation Rule and the Distributing Gain Limitation Rule) with regard to a single Distribution cannot exceed the Statutory Recognition Amount. In addition, Distributing may choose not to apply the POD Gain Limitation Rule or the Distributing Gain Limitation Rule to a Distribution, and instead may recognize the Statutory Recognition Amount. Distributing indicates its choice to apply the preceding sentence by reporting the Statutory Recognition Amount on its original or amended Federal income tax return for the year of the Distribution.

(5) *Section 336(e) election.* Distributing is not eligible to make a section 336(e) election (as defined in § 1.336–1(b)(11)) with respect to a Distribution to which this section applies unless Distributing would, absent the making of a section 336(e) election, recognize the Statutory Recognition Amount with respect to the Distribution (taking into account the POD Gain Limitation Rule and the Distributing Gain Limitation Rule) without regard to the final two sentences of paragraph (e)(4) of this section. See §§ 1.336–1 through 1.336–5 for additional requirements with regard to a section 336(e) election.

(f) *Predecessor or Successor as a member of the affiliated group.* For purposes of section 355(e)(2)(C), if a corporation transfers its assets to a member of the same Expanded Affiliated Group in a Section 381 Transaction, the transferor will be treated as continuing in existence within the same Expanded Affiliated Group.

(g) *Inapplicability of section 355(f) to certain intra-group Distributions*—(1) *In general.* Section 355(f) does not apply to a Distribution if there is a Planned 50-percent Acquisition of a Predecessor of Distributing (but not of Distributing, Controlled, or their Successors), except as provided in paragraph (g)(2) of this section. Therefore, except as provided in paragraph (g)(2) of this section, section 355 (or so much of section 356 as relates to section 355) and the regulations under sections 355 and 356, including the POD Gain Limitation Rule, apply, without regard to section 355(f), to a Distribution within an affiliated group (as defined in section 1504(a)) if the Distribution and the Planned 50-percent Acquisition of the Predecessor of Distributing are part of a Plan. For purposes of this paragraph (g)(1), references to a Distribution (and Distributing and Controlled) include references to a distribution (and Distributing and Controlled) to which section 355 would apply but for the application of section 355(f).

(2) *Alternative application of section 355(f).* Distributing may choose not to apply paragraph (g)(1) of this section to each Distribution (that occurs under a Plan) to which section 355(f) would

otherwise apply absent paragraph (g)(1) of this section. Instead, Distributing may apply section 355(f) to all such Distributions according to its terms, but only if all members of the same Expanded Affiliated Group report consistently the Federal income tax consequences of the Distributions that are part of the Plan (determined without regard to section 355(f)). In such a case, neither the POD Gain Limitation Rule nor the Distributing Gain Limitation Rule is available with regard to any applicable Distribution. Distributing indicates its choice to apply section 355(f) consistently to all applicable Distributions by reporting the Federal income tax consequences of each Distribution in accordance with section 355(f) on its Federal income tax return for the year of the Distribution.

(h) *Examples.* The following examples illustrate the principles of this section. Unless the facts indicate otherwise, assume throughout these examples that: Distributing (D) owns all the stock of Controlled (C), and none of the shares of C held by D has a built-in loss; D distributes the stock of C in a Distribution to which section 355(d) does not apply; X, Y, and Z are individuals; each of D, D1, C, P, P1, P2, and R is a corporation having one class of stock outstanding, and none is a member of a consolidated group; and each transaction that is part of a Plan defined in this section is respected as a separate transaction under general Federal income tax principles. No inference should be drawn from any example concerning whether any requirements of section 355 are satisfied other than those of section 355(e) or whether any general Federal income tax principles (including the step transaction doctrine) are implicated by the example:

(1) *Example 1: Predecessor of D and Planned 50-Percent Acquisition of P*—(i) *Facts.* X owns 100% of the stock of P, which holds multiple assets. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A). Immediately after the merger, X and Y own 10% and 90%, respectively, of the stock of D. D then contributes to C one of the assets (Asset 1) acquired from P in the merger. At the time of the contribution, Asset 1 has a basis of $40x and a fair market value of $110x. In exchange for Asset 1, D receives additional C stock and $10x. D distributes the stock of C (but not the cash) to X and Y, pro rata. The contribution and Distribution constitute a reorganization under section 368(a)(1)(D), and D recognizes $10x of gain under section 361(b) on the contribution. Immediately before the Distribution, taking into account the $10x of gain recognized by D on the contribution, Asset 1 has an adjusted basis of $50x under section 362(b) and a fair market value of $110x, and the stock of C held by D has a basis of $100x and a fair market value of $200x.

(ii) *Analysis*—(A) *P is a Predecessor of D.* Under paragraph (b)(1) of this section, P is a Predecessor of D. First, P is a Potential Predecessor because, as part of a Plan, P transferred property to D in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both of the pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because, immediately before the Distribution and as part of a Plan, C holds P Relevant Property (Asset 1) the gain on which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the Distribution was acquired by D in exchange for Asset 1. See paragraph (b)(1)(ii)(A)(*1*) of this section. The Reflection of Basis Requirement is satisfied because that C stock had a basis prior to the Distribution that was determined in whole or in part by reference to the basis of Separated Property (Asset 1), and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because immediately after the Distribution, D continues to hold Relevant Property of P, and therefore, as part of a Plan, P's Relevant Property has been divided between C and D. See paragraph (b)(1)(iii) of this section.

(B) *Planned 50-percent Acquisition of P.* Under paragraph (d)(1)(i) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P as a result of the merger of P into D. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize $100x of gain ($200x of aggregate fair market value minus $100x of aggregate basis of the C stock held by D), the Statutory Recognition Amount described in section 361(c)(2). However, under the POD Gain Limitation Rule, D's gain recognized by reason of the Planned 50-percent Acquisition of P will not exceed $60x, an amount equal to the amount of gain D would have recognized had D transferred Asset 1 (Separated Property) to a newly formed corporation (C1) solely for C1 stock and distributed the C1 stock to D's shareholders in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. For purposes of the computation in this paragraph (h)(1)(ii)(C), the basis and fair market value of Asset 1 equal the basis and fair market value of Asset 1 in the hands of C immediately before the Distribution. See paragraph (e)(2)(ii)(A) of this section. Under section 361(c)(2), D would recognize $60x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the $110x fair market value over the $50x basis). Therefore, D recognizes $60x of gain (in addition to the $10x of gain recognized under section 361(b)).

(iii) *Plan not in existence at time of acquisition of Potential Predecessor's property.* The facts are the same as in paragraph (h)(1)(i) of this section (*Example 1*) except that the merger of P into D occurred before the existence of a Plan. Even though D transferred P property (Asset 1) to C, Asset 1 was not Relevant Property of P because P did not hold Asset 1 during the Plan Period. See paragraphs (b)(2)(iv) and (a)(4)(iii) of this section. Because Asset 1 is not Relevant Property, D did not receive C stock distributed in the Distribution in exchange for Relevant Property when it contributed Asset 1 to C, none of the distributed C stock had a basis prior to the Distribution that was determined in whole or in part by reference to the basis of Separated Property, and C did not hold Relevant Property immediately before the Distribution. Further, Relevant Property of P has not been divided. Therefore, P is not a Predecessor of D.

(2) *Example 2: Planned 50-percent Acquisition of D, but not Predecessor of D*—(i) *Facts.* X owns 100% of the stock of P, which holds multiple assets. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A). Immediately after the merger, X and Y own 90% and 10%, respectively, of the stock of D. D then contributes to C one of the assets (Asset 1) acquired from P in the merger. In exchange for Asset 1, D receives additional C stock. D distributes the stock of C to X and Y, pro rata. The contribution and Distribution constitute a reorganization under section 368(a)(1)(D). Immediately before the Distribution, Asset 1 has a basis of $50x and a fair market value of $110x, and the stock of C held by D has a basis of $120x and a fair market value of $200x.

(ii) *Analysis*—(A) *P is a Predecessor of D.* Under paragraph (b)(1) of this section, P is a Predecessor of D. First, P is a Potential Predecessor because, as part of a Plan, P transferred property to D in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both of the pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because, immediately before the Distribution and as part of a Plan, C holds P Relevant Property (Asset 1) the gain on which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the Distribution was acquired by D in exchange for Asset 1. See paragraph (b)(1)(ii)(A)(*1*) of this section. The Reflection of Basis Requirement is satisfied because that C stock had a basis prior to the Distribution that was determined in whole or in part by reference to the basis of Separated Property (Asset 1), and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because immediately after the Distribution, D continues to hold Relevant Property of P, and therefore, as part of a Plan, P's Relevant Property has been divided between C and D. See paragraph (b)(1)(iii) of this section.

(B) *Planned 50-percent Acquisition of D.* Under paragraph (d)(1)(i) of this section, Y is

treated as acquiring stock representing 10% of the voting power and value of P as a result of the merger of P into D. The 10% acquisition of P stock does not cause section 355(e) gain recognition or cause application of the POD Gain Limitation Rule because there has not been a Planned 50-percent Acquisition of P. X acquires 90% of the voting power and value of D as a result of the merger of P into D. Accordingly, there has been a Planned 50-percent Acquisition of D. This Planned 50-percent Acquisition implicates section 355(e) and results in gain recognition, subject to the rules of paragraph (e) of this section.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize $80x of gain ($200x of fair market value minus $120x of basis of the C stock held by D), the Statutory Recognition Amount described in section 361(c)(2). However, under the Distributing Gain Limitation Rule, D's gain recognized by reason of the Planned 50-percent Acquisition of D will not exceed $20x, the excess of the Statutory Recognition Amount ($80x) over the amount of gain that D would have been required to recognize under the POD Gain Limitation Rule if there had been a Planned 50-percent Acquisition of P but not D or C ($60x). See paragraph (e)(3) of this section. The hypothetical gain limitation under the POD Gain Limitation Rule equals the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly formed corporation (C1) solely for stock and distributed the C1 stock in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. Under section 361(c)(2), D would recognize $60x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the $110x fair market value over the $50x basis). Therefore, D recognizes $20x of gain ($80x − $60x).

(3) *Example 3: Predecessor of D owns C stock*—(i) *Facts.* X owns 100% of the stock of P, which holds multiple assets, including Asset 2. Y owns 100% of the stock of D. P owns 35% of the stock of C (Block 1), and D owns the remaining 65% of the C stock (Block 2). The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A), and D immediately thereafter distributes all of the C stock to X and Y pro rata. Immediately after the merger, X and Y own 10% and 90%, respectively, of the D stock, and, prior to the Distribution, D owns Block 1 with a basis of $30x and a fair market value of $35x, and Block 2 with a basis of $10x and a fair market value of $65x. D continues to hold Asset 2.

(ii) *Analysis*—(A) *P is a Predecessor of D.* Under paragraph (b)(1) of this section, P is a Predecessor of D. First, P is a Potential Predecessor because, as part of a Plan, P transferred property to D in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both of the pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because some of the C stock distributed in the Distribution (Block 1) was Relevant Property of P. See paragraph (b)(1)(ii)(A)(*2*) of this section. The Reflection of Basis Requirement is satisfied because Block 1 of the C stock is Relevant Property of P, and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because some of the C stock distributed in the Distribution was Relevant Property of P, and therefore C is deemed to have received Relevant Property of P, and D continues to hold Relevant Property of P immediately after the Distribution. See paragraph (b)(1)(iii) of this section. Therefore, as part of a Plan, P's Relevant Property has been divided between C and D.

(B) *Planned 50-percent Acquisition of P.* Under paragraph (d)(1)(i) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P as a result of the merger of P into D. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize $60x of gain ($100x of fair market value minus $40x of basis of the C stock held by D), the Statutory Recognition Amount under section 355(c)(2). However, under the POD Gain Limitation Rule, D's gain recognized by reason of the Planned 50-percent Acquisition of P will not exceed $5x, an amount equal to the amount D would have recognized had it transferred Block 1 of the C stock (Separated Property) to a newly formed corporation (C1) solely for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. Because Relevant Equity (Block 1 of the C stock) is Separated Property, Underlying Property associated with that Relevant Equity is not treated as Separated Property. See paragraph (b)(2)(vii) of this section. For purposes of the computation in this paragraph (h)(3)(ii)(C), the basis and fair market value of the Block 1 C stock equal its basis and fair market value in the hands of D immediately before the Distribution. See paragraph (e)(2)(ii)(A) of this section. Under section 361(c)(2), D would recognize $5x of gain, an amount equal to the gain in the hypothetical C1 stock ($35x fair market value − $30x basis). Therefore, D recognizes $5x of gain.

(4) *Example 4: C stock as Substitute Asset*—(i) *Facts.* X owns 100% of the stock of P, which owns multiple assets, including 100% of the stock of R and Asset 2. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A) (P–D reorganization). Immediately after the merger, X and Y own 10% and 90%, respectively, of the stock of D. D then causes R to transfer all of its assets to C and liquidate in a reorganization under section 368(a)(1) (R–C reorganization). At the time of the P–D reorganization, the R stock has a basis of $40x and a fair market value of $110x. D distributes the stock of C to X and Y, pro rata. D continues to directly hold Asset 2. Immediately before the Distribution, the C stock held by D that was deemed received in the R–C reorganization (Block 1) has a basis of $40x and a fair market value of $110x, and all of the stock of C held by D has a basis of $100x and a fair market value of $200x.

(ii) *Analysis*—(A) *P is a Predecessor of D.* Under paragraph (b)(1) of this section, P is a Predecessor of D. First, P is a Potential Predecessor because, as part of a Plan, P transferred property to D in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because, for the following two reasons, some of the C stock distributed in the Distribution (Block 1) was Relevant Property of P. D is treated as acquiring Block 1 of the C stock in exchange for a direct or indirect interest in R stock (that is, Relevant Property) in the R–C reorganization because the basis of D in that C stock immediately after a transfer of the R stock (in the liquidation of R) is determined in whole or in part by reference to the basis of the R stock immediately before the transfer. See paragraph (b)(2)(x) of this section. Further, because the basis in Block 1 of the C stock is determined in whole or in part by reference to the basis of Relevant Equity (the R stock) the issuer of which ceases to exist for Federal income tax purposes under the Plan, Block 1 of the C stock is a Substitute Asset, and is therefore treated as Relevant Property with the same ownership and transfer history as the R stock. See paragraph (b)(2)(vi)(B)(*2*) of this section. The Reflection of Basis Requirement is satisfied because Block 1 of the C stock is Relevant Property of P, and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because some of the C stock distributed in the Distribution was Relevant Property of P, and therefore C is deemed to have received Relevant Property of P, and immediately after the Distribution, D continues to hold Asset 2, which is Relevant Property of P. See paragraph (b)(1)(iii) of this section. Therefore, as part of a Plan, P's Relevant Property has been divided between C and D.

(B) *Planned 50-percent Acquisition of P.* Under paragraph (d)(1)(i) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P as a result of the P–D reorganization. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize $100x of gain ($200x of fair market value minus $100x of basis of all C stock held by D), the Statutory Recognition Amount described in section 355(c)(2). However, under the POD Gain Limitation Rule, D's gain recognized by reason of the Planned 50-percent Acquisition of P will not exceed $70x, an amount equal to the amount D would have recognized had it transferred Block 1 of the C stock (Separated Property) to a newly formed corporation (C1) solely for stock and

distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. Because Relevant Equity (Block 1 of the C stock) is Separated Property, Underlying Property associated with that Relevant Equity is not treated as Separated Property. See paragraph (b)(2)(vii) of this section. Under section 361(c)(2), D would recognize $70x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the $110x fair market value over the $40x basis). Therefore, D recognizes $70x of gain.

(5) *Example 5: Section 351 transaction*—(i) *Facts.* X owns 100% of the stock of P, which holds multiple assets, including Asset 1, Asset 2, and Asset 3. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P transfers Asset 1 and Asset 2 to D and Y transfers property to D in an exchange qualifying under section 351. Immediately after the exchange, P and Y own 10% and 90%, respectively, of the stock of D. D then contributes Asset 1 to C in exchange for additional C stock. D distributes all of the stock of C to P and Y, pro rata. D continues to directly hold Asset 2, and P continues to directly hold Asset 3. The contribution and Distribution constitute a reorganization under section 368(a)(1)(D). Immediately before the Distribution, Asset 1 has a basis of $40x and a fair market value of $110x, and the stock of C held by D has a basis of $100x and a fair market value of $200x. Following the Distribution, and as part of the same Plan, Z acquires 51% of the P stock.

(ii) *Analysis—P is not a Predecessor of D.* Under paragraph (b)(1) of this section, P is not a Predecessor of D. P is not a Potential Predecessor because P did not transfer property to a Potential Predecessor, D, or a member of the same Expanded Affiliated Group as D in a Section 381 Transaction and P is not a member of the same Expanded Affiliated Group as D immediately after completion of the Plan. See paragraph (b)(2)(ii) of this section. Thus, P cannot be a Predecessor of D. See paragraph (b)(1)(i) of this section.

(6) *Example 6: Section 351 transaction after an acquisition of P*—(i) *Facts.* X owns 100% of the stock of P, which holds multiple assets, including Asset 1 and Asset 2. Y owns 100% of the stock of D, D owns 100% of the stock of D1, and D1 owns 100% of the stock of C. D files a consolidated return for the affiliated group of which it is the common parent. The following steps occur as part of a Plan: D acquires 100% of the stock of P from X. P transfers Asset 1 and Asset 2 to D1 for D1 stock in an exchange qualifying under section 351. See § 1.1502–34. D1 contributes Asset 1 to C in exchange for additional C stock. D1 distributes all of the stock of C to D in exchange for D1 stock (First Distribution). D then distributes all of the stock of C to Y (Second Distribution). D1 continues to directly hold Asset 2. Immediately before the First Distribution, Asset 1 has a basis of $10x and a fair market value of $60x, and the stock of C held by D1 has a basis of $100x and a fair market value of $200x.

(ii) *Analysis*—(A) *P is a Predecessor of D1.* Under paragraph (b)(1) of this section, P is a Predecessor of D1. First, P is a Potential Predecessor of D1 because P is a member of the same Expanded Affiliated Group as D1 immediately after completion of the Plan. See paragraph (b)(2)(ii)(A)(*2*) of this section. The Relevant Property Requirement is satisfied because, immediately before the First Distribution and as part of a Plan, C holds P Relevant Property (Asset 1) the gain on which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the First Distribution was acquired by D1 in exchange for Asset 1. See paragraph (b)(1)(ii)(A)(*1*) of this section. The Reflection of Basis Requirement is satisfied because that C stock had a basis prior to the First Distribution that was determined in whole or in part by reference to the basis of Separated Property (Asset 1), and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full prior to the First Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because immediately after the First Distribution, each of C, on the one hand, and P or D1, on the other hand, continues to hold Relevant Property of P, and therefore, as part of a Plan, P's Relevant Property has been divided between C and D1. See paragraph (b)(1)(iii) of this section.

(B) *Planned 50-percent Acquisition of P.* D has acquired stock representing 100% of the voting power and value of P. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain on First Distribution.* Because there is a Planned 50-percent Acquisition of a Predecessor of Distributing (but not of Distributing, Controlled, or their Successors), section 355(f) will not apply to the First Distribution unless D and D1 choose to have section 355(f) apply. See paragraph (g) of this section. As a result, section 355, including the POD Gain Limitation Rule, will apply to the First Distribution. Under the POD Gain Limitation Rule, D1's gain recognized by reason of the Planned 50-percent Acquisition of P will not exceed $50x, an amount equal to the amount D1 would have recognized had it transferred Asset 1 (Separated Property) to a newly formed corporation (C1) solely for stock and distributed the C1 stock to D1 shareholders in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. Under section 361(c)(2), D1 would recognize $50x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the $60x fair market value over the $10x basis). Therefore, D1 recognizes $50x of gain. Under paragraph (g)(2) of this section, however, D and D1 may choose to apply section 355(f) to the First Distribution as an exception to the general application of paragraph (g)(1) of this section. By application of section 355(f), section 355 (including the POD Gain Limitation Rule) would not apply to the First Distribution. Therefore, D1 would be required to recognize $100x of gain (excess of the $200x fair market value over the $100x basis of C stock held by D1) under section 311(b), and D would be treated under section 302(d) as receiving a distribution of $200x to which section 301 applies.

(D) *P is not a Predecessor of D.* Under paragraph (b)(1) of this section, P is not a Predecessor of D. First, P is a Potential Predecessor of D because P is a member of the same Expanded Affiliated Group as D immediately after completion of the Plan. See paragraph (b)(2)(ii)(A)(*2*) of this section. However, although the Relevant Property Requirement is satisfied, the Reflection of Basis Requirement is not satisfied. The Relevant Property Requirement is satisfied because, immediately before the Second Distribution and as part of a Plan, C holds P Relevant Property (Asset 1) the gain on which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the Second Distribution was indirectly acquired by D in exchange for Asset 1. See paragraph (b)(1)(ii)(A)(*1*) of this section. However, regardless of whether D and D1 choose under paragraph (g)(2) of this section to have section 355(f) apply to the First Distribution, the Reflection of Basis Requirement cannot be satisfied. If section 355(f) applies to the First Distribution, then all of the C stock will have been transferred in a transaction in which the gain on the C stock was recognized in full during the Plan Period prior to the Second Distribution. If section 355(f) does not apply to the First Distribution, then all of the C stock will have been transferred in a distribution to which section 355(e) applied during the Plan Period prior to the Second Distribution. Because not all of the pre-Distribution and post-Distribution requirements are satisfied, P cannot be a Predecessor of D.

(7) *Example 7: Sequential Predecessors*—(i) *Facts.* X owns 100% of P1, which holds multiple assets, including Asset 1 and Asset 2. Y owns 100% of P2, which holds Asset 3, and Z owns 100% of D. The following steps occur as part of a Plan: P1 merges into P2 in a reorganization under 368(a)(1)(A) (P1–P2 reorganization). Immediately after the merger, X and Y own 10% and 90%, respectively, of the stock of P2. P2 then merges into D in a reorganization under 368(a)(1)(A) (P2–D reorganization). Immediately after the merger, X, Y, and Z own 1%, 9%, and 90%, respectively, of the stock of D. D then contributes Asset 1 to C in exchange for additional C stock, and retains Asset 2 and Asset 3. D distributes all of the stock of C to X, Y, and Z, pro rata. Immediately before the Distribution, Asset 1 has a basis of $40x and a fair market value of $100x, and the stock of C held by D has a basis of $100x and a fair market value of $200x.

(ii) *Analysis*—(A) *P2 is a Predecessor of D.* Under paragraph (b)(1) of this section, P2 is a Predecessor of D. First, P2 is a Potential Predecessor because, as part of a Plan, P2 transferred property to D in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because, immediately before the Distribution and as part of a Plan, C holds P2 Relevant Property (Asset 1) the gain on which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the Distribution was acquired

by D in exchange for Asset 1. See paragraph (b)(1)(ii)(A)(*1*) of this section. The Reflection of Basis Requirement is satisfied because that C stock had a basis prior to the Distribution that was determined in whole or in part by reference to the basis of Separated Property (Asset 1), and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because immediately after the Distribution, D continues to hold P2 Relevant Property (Asset 2 and Asset 3), and therefore, as part of a Plan, P2's Relevant Property has been divided between C and D. See paragraph (b)(1)(iii) of this section.

(B) *P1 is a Predecessor of D.* Under paragraph (b)(1) of this section, P1 is a Predecessor of D. First, P1 is a Potential Predecessor because, as part of a Plan, P1 transferred property to a Potential Predecessor (P2) in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because, immediately before the Distribution and as part of a Plan, C holds P1 Relevant Property (Asset 1) the gain on which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the Distribution was acquired by D in exchange for Asset 1. See paragraph (b)(1)(ii)(A)(*1*) of this section. The Reflection of Basis Requirement is satisfied because that C stock had a basis prior to the Distribution that was determined in whole or in part by reference to the basis of Separated Property (Asset 1), and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because immediately after the Distribution, D continues to hold Relevant Property of P1 (Asset 2), and therefore, as part of a Plan, P1's Relevant Property has been divided between C and D. See paragraph (b)(1)(iii) of this section.

(C) *Planned 50-percent Acquisitions of P1 and P2.* Under paragraph (d)(1)(i) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P1 as a result of the P1–P2 merger. In addition, under paragraph (d)(1)(i) of this section, Z is treated as acquiring stock representing 90% of the voting power and value of P2 in the P2–D merger. Accordingly, there have been Planned 50-percent Acquisitions of P1 and P2.

(D) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize $100x of gain ($200x of aggregate fair market value minus $100x of aggregate basis of the C stock held by D), the Statutory Recognition Amount described in section 361(c)(2), because there have been Planned 50-percent Acquisitions of P1 and P2, both Predecessors of D. However, under paragraph (e) of this section, D's gain recognized by reason of the Planned 50-percent Acquisitions of P1 and P2 will not exceed $60x, an amount equal to the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly formed corporation (C1) solely for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. Under section 361(c)(2), D would recognize $60x, an amount equal to the gain in the hypothetical C1 stock (excess of the $100x fair market value over the $40x basis). Paragraph (e)(1)(ii) of this section provides that if there are Planned 50-percent Acquisitions of multiple corporations, Distributing must recognize the Statutory Recognition Amount with respect to each such corporation, subject to the POD Gain Limitation Rule and the Distributing Gain Limitation Rule, if applicable. In this case, the POD Gain Limitation Rule limits the amount of gain required to be recognized by D with respect to each of the Planned 50-percent Acquisitions of P1 and P2 to $60x. See paragraph (e)(2)(i) of this section. Ordinarily, each $60x limitation would be added together, and the total gain limitation provided by paragraph (e) of this section would be $120x. However, the anti-duplication rule set forth in paragraph (e)(2)(ii)(C) of this section provides that, for purposes of applying the POD Gain Limitation Rule, a Predecessor of Distributing's Separated Property is taken into account only to the extent such property was not taken into account with respect to another Predecessor of Distributing. Thus, Asset 1 may not be taken into account more than once in determining the total gain limitation. Therefore, D recognizes $60x of gain.

(8) *Example 8: Multiple Predecessors of D*—(i) *Facts.* X owns 100% of the stock of P1, which holds multiple assets, including Asset 1 and Asset 3. Y owns 100% of the stock of P2, which holds multiple assets, including Asset 2 and Asset 4. Z owns 100% of the stock of D. The following steps occur as part of a Plan: Each of P1 and P2 merges into D in a reorganization under section 368(a)(1)(A). Immediately after the mergers, each of X and Y owns 10%, and Z owns 80%, of the stock of D. D then contributes to C Asset 1 (acquired from P1), and Asset 2 (acquired from P2). In exchange for Asset 1 and Asset 2, D receives additional C stock. D distributes the stock of C to X, Y, and Z, pro rata. D's contribution of Asset 1 and Asset 2 and the Distribution constitute a reorganization under section 368(a)(1)(D). D continues to hold Asset 3 and Asset 4. Immediately before the Distribution, Asset 1 has a basis of $50x and a fair market value of $110x, Asset 2 has a basis of $70x and a fair market value of $90x, and the stock of C held by D has a basis of $130x and a fair market value of $220x.

(ii) *Analysis*—(A) *P1 and P2 are Predecessors of D.* Under paragraph (b)(1) of this section, each of P1 and P2 is a Predecessor of D. First, each of P1 and P2 is a Potential Predecessor because, as part of a Plan, each of P1 and P2 transferred property to D in a Section 381 Transaction. See paragraph (b)(2)(ii)(A)(*1*) of this section. Second, both pre-Distribution requirements and the post-Distribution requirement are satisfied. The Relevant Property Requirement is satisfied because, immediately before the Distribution and as part of a Plan, C holds P1 Relevant Property (Asset 1) and P2 Relevant Property (Asset 2), the gain on each of which was not recognized in full at any point during the Plan Period, and some of the C stock distributed in the Distribution was acquired by D in exchange for each of Asset 1 and Asset 2. See paragraph (b)(1)(ii)(A)(*1*) of this section. The Reflection of Basis Requirement is satisfied because that C stock had a basis prior to the distribution that was determined in whole or in part by reference to the basis of Separated Property (Asset 1 and Asset 2, respectively), and was neither distributed in a distribution to which section 355(e) applied nor transferred in a transaction in which the gain on that C stock was recognized in full during the Plan Period prior to the Distribution. See paragraph (b)(1)(ii)(B) of this section. The Division of Relevant Property Requirement is satisfied because immediately after the Distribution, D continues to hold Relevant Property of P1 and P2, and therefore, as part of a Plan, each of P1's and P2's Relevant Property has been divided between C and D. See paragraph (b)(1)(iii) of this section.

(B) *Planned 50-percent Acquisitions of P1 and P2.* Under paragraph (d)(1)(i) of this section, Z is treated as acquiring stock representing 80% of the voting power and value of each of P1 and P2 as a result of the mergers of P1 and P2 into D. Accordingly, there have been Planned 50-percent Acquisitions of P1 and P2.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize $90x of gain ($220x of fair market value minus $130x of basis of the C stock held by D), the Statutory Recognition Amount under section 361(c)(2). However, under the POD Gain Limitation Rule, D's gain recognized by reason of the Planned 50-percent Acquisition of P1 will not exceed $60x ($110x fair market value minus $50x basis), an amount equal to the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly formed corporation (C1) solely for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. In addition, under the POD Gain Limitation Rule, D's gain recognized by reason of the deemed acquisition of P2 stock will not exceed $20x ($90x fair market value minus $70x basis), an amount equal to the amount D would have recognized had it transferred Asset 2 (Separated Property) to a second newly formed corporation (C2) solely for stock and distributed the C2 stock to D shareholders in a Hypothetical D/355(e) Reorganization. See paragraph (e)(2)(i) of this section. Therefore, D recognizes $80x of gain ($60x + $20x). See paragraph (e)(1)(ii) of this section.

(9) *Example 9: Successor of C*—(i) *Facts.* X owns 100% of the stock of each of D and R. The following steps occur as part of a Plan: D distributes all of its C stock to X. Immediately before the Distribution, D's C

stock has a basis of $10x and a fair market value of $30x. C then merges into R in a reorganization under section 368(a)(1)(D). Immediately after the merger, X owns all of the R stock. As part of the same Plan, Z acquires 51% of the stock of R from X.

(ii) *Analysis*—(A) *R is a Successor of C.* Under paragraph (c)(2)(i) of this section, R is a Successor of C because, after the Distribution, C transfers property to R in a Section 381 Transaction.

(B) *Planned 50-percent Acquisition of C.* Under paragraph (d)(2) of this section, Z's acquisition of stock of R is treated as an acquisition of stock of C. Therefore, Z is treated as acquiring 51% of the stock of C. Accordingly, there has been a Planned 50-percent Acquisition of C.

(C) *Gain not limited.* Section 355(e) applies to the Distribution because there has been a Planned 50-percent Acquisition of C. Neither the POD Gain Limitation Rule nor the Distributing Gain Limitation Rule applies because there has been no Planned 50-percent Acquisition of a Predecessor of D, and no Planned 50-percent Acquisition of D. Therefore, D recognizes $20x of gain ($30x fair market value minus $10x basis of the C stock held by D) under section 355(c)(2).

(10) *Example 10: Multiple Successors*—(i) *Facts.* X owns 100% of the stock of both D and R. Y owns 100% of the stock of S. The following steps occur as part of a Plan: D distributes all of the C stock to X. Immediately after the Distribution, D merges into R in a reorganization under section 368(a)(1)(A) (D–R merger). Following the D–R merger, R merges into S in a reorganization under section 368(a)(1)(A) (R–S merger). Immediately after the R–S merger, X and Y own 10% and 90%, respectively, of the S stock. Immediately before the Distribution, D's C stock has a basis of $10x and a fair market value of $30x.

(ii) *Analysis*—(A) *R and S are Successors of D.* Under paragraph (c)(2)(i) of this section, R is a Successor of D because, after the Distribution, D transfers property to R in a Section 381 Transaction. Under paragraph (c)(2)(ii) of this section, S is also a Successor of D because R (a Successor of D) transfers property to S in a Section 381 Transaction.

(B) *Planned 50-percent Acquisition of D.* Under paragraph (d)(1)(i) of this section, there is no deemed acquisition of D stock as a result of the D–R merger because X wholly owns the stock of D before the merger and wholly owns the stock of R after the merger. Under paragraph (d)(1)(i) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of R (a Successor of D) as a result of the R–S merger. Under paragraph (d)(2) of this section, an acquisition of R stock is also treated as an acquisition of D stock. Accordingly, there has been a Planned 50-percent Acquisition of D.

(C) *Gain not limited.* Section 355(e) applies to the Distribution because there has been a Planned 50-percent Acquisition of D. The POD Gain Limitation Rule does not apply because there has been no Planned 50-percent Acquisition of a Predecessor of D. The Distributing Gain Limitation Rule applies because there has been a Planned 50-percent Acquisition of D. However, the gain limitation under the Distributing Gain Limitation Rule equals the Statutory Recognition Amount, because there is no Predecessor of D (and thus no Separated Property). Therefore, D recognizes $20x of gain ($30x fair market value minus $10x basis of the C stock held by D) under section 355(c)(2).

(i) *Applicability date.* This section applies to Distributions occurring after December 15, 2019. For Distributions occurring on or before December 15, 2019, see § 1.355–8T as contained in 26 CFR part 1 revised as of April 1, 2019.

Douglas W. O'Donnell,

Acting Deputy Commissioner for Services and Enforcement.

Approved: December 9, 2019.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2019–27110 Filed 12–16–19; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0953]

RIN 1625–AA87

Security Zone; San Diego Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone for all navigable waters within a 100-yard radius of berth four at the 10th Avenue Marine Terminal in San Diego, CA during the offload of narcotics from a military vessel. The security zone is needed to protect the military vessel and vessel's personnel. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port San Diego.

DATES: This rule is effective from 7 a.m. until noon on December 18, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0953 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 Lieutenant Briana Biagas, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone 619–278–7656, email *D11MarineEventsSD@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 Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impractical. This urgent security zone is required to protect the military vessel, the surrounding waterway and the 10th Avenue Marine Terminal. It is impracticable to publish an NPRM because we must establish this security zone by December 18, 2019 and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

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 contrary to public interest because immediate action is needed to provide the security of the military vessel and the waterways and structures nearby.

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 Sector San Diego (COTP) has determined that the presence of the military vessel loaded with narcotics presents a potential target for terrorist attack, sabotage, or other subversive acts, accidents, or other causes of similar nature. This rule is needed to protect military personnel, the public and the navigable waters in the vicinity of the 10th Avenue Marine Terminal.

IV. Discussion of the Rule

This rule establishes a security zone from 7 a.m. until noon on December 18,

2019. The security zone will cover all navigable waters within a 100-yards radius around the military vessel moored at berth four of the 10th Avenue Marine Terminal located at 32°41′56.6″ N and 117°9′31.9″ W. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the vessel's personnel are offloading narcotics. No vessel or person will be permitted to enter the security zone without obtaining permission from the COTP or a designated representative.

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 and limited duration of the security zone. This zone impacts a small designated area of the San Diego bay for a very limited period. Furthermore, vessel traffic can safely transit around the security 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 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 security zone 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 above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, 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 establishment of a security zone lasting only 5 hours on the navigable waters of San Diego Bay. It is categorically excluded from further review under paragraph L60(a) 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. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

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 165

Regulated navigation and limited access areas.

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.T11–013 to read as follows:

§ 165.T11–013 Security Zone; San Diego Bay; San Diego, CA.

(a) *Location.* The following area is a security zone: All navigable waters of San Diego Bay within a 100-yards radius around the military vessel moored at berth four of the 10th Avenue Marine Terminal located at 32°41′56.6″ N and 117°9′31.9″ W.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the security zone.

(c) *Regulations.* (1) Under the general security zone regulations in subpart D of this part, you may not enter the security zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF Chnnel 16. Those in the security zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement.* This section will be enforced from 7 a.m. until noon on December 18, 2019.

Dated: December 12, 2019.

T.J. Barelli,

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

[FR Doc. 2019–27353 Filed 12–17–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0838]

RIN 1625–AA00

Temporary Safety Zone for Explosive Dredging; Tongass Narrows, Ketchikan, AK

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters of the Tongass Narrows. This action is necessary to provide for the safety of life on all navigable waters of the Tongass Narrows, from shoreline to shoreline, within a 500-yard radius of the Pinnacle Rock before, during, and after the scheduled operation between December 16, 2019 and January 31, 2020. This temporary final rule prohibits persons and vessels from being in the safety zone unless authorized by the Captain of the Port Southeast Alaska or a designated representative.

DATES: This rule is effective without actual notice from December 18, 2019 through January 31, 2020. For the purposes of enforcement, actual notice will be used from December 16, 2019 through December 18, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0838 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 LT Jesse Collins, Sector Juneau Waterways Management Division, U.S. Coast Guard; telephone 907–463–2846, email *Jesse.O.Collins@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

Contract Drilling & Blasting LLC notified the Coast Guard that it will be conducting explosive dredging from 30 minutes after sunrise to one hour before sunset between December 16, 2019 and January 31, 2020. The operation will take place approximately 300 yards southwest of Berth II in Ketchikan, AK. Hazards from explosive dredging include concussive forces. The COTP has determined that potential hazards associated with the explosives to be used in this operation would be a safety concern for anyone above the water's surface within a 500-yard radius of Pinnacle Rock (located at approximately latitude 55°20′37″ N, longitude 131°38′96″ W).

In response, on November 22, 2019, the Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Temporary Safety Zone for Explosive Dredging, Tongass Narrows, Ketchikan, AK'' (84 FR 64445). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this safety zone. During the comment period that ended December 9, 2019, we received eight comments.

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 protect the public from the potential safety hazards associated with the explosive dredging operation, which is scheduled to begin on December 16, 2019.

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 COTP has determined that potential hazards associated with the explosives to be used in this operation would be a safety concern for anyone above the water's surface within a 500-yard radius of Pinnacle Rock (located at approximately latitude 55°20′37″ N, longitude 131°38′96″ W). The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters of the Tongass Narrows, from shoreline to shoreline, within a 500-yard radius of Pinnacle Rock before, during, and after the scheduled operation December 16, 2019 and January 31, 2020.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received eight comments on our NPRM published on November 22, 2019. Five comments were supportive. Three comments raised concerns regarding the operation's affect on marine wildlife. We considered these comments and

believe the City of Ketchikan has a sufficient and comprehensive plan to protect marine wildlife from harm; the city will employ mitigation measures to include having three dedicated, full-time Protected Species Observers to monitor the area and will have designated shut down zones where operations will cease if Alaskan marine mammals are observed. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a safety zone from 30 minutes after sunrise to one hour before sunset between December 16, 2019 and January 31, 2020. The safety zone would cover all navigable waters within 500 yards of Pinnacle Rock during explosive dredging operations in the Tongass Narrows located approximately 300 yards southwest of Berth II in Ketchikan, AK. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the daily 35-minute period of explosive dredging. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text appears 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, time-of-day and time-of-year of the safety zone. Vessel traffic would be able to safely transit around this safety zone, south of Pennock Island, which would impact a small designated area of the Tongass Narrows for less than one hour per day when Contract Drilling & Blasting LLC would decide to detonate the explosives. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about 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 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, Rev. 1, associated implementing instructions, 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 safety zone lasting less than an hour daily for 47 days that would prohibit entry within 500 yards of an explosive dredging operation in the Tongass Narrows. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS

Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

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 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.T17–0838 to read as follows:

§ 165.T17–0838 Safety Zone for Explosive Dredging Operations; Tongass Narrows, Ketchikan, AK.

(a) *Location.* The following area is a safety zone: All navigable waters of the Tongass Narrows, from shoreline to shoreline, within a 500-yard radius of Pinnacle Rock (located at approximately latitude 55°20′37″ N, longitude 131°38′96″ W) before, during, and after the scheduled operation between December 16, 2019 and January 31, 2020.

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

(1) *Captain of the Port (COTP)* means the Commander, U.S. Coast Guard Sector Juneau.

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

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. All vessels underway within this safety zone at the time it is activated are to depart the zone.

(2) To seek permission to enter, contact the COTP or the COTP's designated representative by telephone at 907–463–2980 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

(3) Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

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

(e) *Enforcement.* This safety zone may be enforced during the period described in paragraph (f) of this section. Contract Drilling & Blasting LLC will have two safety vessels on-scene near the location described in paragraph (a) of this section.

(f) *Enforcement period.* This section may be enforced from 30 minutes after sunrise to one hour before sunset between December 16, 2019, and January 31, 2020, during explosive dredging operations by Contract Drilling & Blasting LLC.

Dated: December 10, 2019.

Stephen R. White,

Captain, U.S. Coast Guard, Captain of the Port Southeast Alaska.

[FR Doc. 2019–27195 Filed 12–17–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2 and 7

[Docket No. PTO–T–2017–0004]

RIN 0651–AD15

Changes to the Trademark Rules of Practice To Mandate Electronic Filing

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule; delay of effective date.

SUMMARY: On July 31, 2019, the United States Patent and Trademark Office published in the **Federal Register** a final rule amending the regulations to mandate electronic filing of trademark applications and all submissions associated with trademark applications and registrations, and to require the designation of an email address for receiving USPTO correspondence, with limited exceptions. That final rule had an effective date of October 5, 2019, which was subsequently delayed until December 21, 2019. A correction to the July 31, 2019 rule was published on December 13, 2019 and is also effective on December 21, 2019. This action further delays the effective date of the both the July 31, 2019 final rule, and the December 13, 2019 correction, until February 15, 2020.

DATES: The effective date of the final rule published on July 31, 2019 (84 FR 37081), delayed on October 2, 2019 (84 FR 52363), is further delayed from December 21, 2019 to February 15, 2020. The correction published on December 13, 2019 (84 FR 68045), is delayed from December 21, 2019 to February 15, 2020.

FOR FURTHER INFORMATION CONTACT: Catherine Cain, Office of the Deputy Commissioner for Trademark Examination Policy, *TMFRNotices@uspto.gov,* (571) 272–8946.

SUPPLEMENTARY INFORMATION: On July 31, 2019, the United States Patent and Trademark Office (USPTO) published in the **Federal Register** (84 FR 37081, July 31, 2019) a final rule amending the regulations to mandate electronic filing of trademark applications and all submissions associated with trademark applications and registrations, and to require the designation of an email address for receiving USPTO correspondence, with limited exceptions. The effective date of the July 31, 2019 rule was delayed from October 5, 2019 until December 21, 2019 (84 FR 52363, October 2, 2019). A correction to the July 31, 2019 rule was published on December 13, 2019 (84 FR 68045) and is also effective on December 21, 2019.

In response to recent feedback received from external stakeholders regarding their need to more fully comprehend the nature of, and prepare to comply with, the new requirements before they become effective, the effective date of both the July 31, 2019 final rule and the December 13, 2019 correction is being delayed until February 15, 2020. This final rule will also allow the USPTO additional time to ensure that internal implementation of the requirements associated with the mandate that applicants and registrants electronically file their trademark applications and all submissions associated with trademark applications and registrations, and that they designate an email address for receiving USPTO correspondence, is in place.

Rulemaking Requirements

Administrative Procedure Act: This final rule revises the effective date of the July 31, 2019 final rule implementing procedures requiring the electronic filing of trademark applications and all submissions associated with trademark applications and registrations, and the subsequent correction rule published on December 13, 2019, and it is a rule of agency practice and procedure, and/or interpretive rules pursuant to 5 U.S.C. 553(b)(A). *See JEM Broad. Co.* v. *F.C.C.,* 22 F.3d 32. (D.C. Cir. 1994) (''[T]he 'critical feature' of the procedural exception [in 5 U.S.C. 553(b)(A)] 'is that it covers agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency.''' (quoting *Batterton* v. *Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980))); *see also Bachow Commc'ns Inc.* v. *F.C.C.,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals were procedural where they did not change the substantive standard for reviewing claims). Accordingly, prior notice and opportunity for public comment are not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law). *See Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' (quoting 5 U.S.C. 553(b)(A)).

Moreover, the Director of the USPTO, pursuant to authority at 5 U.S.C. 553(b)(B), finds good cause to adopt the change in this final rule without prior notice and an opportunity for public comment, as such procedures would be impracticable and contrary to the public interest. Immediate implementation of the delay in effective date is in the public interest, because it is responsive to recent feedback received from external stakeholders regarding their need to more fully comprehend the nature of, and prepare to comply with, the new requirements before they are effective. It will also allow the USPTO additional time to ensure that internal implementation of the requirements associated with the July 31, 2019 final rule and the December 13, 2019 correction is in place. Delay of the July 31, 2019 final rule and the December 13, 2019 correction to provide prior notice and comment procedures is impracticable, because it would allow the July 31, 2019 final rule and December 13, 2019 correction to go into effect before external stakeholders are ready to comply with, and the agency is ready to implement, the new requirements. Therefore, the Director finds there is good cause to waive notice and comment procedures for this rule.

Finally, the change in this final rule may be made effective earlier than the required 30-day delay in effectiveness because this is not a substantive rule under 35 U.S.C. 553(d). Moreover, pursuant to 5 U.S.C. 553(d)(3), the Director finds good cause to waive the 30-day delay in effectiveness for this final rule because such a delay would allow the July 31, 2019 final rule and December 13, 2019 correction to go into effect before external stakeholders are ready to comply with, and the agency is ready to implement, the new requirements.

Dated: December 16, 2019.

Andrei Iancu,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2019–27426 Filed 12–17–19; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2018–0823; FRL–10003–24–Region 10]

Air Plan Approval; AK: Interstate Transport Requirements for the 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act requires each State Implementation Plan (SIP) to contain adequate provisions prohibiting emissions that will have certain adverse air quality effects in other states. On October 25, 2018, the State of Alaska made a submission to the Environmental Protection Agency (EPA) to address these requirements for the 2015 ozone National Ambient Air Quality Standards (NAAQS). The EPA approves the Alaska SIP as meeting the requirement that each SIP contain adequate provisions to prohibit emissions that will significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.

DATES: This final rule is effective January 17, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2018–0823. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information the disclosure of which 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 at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kristin Hall (15–H13), Air and Radiation Division, EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle, WA 98101, (206) 553–6357, *hall.kristin@epa.gov.*

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

Table of Contents

I. Background
II. Response to Comment
III. Final Action
IV. Statutory and Executive Order Review

I. Background

On October 25, 2018, the Alaska Department of Environmental Conservation (ADEC) made a submission addressing the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS.[1] This ''good neighbor'' provision of the CAA requires that a SIP for a new or revised NAAQS must contain adequate provisions prohibiting any source or other type of emissions activity within the State from emitting air pollutants in amounts that will significantly contribute to nonattainment of such NAAQS in any other state or that will interfere with maintenance of the NAAQS in any other state.

On June 5, 2019, we proposed to approve Alaska's SIP submission (84 FR 26041). The reasons for our proposed approval are included in the proposed

[1] Alaska's October 25, 2018 submission addresses all CAA sections 110(a)(1) and (2) infrastructure requirements for the 2015 ozone NAAQS (including interstate transport prongs 1 and 2) and includes regulatory updates and permitting rule revisions for approval into the SIP. This action addresses the portion of the submission related to interstate transport prongs 1 and 2. We are addressing the remainder of the submission in separate actions on August 29, 2019 (84 FR 45419) and October 15, 2019 (84 FR 55094).

action and will not be restated here. The public comment period for the proposed action closed on July 5, 2019. We received adverse comments from one anonymous commenter. Following is our response to each distinct issue raised by the commenter.

II. Response to Comment

Comment 1: The commenter stated that the EPA should not approve Alaska's SIP submission because ADEC did not model Alaska emissions and the effect of those emissions on other states and Canada.

Response 1: The commenter is correct that ADEC did not model Alaska emissions and the effect of those emission on other states and Canada. However, that is not a basis for disapproval in this instance. Alaska's SIP submission included information and analysis on the amount and sources of ozone precursor emissions from Alaska, trends in monitored ambient ozone levels, meteorological conditions, distances from Alaska to the nearest receptors in other states, and intervening geography that isolates Alaska from other areas that have ozone problems. ADEC concluded that emissions from Alaska sources do not significantly contribute to nonattainment of the 2015 ozone NAAQS in any other state and do not interfere with maintenance of the 2015 ozone NAAQS in any other state.

In our review, we evaluated Alaska's SIP submission and conducted our own weight of evidence analysis to determine whether we agreed with ADEC's conclusion. We assessed emissions inventory data, monitoring trends, geography, meteorology, and current SIP-approved provisions. We found these factors sufficiently informative regarding Alaska's potential to adversely impact air quality in downwind states without conducting modeling of emissions as suggested by the commenter, and therefore, proposed to approve the SIP submission. We note this is not a new approach. The EPA has conducted weight of evidence analyses to evaluate prior Alaska interstate transport SIP submissions, and we believe it to be a reasonable and appropriate approach in this instance.[2]

The EPA further agrees that ADEC did not analyze potential transport to Canada, but that is not a deficiency in the State's analysis. The evaluation of international air quality impacts is not a requirement under CAA section 110(a)(2)(D)(i)(I), which is the only provision of the statute addressed in this action.[3]

Comment 2: The commenter stated, ''the EPA can't rely on relative emissions to justify [a finding of] no significant contribution or interference with maintenance'' of the 2015 ozone NAAQS. The commenter also noted that, in our proposal, we showed that nitrogen oxide (NO_X) emissions from certain Alaska sources ranked second highest in the region.

Response 2: The commenter is correct that, based on the 2014 National Emissions Inventory (2014 NEI), NO_X emissions from mobile and stationary sources in Alaska ranked second highest of the Region 10 states.[4] Our analysis, however, also compared Alaska emissions to those nationwide and determined that, based on the 2014 NEI, NO_X emissions from Alaska mobile and stationary sources totaled just one percent of national NO_X emissions.[5] This comparison of relative emissions puts Alaska emissions estimates into context and is a useful exercise in evaluating the Alaska ozone interstate transport SIP submission. Importantly, this was just one factor in our weight of evidence analysis and was considered in conjunction with other factors including monitoring trends, geography, meteorology, and current SIP-approved provisions. In particular, the fact that other, geographically-closer states with comparable or greater emission levels did not impermissibly impact downwind air quality problems supports the conclusion that Alaska emissions are not likely to be linked to identified nonattainment and maintenance receptors in any other state with respect to the 2015 ozone NAAQS. We continue to find this to be true.

Comment 3: The commenter took issue with the EPA's evaluation of in-state monitored ozone levels. The commenter asserted that in-state levels are not predictive of downwind levels.

Response 3: We found it informative to review in-state monitored ozone levels as part of our weight of evidence analysis. This kind of information can shed light on whether in-state conditions are changing and whether those changes could have downwind implications. For example, if ozone levels at monitoring sites in Alaska were rising over time, it could suggest increased precursor emissions from Alaska sources which could also have impacts on downwind air quality in other states. In our proposal, we assessed monitored ozone trends in Alaska and determined that in-state ozone levels were well below the 2015 ozone NAAQS. The table of design values in our proposal illustrated that trends have been generally flat from 2010 to 2017, suggesting that in-state sources of precursor emissions may not be changing much, and may not be a big factor potentially contributing to future transport problems.[6] We reiterate that in-state monitored ozone levels were just one piece of information that helped to inform the EPA's analysis and conclusion.

Comment 4: The commenter said we failed to mention that Alaska was not included in the EPA's modeling and suggested the EPA may have considered Alaska as an international contributor. The commenter concluded that we ignored Alaska emissions in our modeling and for that reason it is not appropriate to use the EPA's modeling data to identify downwind receptors in the first step of our analysis.

Response 4: We disagree that the proposal failed to explain the scope of the modeling. Our proposal clearly stated that the EPA conducted modeling and released the data to states in the form of several memoranda, but that ''none [of the memoranda] project[ed] design values at monitoring sites located in Alaska, nor apportion[ed] specific downwind impacts to Alaska.''[7] We also stated that the memorandum released in March of 2018 helped to identify potential downwind receptors in the first step of our analysis, but that it did not inform whether Alaska was sufficiently linked to those receptors, under the second step of EPA's four-step analysis.[8]

Our proposal described the EPA's modeling domain (which included the 48 contiguous United States and the District of Columbia) and referenced the 2018 memorandum, placed in the docket for this action.[9] The EPA did not consider Alaska as an international contributor to downwind states, nor did we ignore Alaska emissions. Any pollutant concentrations from Alaska

[2] Most recently, we took this approach in our June 27, 2018 action approving the Alaska SIP for purposes of CAA section 110(a)(2)(D)(i)(I) with respect to the 2012 fine particulate matter NAAQS (83 FR 30048).

[3] CAA sections 110(a)(2)(D)(ii) and 115 address international pollution abatement. We proposed approval of this element for the 2015 ozone NAAQS in a separate action on October 15, 2019 (84 FR 55094). Alaska has no pending obligations under CAA section 115 with respect to Canada or any other foreign country.

[4] Alaska's stationary and mobile source NO_X emissions were estimated to be 127,194 tons. Washington's emissions were higher (234,050 tons), while Oregon and Idaho's emissions are somewhat lower (125,626 and 81,135 tons, respectively).

[5] Based on the 2014 NEI.

[6] Proposal published June 5, 2019, 84 FR 26041; at page 26045, Table 2.

[7] Proposal published June 5, 2019, 84 FR 26041; at page 26042, column 3.

[8] Ibid. at page 26044, column 3.

[9] Ibid. at page 26043, column 2.

emissions would have been included as part of the boundary condition concentrations used as inputs to the model. These boundary conditions along the perimeter of our modeling domain were derived from simulations of the GEOSChem global chemistry model for the year 2011.[10] A description of the GEOSChem modeling platform leveraged for these boundary conditions has been placed in the docket for this action.[11] We continue to believe it is appropriate to use the modeling data released in the EPA's March 2018 memorandum to identify potential downwind receptors at the first step in our analysis.

Comment 5: The commenter claimed that the EPA erred in calculating and using geographic distance and the relative emissions of intervening states as factors in our analysis. The commenter argued that it would be hard to imagine other states making this kind of assertion and the EPA treating it as a valid approach.

Response 5: We believe it is appropriate and reasonable to consider the approximately 1,000-mile distance from Alaska's southernmost border to the nearest identified nonattainment and maintenance receptors (located in Sacramento, California) as part of our weight of evidence analysis in this action. We also believe it is appropriate to compare Alaska's emissions to those of intervening states (Washington and Oregon), which are closer to the Sacramento, California nonattainment and maintenance receptors, and which are not linked by the EPA's modeling to those Sacramento receptors. Our weight of evidence analytical approach is specific to Alaska and the submission before us, and functions, in the absence of the contribution data available with respect to impacts on downwind states within our modeling domain, to provide a screening level of analysis that Alaska's emissions are not significantly contributing to a downwind air quality problem.[12] Our evaluation considers not just that the intervening states have higher emissions, but that at those higher levels, the impact on downwind air quality problems does not exceed the 1% air quality threshold. Thus, it is reasonable for the EPA to conclude that Alaska, at a greater distance and with lower emission levels, will also not exceed that threshold. The EPA has in fact employed this rationale in other actions under the good neighbor provision, where contribution modeling data was unavailable.[13]

Comment 6: The commenter said the EPA should not point to the Alaska SIP-approved major new source review permitting programs as programs that help address potential future interstate transport of pollutants. The commenter claimed no such program has ever prevented a source from being constructed due to interstate transport concerns. The commenter further claimed that state permitting officials routinely ''look the other way'' and that source owners and operators try to find loopholes or restrict their modeling to avoid performing analyses which would show impacts to nearby states.

Response 6: In our proposal, we pointed to Alaska's SIP-approved preconstruction permitting programs (known as ''new source review'') as one piece of evidence in our weight of evidence analysis. We believe it is appropriate for the EPA to evaluate the current Federally-approved Alaska SIP on its face for measures that control emissions of ozone precursors. Alaska's new source review permitting programs are Federally-enforceable measures designed to control emissions from proposed new and modified stationary sources of regulated air pollutants, including NO_X and VOCs as precursors to ozone.

We most recently approved revisions to Alaska's new source review permitting programs on August 29, 2019 (84 FR 45419). Alaska routinely evaluates new source review permit applications from subject sources in Alaska and issues permits containing emission limits, work practice standards, monitoring requirements and other controls designed to ensure compliance with emission limits and provide for continued attainment of the ozone NAAQS. The EPA cited this program as helping to ensure that future changes in emissions from Alaska are not likely to lead to impermissible impacts on air quality in downwind states. Nonetheless, because the EPA finds in this action that Alaska will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS downwind based on current emission levels, Alaska does not have an obligation to prohibit any specific level of emissions in the State under the good neighbor provision. Other provisions of the CAA (*e.g.,* sections 110(k)(5) and 126(b)) provide bases for reevaluating this conclusion if future changes in emissions change Alaska's impact on downwind states.

With respect to the commenter's concerns about implementation of permitting programs, the comment is vague and lacks supporting evidence or documentation. Moreover, this comment is related to implementation of the SIP, and is therefore outside the scope of this action. In the context of acting on infrastructure and interstate transport submissions, the EPA evaluates the submitting state's SIP for facial compliance with statutory and regulatory requirements, not for the state's implementation of its SIP.[14] The EPA has other authority to address any issues concerning a state's implementation of the rules, regulations, consent orders, etc. that comprise its SIP.

Comment 7: The commenter asserted the EPA should perform modeling and affirmatively determine whether Alaska sources significantly contribute to nonattainment of the 2015 ozone NAAQS in any other state or interfere with maintenance of the 2015 ozone NAAQS in any other state.

Response 7: To help states develop interstate transport SIPs for the 2015 ozone NAAQS, the EPA modeled the contiguous United States and the District of Columbia and produced data projecting future design values at monitoring sites and apportioning specific downwind impacts to upwind states.[15] The EPA's modeling did not quantify Alaska's contribution to downwind receptors, however nothing in the CAA requires the EPA to do so where other reasonable means are available for evaluating Alaska' s impact to downwind receptors. The EPA did not include Alaska in the modeling domain primarily because it is remote and isolated in relation to other states with identified nonattainment and/or maintenance receptors for the 2015 ozone NAAQS.

The EPA relied on the best information available to inform its decision and evaluated Alaska's SIP submission through a weight of evidence analysis of information, including emissions inventory data, monitoring trends, geography, meteorology, and SIP-approved

[10] The modeling domain is the area within the purple rectangle in Figure 2–1 of the EPA's Air Quality Modeling Technical Support Document for the Updated 2023 Projected Ozone Design Values, dated December 2018.

[11] B.H. Henderson et al.: A database and tool for boundary conditions for regional air quality modeling: Description and evaluation, Geosci. Model Dev., 7, 339–360, 2014 (published February 18, 2014).

[12] Proposal published June 5, 2019, 84 FR 26041; at page 26045.

[13] See prior interstate transport actions with respect to the 2012 fine particulate matter NAAQS. For example, the September 11, 2019 action on the Utah SIP (84 FR 47893) and the August 20, 2018 action on the Washington SIP (83 FR 42031).

[14] See U.S. Court of Appeals for the Ninth Circuit decision in *Montana Environmental Information Center* v. *EPA,* No. 16–71933 (Aug. 30, 2018).

[15] See supra note 9.

provisions that limit current and future emissions of ozone precursors. The EPA has used a weight of evidence analysis to assess Alaska interstate transport SIP submissions in the past, most recently on June 27, 2018 (83 FR 30048).[16] None of the comments justify altering our proposed approval of Alaska's interstate transport SIP submission for the 2015 ozone NAAQS. Therefore, we are finalizing our action as proposed.

III. Final Action

We approve the Alaska SIP as meeting CAA section 110(a)(2)(D)(i)(I) requirements for the 2015 ozone NAAQS. This action is being taken under section 110 of the CAA.

IV. Statutory and Executive Order Review

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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, 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).

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 it 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 February 18, 2020. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: December 2, 2019.

Chris Hladick,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart C—Alaska

■ 2. In § 52.70, amend the table in paragraph (e) by adding the entry ''Interstate Transport Requirements—2015 Ozone NAAQS'' at the end of the table to read as follows:

§ 52.70 Identification of plan.

* * * * *

(e) * * *

[16] This action approved the Alaska SIP for purposes of CAA section 110(a)(2)(D)(i)(I) with respect to the 2012 fine particulate matter NAAQS.

EPA-APPROVED ALASKA NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanations
*	*	*	*	*
Interstate Transport Requirements—2015 Ozone NAAQS.	Statewide	10/25/2018	12/18/2019, [Insert **Federal Register** citation].	Approves SIP for purposes of CAA section 110(a)(2)(D)(i)(I) for the 2015 Ozone NAAQS.

[FR Doc. 2019–27162 Filed 12–17–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2018–0638; FRL–10003–29–OAR]

RIN 2060–AU74

Amendments Related to Global Marine Fuel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending its diesel fuel regulations to allow fuel suppliers to distribute distillate diesel fuel that complies with the sulfur standard that applies internationally for ships instead of the fuel standards that otherwise apply to distillate diesel fuel in the United States. The affected fuel may not be used in the United States' Emission Control Areas.

DATES: This final rule is effective on December 18, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2018–0638. All documents in the docket are listed on the *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 either electronically in *www.regulations.gov* or in hard copy at Air and Radiation Docket and Information Center, EPA Docket Center, EPA/DC, EPA WJC West Building, 1301 Constitution Ave. NW, Room 3334, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Robert Anderson, Office of Transportation and Air Quality, Environmental Protection Agency, (734) 214–4280; *anderson.robert@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Does this action apply to me?

This action relates to companies that produce and distribute distillate diesel fuel. Categories and entities that might be affected include the following:

Category	NAICS code [a]	Examples of potentially affected entities
Industry	324110	Petroleum refineries (including importers).
	424710	Petroleum bulk stations and terminals.
	493190	Other warehousing and storage-bulk petroleum storage.

[a] North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely covered by these rules. This table lists the types of entities that we are aware may be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in the referenced regulations. You may direct questions regarding the applicability of this action to the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What is the Agency's authority for taking this action?

EPA adopted sulfur standards for marine diesel fuel under Clean Air Act authority (42 U.S.C. 7401–7671q). The amendments in this rule are covered by that same authority.

C. What is the effective date of this action?

Section 553(d)(1) of the Administrative Procedure Act, 5 U.S.C. 553(d)(1), provides that final rules shall not become effective until 30 days after publication in the **Federal Register** ''except . . . a substantive rule which grants or recognizes an exemption or relieves a restriction.'' The purpose of this provision is to ''give affected parties a reasonable time to adjust their behavior before the final rule takes effect.'' *Omnipoint Corp.* v. *Fed. Commc'n Comm'n,* 78 F.3d 620, 630 (D.C. Cir. 1996); see also *United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). However, when the agency grants or recognizes an exemption or relieves a restriction, affected parties do not need a reasonable time to adjust because the effect is not adverse. EPA is issuing this final rule under Clean Air Act section 307(d), which states ''The provisions of section 553 through 557. . . of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.'' 42 U.S.C. 7607(d)(1). Thus, section 553(d) of the Administrative Procedures Act does not apply to this rule. EPA is nevertheless acting consistently with the policies underlying APA section 553(d) in making the regulations contained in this final rule effective upon publication in the **Federal Register**. The regulatory amendments to 40 CFR part 80, subpart I, conditionally exempt distillate marine diesel fuel from the prohibition against distributing

distillate diesel fuel that exceeds the sulfur content limits for ultra low-sulfur diesel (ULSD) fuel and Emission Control Area (ECA) marine fuel. This action will allow for distribution of distillate diesel fuel used as global marine fuel that complies with the 5,000 ppm [1] global fuel sulfur content limit contained in MARPOL Annex VI, which goes into effect on January 1, 2020; this fuel may not be used in the U.S. ECAs. Accordingly, it is in keeping with the policy underlying the Administrative Procedures Act for the regulatory amendments to 40 CFR part 80, subpart I, to take effect upon publication in the **Federal Register**.

I. Background

The United States ratified Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL Annex VI) and became a Party to this Protocol effective January 2009. To address ship sulfur oxides (SO_X) and particulate matter (PM) emissions, the Annex contains limits on the sulfur content of fuel used in global shipping. The sulfur content limit is currently 35,000 ppm, decreasing to 5,000 ppm beginning January 1, 2020. This sulfur limit is not as stringent as the limit that applies in designated Emission Control Areas (ECAs), currently set at 1,000 ppm, but is more stringent than the current global limit and is expected to lead to significant health and welfare benefits globally.[2]

The U.S. refining industry has indicated to EPA that they are well positioned to supply fuel meeting this new 2020 global marine fuel standard, for use outside of ECA boundaries.[3] They will do this by providing compliant distillate- or residual-type fuel; blended fuel may be residual or distillate. However, as explained below, they also expressed a concern that existing provisions in our Clean Air Act (CAA) diesel fuel regulations may prevent them from distributing compliant fuel in the United States. We therefore need to amend the CAA fuel regulations at 40 CFR part 80 to allow distribution in the United States of distillate fuel meeting the 2020 global marine fuel standard, for use outside of ECA boundaries. These amendments will help facilitate smooth implementation of the 2020 global marine fuel standard.

II. Technical Discussion

There are two broad categories of marine fuel: Distillate fuel and residual fuel. The International Organization for Standardization (ISO) distinguishes these fuel types based on their kinematic viscosity (see ISO 8217:2017(E)): Residual fuel ranges from 10 to 700 mm^2/s at 50 °C while distillate fuel ranges from 1,400 to 11,000 mm^2/s at 40 °C, meaning that residual fuel is much less viscous than distillate fuel. Residual fuel also has a higher sulfur content, as it is the residue of the refining process. The ISO fuel specifications note that while sulfur content is defined by the purchaser, it is generally subject to a maximum value of 15,000 ppm for distillate fuel. There is no maximum sulfur limit that applies when selling residual fuel, and the sulfur content can be 35,000 ppm or more. MARPOL Annex VI requires any fuel used onboard a ship to not exceed 35,000 ppm when the ship is operating outside of designated ECAs, and this global marine fuel has consistently been residual fuel, not distillate fuel. Beginning in 2020, however, the lower sulfur content of global marine fuel means that compliant fuel can be distillate, residual, or blends of both. ISO does not currently have specifications for blended fuel, however they have issued ISO/PAS 23263 (2019–09), ''Considerations for fuel suppliers and users regarding marine fuel quality in view of the implementation of maximum 0.50% sulfur in 2020.'' [4] This document ''defines general requirements that apply to all 0.50 mass % sulfur (S) fuels and confirms the applicability of ISO 8217 for those fuels.''

Our CAA fuel program, contained in 40 CFR part 80, defines distillate fuel based on the T90 value of the fuel; this is the temperature at which 90 percent volume of the fuel evaporates. According to our regulations, distillate fuel has a T90 value below 700 °F. Marine distillate fuel sold or distributed in the United States under the CAA program has been subject to an EPA-established 15 ppm sulfur limit since 2012; see 40 CFR 80.510(c). In contrast, ECA marine fuel, both distillate and residual, sold or distributed in the United States has been subject to a 1,000 ppm sulfur limit since June 2014. See 40 CFR 80.510(k). This date was meant to facilitate availability of ECA fuel prior to the January 1, 2015, effective date of the 1,000 ppm fuel sulfur limit that would apply in our ECAs. Our CAA program does not contain requirements for residual fuel that is not ECA fuel.

When the United States ratified MARPOL Annex VI in 2008, we did not revise our CAA fuel program to address the global fuel standards, for two reasons. First, the international global marine standards were set at 45,000 ppm until 2012, when it would decrease to 35,000 ppm. Ship owners were expected to use lower-cost residual fuel to comply with those limits, which was not covered by our CAA program, and there were no regulatory requirements for distributing it. Second, the 2020 global marine fuel sulfur limit was subject to an IMO availability review to be completed by 2018, making it premature to adopt the 5,000 ppm limit in 2010, when we modified our CAA fuel program to incorporate the ECA program. The availability review was completed early, in 2016, and the IMO's Marine Environment Protection Committee (MEPC) confirmed the 2020 effective date.[5]

Distillate fuel is expected to play a significant role in meeting the 2020 global marine fuel standard, either as pure distillate fuel or as a component of blended fuel. This is due to the relatively high cost of removing sulfur from low-value residual fuel. U.S. fuel suppliers have informed EPA that they expect to meet the international requirement by providing either distillate fuel or distillate/residual blends; the blended fuel might have a T90 value below 700 °F. But, absent amendment, EPA's existing regulations preclude the distribution in the United States of distillate fuel above the ECA

[1] The MARPOL Annex VI global fuel sulfur limit is set at 0.50% m/m; for ease of discussion and consistency with our 40 CFR part 80 program, this rule refers to the global sulfur limit as 5,000 ppm.

[2] Designated ECAs for the United States include the North American ECA and the U.S. Caribbean Sea ECA. More specific descriptions may be found in EPA fact sheets: ''Designation of North American Emission Control Area to Reduce Emissions from Ships,'' EPA–420–F–10–015, March 2010, *https://www.epa.gov/regulations-emissions-vehicles-and-engines/designation-north-american-emission-control-area-marine;* and ''Designation of Emission Control Area to Reduce Emissions from Ships in the U.S. Caribbean,'' EPA–420–F–11–024, July 2011, *https://www.epa.gov/regulations-emissions-vehicles-and-engines/designation-us-caribbean-emission-control-area-marine.*

[3] See, for example, the website for the Coalition for American Energy Security at *https://americanenergysecurity.com.*

[4] In the introduction to this document, ISO notes that it was not possible to review the international fuel specifications contained in ISO 8217:2017, and that ISO/PAS 23263 (2019–09) was developed to assist in the transition to the 2020 global fuel sulfur standard.

[5] Annex VI included a provision in Regulation 14.8–10 requiring an availability review, and that provision contemplated the possibility as a result of the study that parties may delay the effective date of the 2020 global marine fuel standard to 2025. The review was carried out early, in 2016, and the Parties affirmed the feasibility of meeting the 2020 marine fuel standard and decided not to delay the standard. MEPC 70/18, 11 November 2016, Report of the Marine Environment Protection Committee on its Seventieth Session, para 5.55.3: [the Committee] ''agreed to the date of 1 January 2020 as the effective date of implementation for ships to comply with the 0.50% m/m Sulphur content of fuel oil requirement, as set out in regulation 14.1.3 of MARPOL Annex VI . . .''

fuel sulfur limit. This limitation would hinder the ability of U.S. refiners to supply compliant 2020 global marine fuel to ships engaged in international transportation, because they would be limited to providing only fuel with a T90 at or above 700 °F. This means that a ship wishing to purchase fuel in the United States would be able to buy only 5,000 ppm residual fuel—if it is available; otherwise, the ship would be limited to purchasing higher-price ECA fuel or delaying its fuel purchase to the next port of call to avoid that additional cost. In addition, U.S. fuel providers wishing to participate in the global fuel market would be faced with exporting 2020 distillate global marine fuel with the higher T90 value for distribution elsewhere, which would lead to inefficiencies and increased costs, as well as loss of some portion of the U.S. share of the global fuel market.

In sum, removing the restriction on the distribution of distillate fuel between 1,000 ppm and 5,000 ppm in the United States, for use outside of ECA boundaries, will provide greater flexibility for U.S. fuel suppliers participating in the global marine fuel market, which could reduce fuel costs in that the ship operator would not be faced with either purchasing more expensive ECA fuel or going to another country to purchase fuel. This change, requested by U.S. refiners, will also provide a level playing field for all potential U.S. suppliers—those that supply distillate or blends as well as residual fuel. Such clarity will aid them in finalizing their fuel supply and distribution plans.

III. Final Action

This action amends the regulations at 40 CFR part 80, subpart I, to allow for distribution of distillate diesel fuel that complies with the 5,000 ppm global sulfur standard contained in Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL Annex VI).

This action includes several regulatory changes to accommodate the supply and distribution of distillate diesel fuel as global marine fuel. Primarily we are conditionally exempting distillate diesel fuel from the prohibition against distributing distillate diesel fuel that exceeds the ULSD and ECA marine fuel sulfur standards. This exemption includes several conditions. (1) The fuel must not exceed 0.50 weight percent (0.50% m/m, which is 5,000 ppm) sulfur; (2) fuel manufacturers must designate the fuel as global marine fuel; (3) product transfer documents accompanying the fuel must identify it as global marine fuel; (4) global marine fuel must be segregated from other fuel that is subject to the diesel fuel standards in 40 CFR part 80, subpart I; (5) the fuel may not be used in any vehicles, engines, or equipment operating in the United States (including vessels operating in an ECA or ECA-associated area); and (6) manufacturers and distributors must meet conventional recordkeeping requirements. These changes largely mirror what we currently require for the manufacturers and distributors of home heating oil, which is another class of distillate fuel not subject to diesel fuel standards under 40 CFR part 80. The conditions imposed on home heating oil and the conditions we are including in this final rule are designed to prevent higher sulfur distillate fuel from being diverted into markets that are subject to 15 ppm ULSD standard or the 1,000 ppm ECA marine standard. The conditions that apply for distribution of global marine fuel include basic designation, PTD, segregation and recordkeeping requirements. These conditions are similar to those previously adopted for distribution of heating oil. The conditions for distribution of global marine fuel also require the fuel to meet a 5,000 ppm sulfur limit. This condition is designed to ensure that the exempted fuel will be used consistent with its designation as global marine fuel. This reduces the potential for higher sulfur global marine fuel to be improperly diverted to the ULSD and ECA marine fuel markets.

As noted above, the narrow set of amendments in this rule are intended to remove a regulatory obstacle to the distribution and sale in the United States of marine fuel that meets MARPOL Annex VI global sulfur standard of 5,000 ppm sulfur. In the future, after we have a better understanding of the nature of the fuel made available to comply with the 2020 global marine fuel standard (*i.e.,* whether it is mostly distillate fuel, blended fuel, or residual fuel), we may consider a supplemental rule to address any additional implementation questions with respect to residual fuel.

IV. Economic and Environmental Impacts

The purpose of the amendments is to ensure that U.S. refiners can permissibly distribute distillate marine fuel up to the 5,000 ppm sulfur limit, which will facilitate smooth implementation of the 2020 global marine fuel standard. This is likely to reduce the costs of compliant fuel for ships, although the savings impacts are impossible to estimate without knowledge of the grades of fuel that will be made available for this emerging market beginning in January 2020 and their prices. While there are minor recordkeeping costs for fuel suppliers associated with the exemption described in Section III, there are no requirements to reduce the sulfur content of global marine fuel beyond what is already required by Annex VI.

With respect to environmental and health impacts, the amendments to the CAA fuel regulations are not expected to alter the benefits of EPA's coordinated strategy to reduce emissions from large marine diesel engines and their fuel. This is because the coordinated strategy relies, in part, on the stringent international fuel sulfur limits that apply in United States ECAs, which include the coasts of the continental United States, the main Hawaiian Islands, southeastern portions of Alaska (U.S. portions of the North American ECA), and the Commonwealth of Puerto Rico and the U.S. Virgin Islands (U.S. Caribbean Sea ECA). The ECA fuel sulfur requirements for the North American and U.S. Caribbean Sea ECAs went into force in August 2012 and January 2014, respectively, one year after they were designated by amendment to MARPOL Annex VI.[6] The global fuel sulfur program may provide additional air quality benefits, for example, in those areas of the United States where the ECA is narrow, such as southern Florida, or in areas that are not covered by the ECA, such as Guam and western and northern Alaska. Note however that those benefits would be a consequence of the MARPOL Annex VI global sulfur requirements and would therefore accrue with or without the amendments in this final rule.

V. Response to Comments

We received several comments on the proposed provisions for global marine fuel.[7] Commenters generally supported our proposal and agreed with our rationale to avoid unintended limitations on the supply and distribution of distillate global marine fuel.[8] These commenters noted that EPA

[6] See MEPC.190(60) for the amendments to Annex VI designating the North American Emission Control Area, entry into force 1 August 2011; and MEPC.202(62), designating the U.S. Caribbean Sea Emission Control Area, entry into force on 1 January 2013. Note that the ECA sulfur limits became enforceable one year after entry into force of the relevant amendments.

[7] See 84 FR 46909 (September 6, 2019).

[8] See public comments from American Fuel & Petrochemical Manufacturers (EPA–HQ–OAR–2018–0638–0020), American Petroleum Institute (EPA–HQ–OAR–2018–0026), Coalition for American Energy Security (EPA–HQ–OAR–2018–0638–0029), National Association of Clean Air Agencies (EPA–HQ–OAR–2018–0638–0025), State of Maine Department of Environmental Protection

Continued

did not intend to limit options for compliance with the 2020 global marine fuel standards when it codified the ULSD and ECA marine fuel standards in 40 CFR part 80. We appreciate comments in support of our proposed provisions for global marine fuel and are finalizing in this action provisions to allow under our CAA regulations for the supply and distribution of distillate marine fuel meeting the 2020 global marine fuel standards.

One commenter argued that the proposed rule was not in accordance with the requirements of Annex VI.[9] They contend that Annex VI does not create caps or standards for fuel—instead equivalent measures such as scrubbers are allowed to be used to achieve the same sulfur reductions and that EPA's proposal would effectively set a cap on distillate marine fuel.

As noted in the proposal, we are not setting a 0.50 weight percent sulfur standard on global marine fuel under the CAA, Annex VI, or the Act to Prevent Pollution from Ships (APPS), which is the authority for implementing and enforcing MARPOL Annex VI requirements in the United States. We already have sulfur limits established under the CAA that apply to all distillate marine fuel. This action provides an exemption to the sulfur limits established under the CAA so parties can supply and distribute distillate marine fuel for meeting the 2020 global marine fuel standard. Without this action, parties could not permissibly supply and distribute such fuel within the United States, which as other commenters noted, could have adverse effects on global marine fuel supply.

We do not believe this rulemaking would unnecessarily limit the opportunities for parties to offer fuel that exceeds the 2020 global marine fuel standard, such as for vessels with installed scrubbers. As stated in the proposal,[10] we believe the Annex VI global marine fuel standard of 3.50 weight percent that has been in place for some time was met almost exclusively with residual fuel. We believe it is unlikely that parties would refine a distillate fuel with greater than 0.50 weight percent (5,000 ppm) sulfur content to use in vessels with scrubbers when substantially cheaper residual fuel with higher sulfur levels are available for use. This rule does not preclude the availability of such fuel for vessels with scrubbers installed. Blenders at any point in the distribution system would be able to mix distillate fuel and residual fuel such that the blended fuel has more than 5,000 ppm sulfur, as long as the blended fuel has a T90 distillation point above 700 °F, since the mixture would be residual fuel according to the definitions in 40 CFR part 80.

One commenter noted that EPA staff claimed the proposed rule was needed so EPA can enforce the 2020 global marine fuel standard.[11] The commenter argued that the proposed rule is not needed to enforce the 2020 global marine fuel standard and that EPA, the U.S. Coast Guard, and Department of Justice can enforce the 2020 standard under APPS.

We agree with the commenter that this rule is not necessary to enforce distillate marine fuel requirements under the CAA or take enforcement actions related to the Annex VI standards under APPS. The purpose of this action is to allow parties to supply and distribute distillate global marine fuel under the CAA and is unrelated to our authority to enforce global marine fuel standards under APPS. We consider such comments related to enforcement of MARPOL Annex VI under APPS outside the scope of this final rule. However, we note that in addition to allowing distribution of distillate marine fuel to meet the 2020 global marine fuel standards, the amendments will help to avoid contamination of the distillate marine fuel subject to a sulfur standard by exempting distillate marine fuel used to meet the 2020 global marine fuel standards.

One commenter argued that the proposed rule is outside the scope of EPA's authority to impose regulatory requirements and standards under the CAA and APPS.[12] The commenter noted that nothing in the CAA or APPS provides EPA with the authority to regulate the sulfur content of fuel used entirely outside the United States. The commenter also suggested that EPA staff suggested EPA's proposal was intending to establish requirements under APPS. Finally, the commenter suggested that EPA's proposal exceeds any authority granted to it under MARPOL.

We disagree with the commenter's suggestion that EPA lacks authority to propose an exemption to existing regulatory requirements under the CAA. We have imposed standards and requirements for all distillate marine fuel introduced into commerce in the United States under CAA section 211 at 40 CFR part 80, subpart I.[13] This action does not impose new standards under the CAA as the commenter suggests. As noted in the proposal [14] and in public comments from other stakeholders,[15] this rule is necessary to allow parties to supply and distribute distillate 2020 global marine fuel that, prior to this amendment, was prohibited under previous rulemakings limiting distribution of distillate marine fuel with sulfur content exceeding standards under 40 CFR part 80. We are not taking this action under APPS or IMO Annex VI, so comments related to our authority under APPS or IMO Annex VI are outside the scope of this action.

One commenter contended that the proposed rule was overly complex because it imposed designation and documentation requirements (through PTDs) for distillate global marine fuel instead of simply excluding all fuel used as bunker fuel outside of U.S. waters from the 40 CFR part 80 diesel fuel standards.[16] The commenter pointed to EPA's treatment of stationary distillate fuel and exported distillate fuel as examples of cases where EPA has excluded fuel from the diesel fuel standards of 40 CFR part 80. We disagree that the rule is overly complex. The exemption for 2020 distillate global marine fuel functions in the same way that other exemptions to the diesel fuel standards function under the regulations at 40 CFR part 80, subpart I. This includes identifying the fuel as exempt (using designations on PTDs), ensuring that the fuel is segregated from fuel that is subject to the diesel sulfur standards, and keeping records to demonstrate that the fuel was appropriately designated and distributed as allowed under the regulations. Other exemptions to the diesel fuel standards of 40 CFR part 80, subpart I, also require that such fuel is used for the purpose that the fuel is exempt (or prohibit the use of such fuel for a different purpose).[17] In the case of

(EPA–HQ–OAR–2018–0638–0034), and the Truck and Engine Manufacturers Association (EPA–HQ–OAR–2018–0638–0033).

[9] See public comments from Eversheds Sutherland (EPA–HQ–OAR–2018–0638–0031).

[10] See 84 FR 46910 (September 6, 2019).

[11] See public comments from Eversheds Sutherland (EPA–HQ–OAR–2018–0638–0031).

[12] See public comments from Eversheds Sutherland (EPA–HQ–OAR–2018–0638–0031).

[13] See 66 FR 5134 (January 18, 2001) and 69 FR 39164 (June 29, 2004).

[14] See 84 FR 46919 (September 6, 2019).

[15] See public comments from American Fuel & Petrochemical Manufacturers (EPA–HQ–OAR–2018–0638–0020), American Petroleum Institute (EPA–HQ–OAR–2018–0026), Coalition for American Energy Security (EPA–HQ–OAR–2018–0638–0029), National Association of Clean Air Agencies (EPA–HQ–OAR–2018–0638–0025), State of Maine Department of Environmental Protection (EPA–HQ–OAR–2018–0638–0034), and the Truck and Engine Manufacturers Association (EPA–HQ–OAR–2018–0638–0033).

[16] See public comments from Eversheds Sutherland (EPA–HQ–OAR–2018–0638–0031).

[17] For example, 40 CFR 80.501(b) excludes a fuel only if the fuel is exported. If the fuel is not

exports specifically, parties must designate the distillate fuel for export (see 40 CFR 80.598(a)(2)) on PTDs (see 40 CFR 80.590(a)(6) or (b)(2)) and keep records of such designations and PTDs (see 40 CFR 80.592(a)(1) and 80.602(a)(1)). We imposed these provisions on exports in prior rulemakings to help ensure that exported distillate fuel did not contaminate distillate fuel that is subject to diesel fuel standards. We have the same concerns with distillate global marine fuel since parties could distribute such fuel with distillate fuel subject to the diesel fuel standards. Therefore, we are imposing necessary and reasonable conditions for parties claiming an exemption for distillate global marine fuel consistent with how we currently treat exempted fuel under 40 CFR part 80, subpart I.

One commenter suggested that EPA's proposal misinterpreted its 40 CFR part 80 regulations by noting that distribution of distillate marine fuel containing more than 1,000 ppm sulfur content could not be supplied and distributed as global marine fuel.[18] The commenter pointed to substitute PTD language requirements for high-sulfur fuel used in marine vessels under MARPOL Annex VI, Regulations 3 and 4 as an example of how EPA misinterpreted its regulations to limit the sulfur content of distillate marine fuel. The commenter also suggested that the classification of a distillate fuel determines whether the fuel is subject to EPA's diesel fuel requirements. The commenter states that since EPA staff recognized that distillate fuel is sometimes not subject to EPA's requirements (*e.g.,* distillate fuel used for power generation), that EPA's regulations at 40 CFR part 80 do not cover high-sulfur distillate fuel used in marine engines.

We also disagree with the suggestion that because stationary distillate fuel does not have to meet the diesel fuel standards of 40 CFR part 80, a category of distillate marine fuel is not subject to the diesel fuel requirements under 40 CFR part 80 and that a fuel is only subject to the regulation if a party classifies the fuel as a fuel that is subject to the regulatory requirements. While the regulatory provisions in 40 CFR part 80 may not cover all distillate products, the regulations clearly apply to distillate fuel intended for use, made available for use, and used in marine engines. The regulations at 40 CFR 80.2(aaa) and (ppp) broadly define both distillate fuel and locomotive or marine (LM) diesel fuel. Furthermore, the regulation at 40 CFR 80.501 clearly specifies that marine diesel fuel and other types of distillate fuel are subject to the provisions of 40 CFR part 80, subpart I.[19] These definitions and the regulations that cover which types of fuel are subject to our regulations are not based solely on how the fuel is classified, as suggested by the commenter, but also on how the fuel is intended for use, made available for use, and ultimately used. For example, the definitions of ''marine diesel fuel'' and ''ECA marine fuel'' make clear that the definition covers the specified fuel ''used, intended for use, or made available for use'' (40 CFR 80.2(ppp) and (ttt)). Thus, claiming that a distillate fuel was intended for use in stationary internal combustion engines and then making that fuel available for use or using that fuel in a marine engine would still subject that fuel to the marine diesel fuel requirements. The regulations at 40 CFR part 80 require that such fuel must either meet the appropriate diesel sulfur standard or be exempted from the applicable standards, subject to certain conditions.

We also disagree that the allowance of substitute language for high-sulfur fuel used in marine vessels under MARPOL Annex VI, Regulations 3 and 4 implies that distillate marine fuel containing more than 1,000 ppm is exempt from the regulations at 40 CFR part 80, subpart I. First, for a party to use the substitute PTD language for marine fuel at 40 CFR 80.590(b)(5)–(7), the party and the fuel would need to be subject to the provisions under 40 CFR part 80, subpart I. Second, the commenter misunderstands that these language provisions are in place for residual fuel (which is covered under the regulations at 40 CFR part 80 when used as ECA marine fuel) to demonstrate that they are not subject to diesel fuel and ECA marine standards and can only be used in vessels that can lawfully use that fuel. That does not mean that the fuel and parties that supply and distribute such fuel are not subject to the requirements or exempt from diesel fuel standards.

Two commenters asked EPA to clarify whether residual fuel would be affected by the proposed provisions.[20] These commenters suggested minor revisions to the definition of global marine fuel and the proposed regulations to clarify EPA's intent to apply the exemption provisions only to distillate fuel already subject to 40 CFR part 80 requirements. As noted in the proposal[21] and in Section II of this preamble, 40 CFR part 80, subpart I, does not impose new standards on residual fuel, which makes an exemption unnecessary. We do not intend to introduce residual fuel regulations as part of this action. We agree with commenters' suggestions to clarify the scope of the proposed changes to 40 CFR part 80, subpart I, and have made corresponding changes to the regulations in response to these comments.

One commenter asked for clarification on when designation and segregation would apply to distillate global marine fuel.[22] In this action we are finalizing the proposed condition that, for distillate global marine fuel to be exempt from the diesel sulfur requirements, the distillate global marine fuel would need to be designated as global marine fuel and segregated from fuel subject to the regulatory requirement from the point of production to the point where the fuel is supplied to marine vessels that would use the fuel. The same commenter asked for clarification that 2020-compliant fuel is allowed and that distillate fuel with sulfur content above 5,000 ppm could be sold as bunker fuel.[23] As discussed above, this rule would not preclude the sale or distribution of residual fuel used to meet the 2020 standard, and we do not expect production of distillate marine fuel with sulfur content above 5,000 ppm, as it would be too costly.

Commenters also requested that EPA complete this action in a timely manner to avoid disruption in the supply and distribution of distillate global marine fuel ahead of the January 1, 2020 implementation date for the global marine fuel sulfur standard.[24] Commenters noted that failure to modify the regulations to allow for the supply and distribution of distillate global marine fuel would have significant cost impacts and send signals of uncertainty to parties wishing to supply and distribute product to meet the demand for distillate global marine fuel in the United States. We appreciate the need to provide regulatory certainty and believe it is in the public interest to

exported and instead used as diesel fuel in the United States, such fuel would be subject to applicable diesel fuel requirements under EPA's regulations.

[18] See public comments from Eversheds Sutherland (EPA–HQ–OAR–2018–0638–0031).

[19] See 40 CFR 80.501(a)(2) and (6).

[20] See public comments from American Petroleum Institute (EPA–HQ–OAR–2018–0638–0026) and Eversheds Sutherland (EPA–HQ–OAR–2018–0031).

[21] See 84 FR 46910 (September 6, 2019).

[22] See public comments from Eversheds Sutherland (EPA–HQ–OAR–2018–0638–0031).

[23] Id.

[24] See public comments from American Petroleum Institute (EPA–HQ–OAR–2018–0638–0026) and American Fuel and Petrochemical Manufacturers (EPA–HQ–OAR–2018–0638–0020).

allow parties to supply and distribute distillate global marine fuel ahead of the January 1, 2020, implementation deadline. We are therefore making the regulatory changes for distillate global marine fuel effective on the date this action is published in the **Federal Register**.

VI. Statutory and Executive Order Reviews

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

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

B. 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 any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0308. We believe this action does not impose any new information collection burden as this action will provide clarity and additional flexibility to U.S. fuel suppliers providing distillate global marine fuel.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This action will provide clarity and additional flexibility to U.S. fuel suppliers providing distillate global marine fuel. We have therefore concluded that this action will have no adverse regulatory impact for any directly regulated small entities.

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. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

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. This rule will be implemented at the Federal level and affects suppliers of global marine fuel. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866. This action's assessment of the environmental impact of the rule contained in Section IV shows that the rule will have no adverse impact. This action will therefore not affect children's health.

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

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

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

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). As discussed in Section IV, we do not expect this action to alter the benefits of EPA's coordinated strategy to reduce emissions from large marine diesel engines and their fuels.

L. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 80

Environmental protection, Fuel additives, Gasoline, Greenhouse gases, Imports, Labeling, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: December 10, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set forth above, EPA is amending 40 CFR part 80 as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7521, 7542, 7545, and 7601(a).

■ 2. Section 80.2 is amended by adding paragraph (aa) to read as follows:

§ 80.2 Definitions.

* * * * *

(aa) *Global marine fuel* means diesel fuel, distillate fuel, or residual fuel used, intended for use, or made available for use in steamships or Category 3 marine vessels while the vessels are operating outside the boundaries of an Emission Control Area (ECA). Global marine fuel is subject to the provisions of the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI. Note that this part regulates global marine fuel only if it qualifies as a distillate fuel.

* * * * *

■ 3. Section 80.501 is amended by redesignating paragraphs (a)(6) and (7) as paragraphs (a)(7) and (8), adding a new paragraph (a)(6), and revising paragraph (b) to read as follows:

§ 80.501 What fuel is subject to the provisions of this subpart?

(a) * * *

(6) Distillate global marine fuel.

* * * * *

(b) *Excluded fuel.* The provisions of this subpart do not apply to—

(1) Distillate fuel that is designated for export outside the United States in accordance with § 80.598, identified for export by a transfer document as

required under § 80.590, and that is exported.

(2) Residual global marine fuel.

■ 4. Section 80.590 is amended by revising the section heading and paragraph (a) introductory text and adding paragraph (a)(7)(viii) to read as follows:

§ 80.590 What are the product transfer document requirements for motor vehicle diesel fuel, NRLM diesel fuel, heating oil, distillate global marine fuel, ECA marine fuel, and other distillates?

(a) This paragraph (a) applies on each occasion that any person transfers custody or title to MVNRLM diesel fuel, heating oil, distillate global marine fuel, or ECA marine fuel (including distillates used or intended to be used as MVNRLM diesel fuel, heating oil, global marine fuel, or ECA marine fuel) except when such fuel is dispensed into motor vehicles or nonroad equipment, locomotives, marine diesel engines or steamships or Category 3 vessels. Note that 40 CFR part 1043 specifies requirements for documenting fuel transfers to certain marine vessels. For all fuel transfers subject to this paragraph (a), the transferor must provide to the transferee documents which include the following information:

* * * * *

(7) * * *

(viii) *Distillate global marine fuel.* ''For use only in steamships or Category 3 marine vessels operating outside the boundaries of an Emission Control Area (ECA), consistent with MARPOL Annex VI.''

* * * * *

■ 5. Section 80.598 is amended by revising paragraphs (a)(2)(i)(G) and (b)(8)(iii) to read as follows:

§ 80.598 What are the designation requirements for refiners, importers, and distributors?

(a) * * *

(2) * * *

(i) * * *

(G) Exempt distillate fuels such as distillate global marine fuels under § 80.605, fuels that are covered by a national security exemption under § 80.606, fuels that are used for purposes of research and development pursuant to § 80.607, and fuels used in the U.S. Territories pursuant to § 80.608 (including additional identifying information).

* * * * *

(b) * * *

(8) * * *

(iii) Exempt distillate fuels such as distillate global marine fuels under § 80.605, fuels that are covered by a national security exemption under § 80.606, fuels that are used for purposes of research and development pursuant to § 80.607, and fuels used in the U.S. Territories pursuant to § 80.608 (including additional identifying information).

* * * * *

■ 6. Amend § 80.602 by revising the section heading and paragraphs (a) and (b)(4)(i) to read as follows:

§ 80.602 What records must be kept by entities in the NRLM diesel fuel, ECA marine fuel, distillate global marine fuel, and diesel fuel additive production, importation, and distribution systems?

(a) *Records that must be kept by parties in the NRLM diesel fuel, ECA marine fuel, distillate global marine fuel and diesel fuel additive production, importation, and distribution systems.* Beginning June 1, 2007, or June 1, 2006, if that is the first period credits are generated under § 80.535, any person who produces, imports, sells, offers for sale, dispenses, distributes, supplies, offers for supply, stores, or transports nonroad, locomotive or marine diesel fuel, or ECA marine fuel (beginning June 1, 2014) subject to the provisions of this subpart, must keep all the records specified in this paragraph (a). The recordkeeping requirements for distillate global marine fuel in this paragraph (a) start January 1, 2020.

(1) The applicable product transfer documents required under §§ 80.590 and 80.591.

(2) For any sampling and testing for sulfur content for a batch of NRLM diesel fuel produced or imported and subject to the 15 ppm sulfur standard or any sampling and testing for sulfur content of any fuel subject to the provisions of this subpart as part of a quality assurance testing program, and any sampling and testing for cetane index, aromatics content, marker solvent yellow 124 content or dye solvent red 164 content of NRLM diesel fuel, ECA marine fuel, NRLM diesel fuel additives or heating oil:

(i) The location, date, time and storage tank or truck identification for each sample collected;

(ii) The name and title of the person who collected the sample and the person who performed the testing; and

(iii) The results of the tests for sulfur content (including, where applicable, the test results with and without application of the adjustment factor under § 80.580(d)), for cetane index or aromatics content, dye solvent red 164, marker solvent yellow 124 (as applicable), and the volume of product in the storage tank or container from which the sample was taken.

(3) The actions the party has taken, if any, to stop the sale or distribution of any NRLM diesel fuel, distillate global marine fuel, or ECA marine fuel found not to be in compliance with the sulfur standards specified in this subpart, and the actions the party has taken, if any, to identify the cause of any noncompliance and prevent future instances of noncompliance.

(b) * * *

(4) * * *

(i) NRLM diesel fuel, NR diesel fuel, LM diesel fuel, distillate global marine fuel, ECA marine fuel, or heating oil, as applicable.

* * * * *

■ 7. Section 80.605 is added to read as follows:

§ 80.605 Global marine fuel exemption.

(a) The standards of this subpart do not apply to distillate global marine fuel that is produced, imported, sold, offered for sale, supplied, offered for supply, stored, dispensed, or transported for use in steamships or Category 3 marine vessels when operating outside of ECA boundaries.

(b) The exempt fuel must meet all the following conditions:

(1) It must not exceed 0.50 weight percent sulfur ($5.0 \cdot 10^3$ ppm).

(2) It must be accompanied by product transfer documents as required under § 80.590.

(3) It must be designated as specified under § 80.598.

(4) It must be segregated from non-exempt fuel at all points in the distribution system.

(5) It may not be used in any vehicles, engines, or equipment other than those referred to in paragraph (a) of this section.

(c) Fuel not meeting the conditions specified in paragraph (b) of this section is subject to the standards, requirements, and prohibitions that apply for MVNRLM diesel fuel. Similarly, any person who produces, imports, sells, offers for sale, supplies, offers for supply, stores, dispenses, or transports distillate global marine fuel without meeting the recordkeeping requirements under § 80.602 may not claim the fuel is exempt from the standards, requirements, and prohibitions that apply for MVNRLM diesel fuel.

[FR Doc. 2019–27158 Filed 12–17–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket Nos. 07–42 and 17–105, FCC 19–52; FRS 16303]

Leased Commercial Access; Modernization of Media Regulation Initiative

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's Report and Order (*Order*) updating its leased access rules as part of its Modernization of Media Regulation Initiative. This document is consistent with the *Order,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of the rules that contain new or modified information collection requirements.

DATES: Title 47 CFR 76.970(h) and 76.975(e), published at 84 FR 28761, June 20, 2019, are effective on December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Diana Sokolow, Policy Division, Media Bureau, at (202) 418–2120, or email: *diana.sokolow@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that on December 3, 2019, OMB approved, for a period of three years, the information collection requirements relating to the rules and procedures contained in the Commission's *Order,* FCC 19–52, published at 84 FR 28761, June 20, 2019. The OMB Control Number is 3060–0568. The Commission publishes this document as an announcement of the effective date of the rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street SW, Washington, DC 20554. Please include the OMB Control Number, 3060–0568, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on December 3, 2019, for the information collection requirements contained in revised rules 47 CFR 76.970(h) and 76.975(e).

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0568.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–0568.

OMB Approval Date: December 3, 2019.

OMB Expiration Date: December 31, 2022.

Title: Sections 76.970, 76.971, and 76.975, Commercial Leased Access Rates, Terms and Conditions, and Dispute Resolution.

Form Number: N/A.

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.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On June 7, 2019, in document FCC 19–52, the Commission released a *Report and Order* updating its leased access rules as part of its Modernization of Media Regulation Initiative. Two of the revised rules (47 CFR 76.970(h) and 76.975(e)) contained new or modified information collection requirements.

Title 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.

Title 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.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–27239 Filed 12–17–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Part 1419

[190D0102DM DS62500000 DLSN00000.000000 DX62501]

RIN 1090–AB22

Acquisition Regulation: Removal of Outdated References

AGENCY: Office of Small and Disadvantaged Business Utilization, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior (DOI) is issuing a final rule amending the Department of the Interior Acquisition Regulation (DIAR) to implement Section 15(k) of the Small Business Act and remove outdated references and/or obsolete information.

DATES: This final rule will become effective February 18, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Bell, Senior Small Business Specialist, Office of Small and Disadvantaged Small Business, Department of the Interior, 1849 C Street NW, Mail Stop 4214 MIB, Washington, DC 20240; telephone (202) 208–3458 or email *christopher_bell@ios.doi.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This rule will revise the Department of the Interior Acquisition Regulation (DIAR) in order to update references to other Federal and Departmental directives, remove obsolete material and remove obsolete references.

On November 24th, 2015, DOI's Office of Acquisition and Property Management (PAM) issued a policy that deviated from DIAR 1419.2, to revise the content in sections 1419.201 and 1419.202. This policy deviation was needed to comply with statutory requirements of the Small Business Act. This rule updates the DIAR with changes from the class deviation and subsequently allows the Department to rescind the class deviation.

The content of DIAR 1419.201 related to setting goals for small business contracting, the role of the Office of Small and Disadvantaged Business Utilization (OSDBU) and the appointment of Small Business Specialists was out of date and inconsistent with statutory requirements and the Federal Acquisition Regulation (FAR). The deviation ensured that DOI manages our small business goals in full compliance with SBA's procedures and adhered to FAR requirements regarding the role of the OSDBU and Small Business Specialists. This rule ensures that the role of the Director of the OSDBU is consistent with the Small Business Act 15 U.S.C. 644(k).

The rule simplifies DIAR 1419.202–70 to allow the OSDBU Director responsibility for issuing policy on the use and content of the Form DI–1886 ''Acquisition Screening and Review Form''.

The rule further intends to remove the following from DIAR 1419:

Remove DIAR 1419.505, ''Rejecting Small Business Administration recommendations.'' The Department has determined that the procedures in FAR 19.505 are sufficient for documenting the rejection of Small Business Administration's recommendation and that further supplemental guidance in the DIAR is duplicative and redundant;

Remove DIAR 1419.506, ''Withdrawing or modifying small business set-asides.'' The Department has determined that the procedures in FAR 19.506 are sufficient for withdrawing or modifying small business set-asides and that further supplemental guidance in the DIAR is duplicative and redundant;

Remove DIAR 1419.7, ''The Small Business Subcontracting Program'', in its entirety. DOI has determined that the procedures in FAR 19.7 are sufficient for managing the DOI's small business subcontracting program;

Remove DIAR 1419.803, ''Selecting acquisitions for the 8(a) program'' in its entirety.

DOI has determined that the procedures in FAR 19.8 are sufficient for managing DOI's responsibilities under the Section 8(a) program;

Remove DIAR 1419.9, ''Contracting Opportunities for Women-Owned Small Businesses'', in its entirety. The Executive order supporting the regulation has been superseded by the Women Owned Small Business program established under 15 U.S.C 637(m);

Remove DIAR 1419.10, ''Small Business Competitiveness Demonstration Program'', in its entirety. FAR 19.10 was established to meet the requirements of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100–656). Section 1335 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) amended the Business Opportunity Development Reform Act of 1988 and repealed the Small Business Competitiveness Demonstration Program.

II. Summary of and Response to Comments

DOI published the proposed rule 84 FR 17131 on April 24, 2019 in the **Federal Register** for a 60-day public comment period. The public comment period closed on June 24, 2019. DOI received no comments on the proposed rule in Docket No. DOI–2018–0018.

III Required Determinations

1. *Regulatory Planning and Review (Executive Orders 12866 and 13563).* Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory objectives. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. *Regulatory Flexibility Act.* The Secretary certifies that the adoption of this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

3. *Small Business Regulatory Enforcement Fairness Act.* This rule is not a major rule under the Small

Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule does not have an annual effect on the economy of $100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. *Unfunded Mandates Reform Act.* This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector nor does the rule impose requirements on State, local, or tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. *Takings (E.O. 12630).* This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

6. *Federalism (E.O. 13132).* Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A federalism summary impact statement is not required.

7. *Civil Justice Reform (E.O. 12988).* This rule complies with the requirements of E.O. 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this E.O. requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (2) meets the criteria of section 3(b)(2) of this E.O. requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation with Indian tribes (E.O. 13175).* The Department strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined that it has no substantial direct effect on federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required. This rule does not apply to tribal awards made in accordance with the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638, 88 Stat. 2204), as amended.

9. *Paperwork Reduction Act,* 44 U.S.C. 3501, *et seq.* This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act (PRA) is not required.

10. *National Environmental Policy Act.* This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by the categorical exclusion listed in 43 CFR 46.210(c). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. *Effects on the Energy Supply (E.O. 13211).* This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

12. *Clarity of this Regulation.* We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must (1) be logically organized; (2) use the active voice to address readers directly; (3) use common, everyday words and clear language rather than jargon; (4) be divided into short sections and sentences; and (5) use lists and tables wherever possible.

13. *Public availability of comments.* 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 publically available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 48 CFR Part 1419

Government procurement, Small business.

■ For the reasons described above, we hereby revise part 1419, chapter 14 of title 48 of the Code of Federal Regulations as set forth below.

PART 1419—SMALL BUSINESS PROGRAMS

Sec.

Subpart 1419.1—[Reserved]

Subpart 1419.2 Policies

1419.201 General policy.
1419.202 Specific policies.
1419.202–70 Acquisition screening and Small Business Specialist recommendations.

Subpart 1419.3—[Reserved]

Subpart 1419.4—[Reserved]

Subpart 1419.5—Set-Asides for Small Business

1419.503 Setting aside a class of acquisitions.
1419.503–70 Class set-aside for construction acquisitions.

Subpart 1419.6—Certificates of Competency and Determinations of Responsibility

1419.602 Procedures.
1419.602–1 Referral.

Subpart 1419.7—[Reserved]

Subpart 1419.8 Contracting with the Small Business Administration (The 8(a) Program)

1419.803 [Reserved]
1419.810 SBA appeals.

Subpart 1419.9—[Reserved]

Subpart 1419.10—[Reserved]

Authority: 40 U.S.C. 121(c); 40 U.S.C. 486(c); and 5 U.S.C. 301.

Subpart 1419.1—[Reserved]

Subpart 1419.2—Policies

1419.201 General policy.

The Director of the Office of Small Disadvantaged Business Utilization (OSDBU) is responsible for the following:

(a) Developing and maintaining policies, procedures, regulations, and guidelines for the effective administration of the Department's small business and disadvantaged business programs;

(b) The appointment of Small Business Specialists to ensure compliance with all applicable law, regulation, and policy; and

(c) The negotiation of annual small business and subcontracting goals with the Small Business Administration (SBA). The purpose of these goals is to increase participation of small business and disadvantaged small businesses in contract and subcontract opportunities.

1419.202 Specific policies.

1419.202–70 Acquisition screening and Small Business Specialist recommendations.

The Director of the OSDBU is responsible for issuing policy for use of the DI Form 1886 and determining the content of Form DI–1886 ''Acquisition Screening and Review Form.''

Subpart 1419.3—[Reserved]

Subpart 1419.4—[Reserved]

Subpart 1419.5—Set-Asides for Small Business

1419.503 Setting aside a class of acquisitions.

1419.503–70 Class set-aside for construction acquisitions.

(a) Acquisitions for construction (as defined in Federal Acquisition Regulation (FAR) 2.101) estimated to cost $2 million or less must be set-aside on a class basis for exclusive participation by small business or disadvantaged business concerns. This class set-aside does not apply when:

(1) The acquisition is procured using simplified acquisition procedures;

(2) A non-competitive acquisition has been approved under the procedures of FAR 6.3;

(3) Work is to be performed outside the U.S.; or

(4) The Bureau Procurement Chief determines that adequate competition is not likely to be obtained if the acquisition is restricted to small business concerns.

(b) [Reserved]

Subpart 1419.6—Certificates of Competency and Determinations of Responsibility

1419.602 Procedures.

1419.602–1 Referral.

The contracting officer must obtain approval from the Chief of the Contracting Office for all determinations documenting a responsive small business' lack of responsibility prior to submission to the appropriate SBA office. A copy of the determination must be sent to OSDBU within 5 working days of the approval date of the determination.

Subpart 1419.7—[Reserved]

Subpart 1419.8—Contracting with the Small Business Administration (The 8(a) Program)

1419.803 [Reserved]

1419.810 SBA appeals.

The Assistant Secretary of Policy Management and Budget, without the power of redelegation, is authorized to issue the decision on an SBA appeal of a Contracting Officer's Section 8(a) decision.

Subpart 1419.9—[Reserved]

Subpart 1419.10—[Reserved]

Susan Combs,

Assistant Secretary—Policy, Management and Budget.

[FR Doc. 2019–26865 Filed 12–17–19; 8:45 am]

BILLING CODE 4334–63–P

Proposed Rules

Federal Register

Vol. 84, No. 243

Wednesday, December 18, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0328; Airspace Docket No. 18–ANM–5]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Rifle, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace area, designated as a surface area, at the Rifle Garfield County Airport, Rifle, CO. The proposal would increase the circular radius of the area in the west and northwest of the airport. Also, this action proposes to amend the Class E airspace by adding a Class E airspace area, designated as an extension to a Class D or Class E surface area, to the east of the airport. Additionally, this action proposes to amend the Class E airspace extending upward from 700 feet above the surface by removing extensions to the airspace's radius and increasing the radius of the airspace around most of the airport and reducing it to the north and northeast of the airport. Lastly, this action proposes several administrative updates to the airspace legal descriptions for the airport. These changes are necessary to accommodate airspace redesign for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before February 3, 2020.

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–2019–0328; Airspace Docket No. 18–ANM–5, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://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 *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

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 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 amend Class E airspace at Rifle Garfield County Airport, Rifle, CO, to ensure the safety and management of Instrument Flight Rules (IFR) operations at the airport.

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 and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2019–0328; Airspace Docket No. 18–ANM–5''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://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 the **ADDRESSES** section for the 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 Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

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 document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace at the Rifle Garfield County Airport, Rifle, CO. The action proposes to amend the Class E airspace designated as a surface area by increasing the circular radius in the west and northwest of the airport to contain IFR arrivals descending below 1,000 above the surface. That airspace extending upward from the surface within a 4.1-mile radius of the airport beginning at the 339° bearing from the airport clockwise to the 243° bearing from the airport, thence within a 5.2-mile radius of the airport from the 243° bearing from the airport clockwise to the 339° bearing from the Rifle Garfield County Airport.

Also, this action proposes to add amend the Class E airspace by adding a Class E airspace area, designated an extension to Class D and Class E2 surface areas. That airspace extending upward from the surface within 1 mile north and 2.5 miles south of the 078° bearing from the airport extending from the 4.1-mile radius to 8.5 miles east of the Rifle Garfield County Airport.

Additionally, this action proposes to amend the Class E airspace extending upward from 700 feet above the surface by removing extensions from the airspace's radius and increasing the radius of the airspace around the most of the airport and reducing it to the north and northwest of the airport. That airspace extending upward from 700 feet above the surface within a 5.5-mile radius of the airport beginning at the 336° bearing from the airport clockwise to the 065° bearing from the airport, thence an 11-mile radius beginning at the 065° bearing from the airport clockwise to the 336° bearing from the Rifle Garfield County Airport.

Lastly, the action proposes administrative updates to the airspace's legal description. The geographic coordinates need to be updated to (lat. 39°31′36″ N, long. 107°43′41″ W) to match the FAA's aeronautical database. The airport name needs to be updated to ''Rifle Garfield County Airport, Rifle, CO'', to match the FAA's aeronautical database. The Class E2 airspace should be full time; the following two sentences do not accurately represent the time of use for the Class E2 airspace and need to be removed: ''This Class E airspace area is effective during specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.''

Class E airspace designations are published in paragraphs 6002, 6004 and 6005 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 Class E airspace designations listed in this document will be published subsequently 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 regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); 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 rule, when promulgated, would 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

Accordingly, pursuant to the authority delegated to me, 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 14 CFR 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 6002 Class E Airspace Areas Designated as a Surface Area.

* * * * *

ANM CO E2 Rifle, CO [Amended]

Rifle Garfield County Airport, Rifle, CO
(Lat. 39°31′36″ N, long. 107°43′41″ W)

That airspace extending upward from the surface within a 4.1-mile radius of airport beginning at the 339° bearing from the airport clockwise to the 243° bearing from the airport, thence a 5.2-mile radius from the 243° bearing from the airport to the 339° bearing from the Rifle Garfield County Airport.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

ANM CO E4 Rifle, CO [New]

Rifle Garfield County Airport, Rifle, CO
(Lat. 39°31′36″ N, long. 107°43′41″ W)

That airspace extending upward from the surface within 1 mile north and 2.5 miles south of the 078° bearing from the airport extending from the 4.1-mile radius to 8.5 miles east of the Rifle Garfield County Airport.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANM CO E5 Rifle, CO [Amended]

Rifle Garfield County Airport, Rifle, CO
(Lat. 39°31′36″ N, long. 107°43′41″ W)

That airspace extending upward from 700 feet above the surface within a 5.5-mile radius of the airport from the 336° bearing from the airport clockwise to the 065° bearing from the airport thence an 11-mile radius beginning at the 065° bearing from the airport clockwise to the 336° bearing from the Rifle Garfield County Airport.

Issued in Seattle, Washington, on December 11, 2019.

Tom Clark,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2019–27150 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 147

[Docket Number USCG–2019–0402]

RIN 1625–AA00

Safety Zone; Big Foot Tension Leg Platform, Outer Continental Shelf on the Gulf of Mexico

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a permanent safety zone around the Big Foot Tension Leg Platform (TLP), located in Walker Ridge 29 on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The purpose of this proposed rule is to protect the facility from any dangers associated with vessels operating outside the normal shipping channels and fairways that are not providing service to or working with the facility. Placing a permanent safety zone around the facility will significantly reduce the threat of allisions, collisions, security breaches, oil spills, releases of natural gas, and thereby protect the safety of life, property, and the environment. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before February 18, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0402 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LCDR Michael Dougherty, District Eight OCS, U.S. Coast Guard; telephone 504–671–2106, *Michael.J.Dougherty@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

Under the authority provided in 43 U.S.C. 1333, 46 U.S.C. 70034, and Department of Homeland Security Delegation No. 0170.1(90), Title 33, CFR 147.1, 147.5, and 147.10 permit the establishment of safety zones for facilities located on the Outer Continental Shelf (OCS) for the purpose of protecting life and property on the facilities, their appurtenances and attending vessels, and on the adjacent waters within the safety zones.

On July 17, 2015, the Coast Guard published an interim rule and request for comments titled *Safety Zone; Big Foot TLP, Walker Ridge 29, Outer Continental Shelf on the Gulf of Mexico* (80 FR 42385). In response to the rule, we received no comments. The rule established a temporary safety zone for the Big Foot TLP. On May 1, 2019, the Coast Guard received a request from the owner to make the safety zone permanent. This proposed 500-meter safety zone is necessary to protect the platform from inherent hazards associated with maritime traffic and to protect vessel traffic, the facility, and the marine environment.

III. Discussion of Proposed Rule

The Coast Guard proposes to establish an permanent OCS safety zone extending 500 meters (1,640.4 feet) from the coordinates: Latitude N 26–55 longitude W 90–31–14.952.

Transit into and through this area would be prohibited for any vessels not providing service to or working with the Big Foot Tension Leg Platform at Walker Ridge 29 (TLP) on the Outer Continental Shelf (OCS). Entry into this OCS safety zone would be prohibited unless specifically authorized by the Commander, Eighth Coast Guard District (District Commander) or a designated representative. Requests for entry would be considered and reviewed on a case-by-case basis.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This proposed regulatory action determination is based on safety zone's location and its distance from both land and safety fairways. This proposed rule is not a significant regulatory action due to the location of the TLP on the Outer Continental Shelf, and its distance from both land and safety fairways. Vessels traversing waters near the proposed safety zone would be able to safely travel around the zone using alternate routes. An exception to this proposed rule would include attending vessels, as defined by 33 CFR 147.20. The District Commander, or a designated representative, would consider requests to transit through the proposed safety zone on a case-by-case basis.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the permanent safety zone might be small entities, for the reasons stated in section IV.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 proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under

the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security 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 proposed rule involves the establishment of a safety zone around an OCS facility to protect life, property and the marine environment. Normally such actions are categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

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

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

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

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

List of Subjects in 33 CFR Part 147

Continental shelf, Marine safety, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 147 as follows:

PART 147—SAFETY ZONES

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

Authority: 14 U.S.C. 85; 43 U.S.C. 1333; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend 33 CFR 147.861 to read as follows:

§ 147.861 Safety Zone; Big Foot Tension Leg Platform, Outer Continental Shelf on the Gulf of Mexico.

(a) Description. The Big Foot Tension Leg Platform (TLP) is in the deepwater area of the Gulf of Mexico at Walker Ridge 29. The Big Foot TLP is located at latitude N 26–55.308 and longitude W 90–31–14.952, and the area within 500 meters of the Big Foot TLP, is a permanent safety zone.

(b) *Regulation.* No vessel may enter or remain in this safety zone except for the following:

(1) An attending vessel, as defined by 33 CFR 147.20, or

(2) A vessel authorized by the Commander, Eighth Coast Guard District or a designated representative.

Dated: December 10, 2019.

John P. Nadeau,

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

[FR Doc. 2019–27175 Filed 12–17–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2019–0103; FRL–10003–48–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Infrastructure Requirements for the 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submittal from the State of West Virginia pursuant to the Clean Air Act (CAA). Whenever new or revised national ambient air quality standards (NAAQS or standards) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority,

and adequate resources necessary to assure attainment and maintenance of the standards. These elements are referred to as infrastructure requirements. West Virginia made a submittal addressing most of the infrastructure requirements for the 2015 ozone NAAQS and later supplemented the submittals to address the interstate transport elements; EPA is not proposing any action on the interstate transport elements at this time.

DATES: Written comments must be received on or before January 17, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2019–0103 at *https://www.regulations.gov,* or via email to *spielberger.susan@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Joseph Schulingkamp, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2021. Mr. Schulingkamp can also be reached via electronic mail at *schulingkamp.joseph@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 26, 2015, EPA revised both the primary and secondary NAAQS for ozone based on 8-hour average concentrations to 0.070 parts per million (ppm). See 80 FR 65292. Pursuant to CAA section 110(a)(1), states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The content of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains.

In the case of the 2015 ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with the 1997 and 2008 ozone NAAQS. Section 110(a)(1) of the CAA provides the procedural and timing requirements for SIPs, while section 110(a)(2) lists specific elements that states must meet for infrastructure SIP requirements related to a newly established or revised NAAQS. As mentioned earlier, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS.

I. Background

On September 14, 2018, WVDEP submitted a revision to its SIP to satisfy the requirements of CAA section 110(a)(2) for the 2015 ozone NAAQS (hereafter the ''2015 Infrastructure SIP''). This submittal addressed the following elements of CAA section 110(a)(2): (A), (B), (C), (D)(i)(II), (E), (F), (G), (H), (J), (K), (L), and (M). This submittal did not address CAA section 110(a)(2)(D)(i)(I) (interstate transport), however, the state committed to submitting a supplemental SIP revision to fully address this requirement. On February 4, 2019, the WVDEP supplemented its 2015 Infrastructure SIP to address the interstate transport elements of CAA section 110(a)(2)(D)(i)(I) (hereafter the ''2015 Transport SIP''). At this time, EPA is not taking action on West Virginia's 2015 Transport SIP and will address that submittal in a later separate action.

II. How EPA Evaluates Infrastructure SIPs

Pursuant to CAA section 110(a), states must provide SIP revisions addressing relevant infrastructure SIP elements from section 110(a)(2)(A) through (M) or provide certification that the existing SIP contains provisions adequately addressing these elements for the 2015 ozone NAAQS.

EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of CAA section 110(a)(2), as appropriate. Historically, EPA has elected to use non-binding guidance documents to make recommendations for states' development and EPA review of infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues, and in others conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements. EPA guidance applicable to these infrastructure SIP submissions is embodied in several documents.[1] Unless otherwise noted below, EPA is following that existing approach in acting on this submission. In addition, in the context of acting on such infrastructure submissions, EPA evaluates the submitting state's SIP for facial compliance with statutory and regulatory requirements, not for the state's implementation of its SIP.[2] EPA has other authority to address any issues concerning a state's implementation of the rules, regulations, consent orders, etc. that comprise its SIP.

III. EPA's Analysis

West Virginia's 2015 Infrastructure SIP submittal addressed the following infrastructure elements, or portions thereof, for the 2015 ozone NAAQS: CAA section 110(a)(2)(A), (B), (C), D(i)(II), D(ii), (E), (F), (G), (H), (J), (K), (L), and (M). The 2015 Infrastructure SIP submittal did not address element (I) which pertains to the nonattainment requirements of part D, title I of the CAA, since this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1) and will be addressed in a separate process.

EPA has analyzed the 2015 Infrastructure SIP submission and is

[1] EPA explains its approach in its September 13, 2013 Infrastructure SIP Guidance (available at *https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf*), as well as in numerous agency actions, including EPA's prior action on West Virginia's infrastructure SIP to address the 2008 ozone NAAQS (79 FR 19001 (April 7, 2014)).

[2] See *Montana Environ. Info. Center* v. *EPA,* 902 F.3d 971 (9th Cir. 2018).

proposing to make a determination that the submittal meets the requirements of the identified elements. A detailed summary of EPA's review and rationale for approving West Virginia's submittal may be found in the technical support document (TSD) for this proposed rulemaking action which is available online at *www.regulations.gov,* docket number EPA–R03–OAR–2019–0103.

IV. Proposed Action

EPA is proposing to approve West Virginia's September 14, 2018 submittal which provides the basic program elements, or portions thereof, specified in section 110(a)(2)(A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M) necessary to implement, maintain, and enforce the 2015 ozone NAAQS. This proposed rulemaking action does not include action on section 110(a)(2)(I) which pertains to the nonattainment planning requirements of part D, title I of the CAA, because this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1) of the CAA and will be addressed in a separate process. This proposed rulemaking action also does not address section 110(a)(2)(D)(i)(I) which pertains to the interstate transport of emissions; EPA will propose action on West Virginia's 2015 Transport SIP in a later separate action. EPA is soliciting public comments on the issues discussed in this document which will be considered before taking final rulemaking action.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to West Virginia's section 110(a)(2) infrastructure requirements for the 2015 ozone NAAQS, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

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

Dated: December 12, 2019.

Diana Esher,

Acting Regional Administrator, Region III.

[FR Doc. 2019–27274 Filed 12–17–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 27

[WT Docket No. 18–120; Report No. 3135; FRS 16304]

Petitions for Reconsideration of Action in Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for Reconsideration.

SUMMARY: Petitions for Reconsideration (Petitions) have been filed in the Commission's proceeding listed below by Kevin J. Allis, on behalf of National Congress of American Indians, Burt Q.C. Lum, on behalf of The Hawaii Broadband Initiative and Keith Krueger, *et al.,* on behalf of the Schools, Health & Libraries Broadband Coalition, Consortium for School Networking, State Educational Technology Directors Association, American Library Association, Nation Digital Inclusion Alliance, the Nebraska Department of Education, Utah Education and Telehealth Network, Council of Chief State School Officers, A Better Wireless, and Access Humboldt.

DATES: Oppositions to the Petitions must be filed on or before January 2, 2020. Replies to an opposition must be filed on or before January 13, 2020.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: John Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau at (202) 418–0797.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3135, released December 05, 2019. The full text of the Petitions are available for viewing and copying at the FCC Reference Information Center, 445 12th Street SW, Room CY–A257, Washington, DC 20554. Petitions also may be accessed online via the Commission's Electronic Comment Filing System at: *http://apps.fcc.gov/ecfs/.* The Commission will not send a Congressional Review Act (CRA) submission to Congress or the Government Accountability Office pursuant to the CRA, 5 U.S.C. because no rules are being adopted by the Commission.

Subject: Transforming the 2.5 GHz Band, FCC 19–62, published at 84 FR 57343, published October 25, 2019, *correction published* at 84 FR 64209, November 21, 2019, in WT Docket No. 18–120.

Number of Petitions Filed: 3.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–27240 Filed 12–17–19; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 84, No. 243

Wednesday, December 18, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Submission for Review; Correction

AGENCY: U.S. Agency for International Development.

ACTION: 30-Day notice; correction.

SUMMARY: U.S. Agency for International Development (USAID), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the following new information collection, as required by the Paperwork Reduction Act of 1995. Comments are requested concerning whether the proposed collection of information is necessary for the sustaining USAID-funded programming beyond USAID funding; the accuracy of USAID's estimate of the burden of the proposed collection of information; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents.

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: Interested persons are invited to submit comments regarding the proposed information collection to Elena Walls, USAID, Bureau of Economic Growth, Education and Environment (E3)/Office of Education at *ewalls@usaid.gov.*

FOR FURTHER INFORMATION CONTACT: Elena Walls, USAID, Bureau of Economic Growth, Education and Environment (E3)/Office of Education at *ewalls@usaid.gov* or 202–468–3810.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of December 3, 2019, in FR Doc. 2019–26133, on page 66146, in the second column, correct the Agency Form No to read:

Agency Form No.: N/a, new data collection.

Title: Forms for reporting on contributions to USAID-funded education activities by host country governments, non-governmental entities and implementing partners.

Analysis: Data from these forms are required for measuring costs of USAID-funded education interventions. The results of the cost analysis will be used to inform scale and sustainability of USAID-funded interventions, for improving planning, budgeting and management of activities, and for reporting to Congress and other stakeholders.

OMB Number: N/A, new data collection.

Agency Form No.: N/A, new data collection.

Agency: U.S. Agency for International Development.

Federal Register: This information was previously published in the **Federal Register** on July 18, 2019 allowing for a 60-day public comment period, under Document # 2019–15228.

Affected Public: Organizations that are awarded USAID awards (contracts and cooperative agreements) to implement education activities.

Number of Respondents: 120.

Frequency: Once per year.

Estimated number of hours: 960 hours.

Benjamin Sylla,

Evidence Team Lead, Engagement, Policy and Planning Division, Office of Education, U.S. Agency for International Development.

[FR Doc. 2019–26644 Filed 12–17–19; 8:45 am]

BILLING CODE 6116–02–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Contract Proposals (NOCP) for the 9005 Advanced Biofuel Payment Program for Fiscal Years 2019 and 2020

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: This Notice announces the acceptance of applications to enter into Contracts to make payments to eligible advanced biofuel producers under the Bioenergy Program for Advanced Biofuels to support and ensure an expanding production of advanced biofuels. To be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biorefinery located in a State.

This Notice is being published concurrently with the issuance of the Bioenergy Program for Advanced Biofuels final rule. The Agency did not request applications, nor make payments in Fiscal Year 2019 pending the rule's promulgation/publication. This notice announces the availability of up to $7 million for each of two Fiscal Years, 2019 and 2020, to make payments to eligible advanced biofuel producers for the production of eligible advanced biofuels.

DATES: Applications for enrollment in the Advanced Biofuel Payment Program for each of the Fiscal Years 2019 and 2020 will be accepted from December 18, 2019 through February 18, 2020. A separate Enrollment Application is required for each fiscal year. Enrollment applications received after 4:30 p.m. local time on February 18, 2020 will not be considered, regardless of postmark.

Payment Request applications for each of the four quarters of Fiscal Year 2019 are to be submitted simultaneously with the FY 2019 Enrollment Application. Fiscal Year 2019 Payment Request applications received after 4:30 p.m. local time February 18, 2020 will not be considered, regardless of postmark.

Payment Request applications for Fiscal Year 2020 are to be submitted as specified in 7 CFR 4288.130.

ADDRESSES: Applications must be submitted to the USDA Rural Development State Office for the State where the Producer is located. A list of USDA Rural Development State Energy Coordinator contacts can be found via the link: *https://www.rd.usda.gov/files/RBS_StateEnergyCoordinators_0.pdf.*

FOR FURTHER INFORMATION CONTACT: For information about the Advanced Biofuel Payment Program, please contact the USDA Rural Development Energy Coordinator, as provided in the **ADDRESSES** above, or Lisa Noty, Energy Programs, USDA Rural Development,

511 W 7th Street, Atlantic, IA 50022. Telephone: 712–254–4366. Email: *lisa.noty@usda.gov.*

SUPPLEMENTARY INFORMATION:

Fiscal Years 2019 and 2020 Applications for the Advanced Biofuel Payment Program

Applicants must be registered in the System for Award Management (SAM) prior to submitting an application; which can be obtained at no cost via a toll-free request line at (866) 705–5711 or online at *https://www.sam.gov/SAM/.* Registration of a new entity in SAM requires an original, signed, and notarized letter stating that the applicant is the authorized Entity Administrator, before the registration will be activated.

All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at *http://fedgov.dnb.com/webform.*

Overview

Solicitation Opportunity Type: Advanced Biofuel Payment Program.

Announcement Type: Solicitation Announcement; Concurrent with publication of final rule.

Catalog of Federal Domestic Assistance Number: 10.867.

Dates: The sign-up periods for participation for Fiscal Years 2019 and 2020 are identified in **DATES**.

A. Program Description

1. Purpose of the Program. The purpose of this program is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers. Implementing this program promotes the Agency mission of sustainable economic development in rural America and is an important part of achieving Administration goals for increased biofuel production.

2. Statutory Authority. This program is authorized under 7 U.S.C. 8105.

3. Definition of Terms. The definitions applicable to this Notice are published in 7 CFR 4288.102.

4. Application Awards. This program makes payments to eligible advanced biofuel producers for the production of eligible advanced biofuels and is administered according to the provisions found in 7 CFR part 4288 subpart B, and as indicated in this Notice. The Agency advises all interested parties that applicants bear the burden in preparing and submitting an application in response to this Notice whether or not funding is appropriated for this Program in FY 2020.

Availability of Notice and Rule: This Notice and the final rule for the Advanced Biofuel Payment Program are available on the USDA Rural Development website at *http://www.rd.usda.gov/BCP_Biofuels.html.*

B. Federal Award Information

Type of Awards: Payments.

Fiscal Year Funds: FY 2019 and FY 2020.

Available Funds: In accordance with the Agricultural Act of 2018 (Pub. L. 115–334), the Agency is authorized to provide up to $7 million for this program for the production of advanced biofuels in each of Fiscal Years 2019 and 2020.

Approximate Number of Awards: The number of awards will depend on the number of participating advanced biofuel producers.

Range of Amounts of Each Payment: There is no minimum payment amount that an individual producer can receive. The maximum payment amount that an individual producer or group of producers can receive is specified in 7 CFR 4288.131(e). The amount that each producer receives will depend on the number of eligible advanced biofuel producers participating in the program for the respective fiscal year, the amount of advanced biofuels produced by such advanced biofuel producers, and the amount of funds available.

Award Dates: As specified in 7 CFR 4288.131.

Performance Period: October 1, 2018, through September 30, 2019; October 1, 2019, through September 30, 2020.

Renewal or Supplemental Awards: None.

Contract: All producers wishing to participate in this program must enroll and enter into contracts with the Agency as provided for in 7 CFR 4288.120 and 7 CFR 4288.121, respectively, and as otherwise specified in this Notice.

Production Period: Payments to participating advanced biofuel producers under this Notice will be made on actual eligible advanced biofuels produced from October 1, 2018, through September 30, 2019, and from October 1, 2019, through September 30, 2020, in accordance with 7 CFR part 4288 subpart B and as otherwise specified in this Notice.

Type of Instrument: Payment.

C. Eligibility Information

1. *Eligible Applicants.*

To be eligible for this program, an applicant must meet the eligibility requirements specified in 7 CFR 4288.110.

2. *Biofuel Eligibility.*

To be eligible for payment, an advanced biofuel must meet the eligibility requirements specified in 7 CFR 4288.111.

3. *Payment Eligibility.*

To be eligible for program payments, an advanced biofuel producer must maintain the records specified in 7 CFR 4288.113.

D. Application and Submission Information

1. *Address to Request Applications.*

Annual Enrollment Application, Contract, and Payment Request Application forms are available from the USDA Rural Development State Office, Rural Development Energy Coordinator (contact information provided in the **SUPPLEMENTARY INFORMATION** section of this Notice).

2. *Content and Form of Application Submission.*

The enrollment provisions, including application content and form of submission, are specified in 7 CFR 4288.120 and 4288.121.

3. *Submission Dates and Times.*

(a) Enrollment. Producers must submit a new Enrollment application for each fiscal year, in which they wish to be considered. The Biofuel Payment Program Annual Application, Form RD 4288–1, must be received by the submission deadline specified in **DATES**.

(b) Payment applications. Advanced biofuel producers must submit Form RD 4288–3, ''Advanced Biofuel Payment Program—Payment Request,'' for each of the four Federal fiscal quarters for each fiscal year. Pay requests for each quarter must be received by the submission deadlines as identified in **DATES**.

4. *Funding Restrictions.*

(a) Commodity. Not more than one third (⅓) of the funds in any fiscal year will be made available to one or more eligible producers of advanced biofuels derived from a single eligible Commodity (as defined in 7 CFR 4288.102) including intermediate ingredients of that single Commodity or use of that single Commodity and its intermediate ingredients in combination with another Commodity.

(b) Large producers. Not more than five (5) percent of the funds in any fiscal year will be made available to Large Producers (as defined in 7 CFR 4288.102).

(c) Individual producers. Not more than eight (8) percent of program funds will be made available in any fiscal year to any eligible producer of advanced biofuels, that is not a Large producer, to limit the amount of payments that may be received by a single eligible producer under this section in order to distribute

the total amount of funding available in an equitable manner.

The remaining funds will be made available to all other producers.

E. Application Review Information

Payments will be made according to the provisions specified in 7 CFR 4288.130 through 4288.137, unless otherwise specified in this Notice.

F. Federal Award Administration Information

1. Notice of Eligibility. The provisions of 7 CFR 4288.112 apply to this Notice. These provisions include notifying an applicant determined to be eligible for participation and assigning such applicant a contract number and notifying an applicant determined to be ineligible, including the reason(s) the applicant was rejected and providing such applicant appeal rights as specified in 7 CFR 4288.103.

2. *Administrative and National Policy Requirements.*

(a) Review or appeal rights. A person may seek a review of an adverse agency decision or appeal to the National Appeals Division as provided in 7 CFR 4288.103.

(b) Compliance with other laws and regulations. The provisions of 7 CFR 4288.104 apply to this Notice, which includes requiring advanced biofuel producers to be in compliance with other applicable Federal, State, and local laws.

(c) Oversight and monitoring. The provisions of 7 CFR 4288.105 apply to this Notice.

(d) Exception authority. The provisions of 7 CFR 4288.107 apply to this Notice.

(e) Unauthorized Assistance. The provisions of 7 CFR 4288.135 apply to this Notice.

G. Federal Awarding Agency Contacts

For assistance on this payment program, please contact a USDA Rural Development Energy Coordinator, as provided in the **SUPPLEMENTARY INFORMATION** section of this Notice, or Lisa Noty, Energy Programs, USDA Rural Development, 511 W 7th Street, Atlantic, IA. Telephone: (712) 243–2107 extension 116. Email: *lisa.noty@usda.gov.*

H. Civil Rights Requirements

All grants made under this notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A) and Section 504 of the Rehabilitation Act of 1973, Title VIII of the Civil Rights Act of 1968, Title IX of the Civil Rights Act of 1968, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

I. Other Information

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collection requirement contained in this notice is approved by OMB under OMB Control Number 0570–0070.

Federal Funding Accountability and Transparency Act

All applicants, in accordance with 2 CFR part 25, must have a DUNS number, which can be obtained at no cost via a toll-free request line at (866) 705–5711 or online at *http://fedgov.dnb.com/webform.* Similarly, all applicants applying for grant funds must be registered in SAM prior to submitting an application. Applicants may register for the SAM at *http://www.sam.gov/SAM.* All recipients of Federal financial grant assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

Environmental Review

This document has been reviewed in accordance with 7 CFR part 1970, subpart A, ''Environmental Policies.'' The Agency has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act (NEPA) of 1969, Public Law 91–190, neither an Environmental Assessment nor an Environmental Impact Statement is required. Payment applications will be reviewed individually to determine compliance with NEPA.

Nondiscrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its agencies, offices, and employees, and institutions participating in or administering USDA Programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Bette Brand,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2019–27215 Filed 12–17–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–75–2019]

Foreign-Trade Zone (FTZ) 277—Western Maricopa County, Arizona; Notification of Proposed Production Activity; Ball Metal Beverage Container Corporation (Aluminum Cans and Briquettes); Goodyear, Arizona

Ball Metal Beverage Container Corporation (Ball) submitted a notification of proposed production activity to the FTZ Board for its facility in Goodyear, Arizona. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 5, 2019.

The Ball facility is located within FTZ 277. The facility is used for the production of aluminum cans and briquettes. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status component and specific finished products described

in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Ball from customs duty payments on the foreign-status component used in export production. On its domestic sales, for the foreign-status component noted below, Ball would be able to choose the duty rates during customs entry procedures that apply to: Aluminum cans; can ends and lids; and, aluminum briquettes (duty rate ranges from duty free to 5.7%). Ball would be able to avoid duty on the foreign-status component which becomes scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The component/material sourced from abroad is coils of aluminum alloy sheets (duty rate 3%). The request indicates that the coils of aluminum alloy sheets are subject to special duties under Section 232 of the Trade Expansion Act of 1962 (Section 232) and Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 232 and Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov*. The closing period for their receipt is January 27, 2020.

A copy of the notification will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz*.

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: December 6, 2019.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2019–27228 Filed 12–17–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–881; C–533–882]

Large Diameter Welded Pipe From India: Initiation and Expedited Preliminary Results of Antidumping Duty and Countervailing Duty Changed Circumstances Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is initiating and issuing expedited preliminary results of changed circumstances reviews (CCRs) of the antidumping duty (AD) and countervailing duty (CVD) orders on large diameter welded pipe from India.

DATES: Applicable December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Katherine Johnson or Jaron Moore, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–3640, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 6, 2019, Commerce published the AD and CVD orders on large diameter welded pipe from India.[1] On October 18, 2019, nine members of the domestic industry, including the petitioners from the underlying investigations (individually and as members of the American Line Pipe Producers Association), and Welspun Global Trade LLC, requested that Commerce initiate CCRs to revoke, in part, the AD and CVD orders of large diameter welded pipe from India with respect to certain large diameter welded pipe products within four specific groups of grades, outside diameters, and wall thicknesses.[2]

Scope of the Orders

The merchandise covered by these orders is welded carbon and alloy steel line pipe (other than stainless steel pipe), more than 406.4 mm (16 inches) in nominal outside diameter (large diameter welded line pipe), regardless of wall thickness, length, surface finish, grade, end finish, or stenciling. Large diameter welded pipe may be used to transport oil, gas, slurry, steam, or other fluids, liquids, or gases.

Large diameter welded line pipe is used to transport oil, gas, or natural gas liquids and is normally produced to the American Petroleum Institute (API) specification 5L. Large diameter welded line pipe can be produced to comparable foreign specifications, grades and/or standards or to proprietary specifications, grades and/or standards, or can be non-graded material. All line pipe meeting the physical description set forth above, including any dual- or multiple-certified/stenciled pipe with an API (or comparable) welded line pipe certification/stencil, is covered by the scope of the orders.

Subject merchandise also includes large diameter welded line pipe that has been further processed in a third country, including but not limited to coating, painting, notching, beveling, cutting, punching, welding, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the in-scope large diameter welded line pipe.

Excluded from the scope of the orders is structural pipe, which is produced only to American Society for Testing and Materials (ASTM) standards A500, A252, or A53, or other relevant domestic specifications, or comparable foreign specifications, grades and/or standards or to proprietary specifications, grades and/or standards. Also excluded is large diameter welded pipe produced only to specifications of the American Water Works Association (AWWA) for water and sewage pipe.

The large diameter welded line pipe that is subject to these orders is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7305.11.1030, 7305.11.1060, 7305.11.5000, 7305.12.1030, 7305.12.1060, 7305.12.5000, 7305.19.1030, 7305.19.1060, and 7305.19.5000. Merchandise currently classifiable under subheadings 7305.31.4000, 7305.31.6090, 7305.39.1000 and 7305.39.5000 and that otherwise meets the above scope language is also covered. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.

Initiation and Expedited Preliminary Results of Changed Circumstances Review

Pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216(d), Commerce will conduct a CCR of an AD or CVD order when it receives information which shows changed circumstances sufficient to warrant such a review. Section 782(h)(2) of the Act and 19 CFR 351.222(g)(1)(i) provide that Commerce may revoke an order (in whole or in part) if it determines that producers accounting for substantially all of the production of the domestic like product have no further interest in the order, in

[1] *See Large Diameter Welded Pipe from India: Antidumping Duty Order,* 84 FR 8079 (March 6, 2019); and *Large Diameter Welded Pipe from India: Countervailing Duty Order,* 84 FR 8085 (March 6, 2019) (collectively, *Orders*).

[2] *See* Letter from Domestic Industry, ''Large Diameter Welded Pipe from India: Petitioners' Request for Changed Circumstances Review and Partial Revocation,'' dated October 18, 2019 (Oct 18 CCR Request) and Attachment to this notice.

whole or in part. In the event Commerce determines that expedited action is warranted, 19 CFR 351.221(c)(3)(ii) permits Commerce to combine the notices of initiation and preliminary results.

For the reasons discussed below, we find that such sufficient information exists to warrant CCRs. Further, Commerce requires no additional information to make a preliminary finding. For this reason, as permitted by 19 CFR 351.221(c)(3)(ii), Commerce finds that expedited action is warranted and is conducting these reviews on an expedited basis by publishing preliminary results in conjunction with a notice of initiation.

The ten domestic producers filing the request assert that they account for ''substantially all'' [3] of the domestic production of large diameter welded pipe.[4] Because there is no record information that contradicts this claim, in accordance with section 751(b) of the Act and 19 CFR 351.222(g)(1)(i), we find that the ten domestic producers comprise substantially all of the production of the domestic like product.

Because this CCR request was filed less than 24 months after the date of publication of notices of the final determinations in the investigations, pursuant to 19 CFR 351.216(c), Commerce must determine whether ''good cause'' exists to initiate these CCRs. We find that the ten domestic producers' affirmative statement of no interest in the orders with respect to certain specific large diameter welded pipe products, coupled with the circumstances described below, constitute good cause for the conduct of these reviews.[5] Specifically, the domestic industry does not currently produce the particular large diameter welded pipe products subject to this CCR request. Furthermore, according to the domestic producers, the investment needed for the industry to produce these products far exceeds the potential benefit of such an investment, given that the U.S. market for deep offshore projects, *i.e.,* the primary market for the large diameter welded pipe product groups at issue, is relatively small.[6] In addition, the domestic producers provided an explanation indicating that the commercial reality has changed since the *Orders* were put in place.[7] In the absence of any objection by any other interested parties, we preliminarily determine that substantially all of the domestic producers of the like product have no interest in the continued application, in part, of the AD and CVD orders on large diameter welded pipe from India. Accordingly, we are notifying the public of our intent to revoke, in part, the AD and CVD orders as they relate to certain specific large diameter welded pipe products. We intend to change the scope of the AD and CVD orders on large diameter welded pipe from India by adding the exclusion language provided in the Attachment to this notice.

Public Comment

Interested parties may submit case briefs not later than 14 days after the date of publication of this notice.[8] Rebuttal briefs, which must be limited to issues raised in case briefs, may be filed not later than seven days after the due date for case briefs.[9] All submissions must be filed electronically using Enforcement and Compliance's AD and CVD Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Commerce building. An electronically filed document must be received successfully in its entirety in ACCESS by 5:00 p.m. Eastern Time on the due date set forth in this notice.

An interested party may request a hearing within 14 days of publication of this notice. Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230 in a room to be determined.[10]

Unless extended, consistent with 19 CFR 351.216(e), we intend to issue the final results of these CCRs no later than 270 days after the date on which these reviews were initiated, or within 45 days of that date if all parties agree to the outcome of the reviews.

Notification to Interested Parties

This notice is published in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.216 and 351.221(c)(3).

Dated: December 12, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Attachment

Proposed Revision to the Scope of the Orders

Excluded from the scope of the antidumping/countervailing duty orders are large diameter welded pipe products in the following combinations of grades, outside diameters, and wall thicknesses:

- Grade X60, X65, or X70, 18″ outside diameter, 0.688″ or greater wall thickness;
- Grade X60, X65, or X70, 20″ outside diameter, 0.688″ or greater wall thickness;
- Grade X60, X65, X70, or X80, 22″ outside diameter, 0.750″ or greater wall thickness; and
- Grade X60, X65, or X70, 24″ outside diameter, 0.750″ or greater wall thickness.

[FR Doc. 2019–27265 Filed 12–17–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–802]

Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation: Preliminary Results of 2017–2018 Administrative Review and Postponement of Final Results

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is conducting an administrative review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation (the Agreement). We preliminarily find that the State Atomic Energy Corporation ''ROSATOM'' (ROSATOM), its affiliates TENEX, Joint-Stock Company (TENEX) and TENEX–USA, Incorporated (TENEX–USA), and TENEX's unaffiliated resellers, Centrus Energy Corp. and United States

[3] In its administrative practice, Commerce has interpreted ''substantially all'' to mean at least 85 percent of the total production of the domestic like product covered by the order. *See, e.g., Supercalendered Paper from Canada: Final Results of Changed Circumstances Review and Revocation of Countervailing Duty Order,* 83 FR 32268 (July 12, 2018).

[4] *See* Oct 18 CCR Request at 5–7 (identifying percentage of production in 2017 and 2018 (designated as business proprietary information)).

[5] *See, e.g., Certain Cold-Rolled Steel Flat Products from Japan: Initiation and Preliminary Results of Changed Circumstances Review, and Intent to Revoke Order in Part,* 82 FR 821 (January 4, 2017) (finding that ''Petitioners' affirmative statement of no interest in the order . . . constitutes good cause for the conduct of this review.'').

[6] *See* Oct 18 CCR Request at 8.

[7] *Id.* at 9–11.

[8] Commerce is exercising its discretion under 19 CFR 351.309(c)(1)(ii) to alter the time limit for filing of case briefs.

[9] Commerce is exercising its discretion under 19 CFR 351.309(d)(1) to alter the time limit for filing of rebuttal briefs.

[10] *See* 19 CFR 351.310(d).

Enrichment Corporation (collectively, Centrus) and Nukem, Inc. (Nukem), are in compliance with the Agreement.

DATES: Applicable December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or Jill Buckles, Bilateral Agreements Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0162 or (202) 482–6230, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 16, 1992, Commerce signed an agreement with the Russian Federation's Ministry for Atomic Energy (MINATOM), the predecessor to ROSATOM, under section 734(l) of the Tariff Act of 1930, as amended (the Act), suspending the antidumping duty investigation on uranium from the Russian Federation.[1] There have been five amendments to the Agreement, the most recent of which was signed on February 1, 2008.[2] Section 8118 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, codified at 42 U.S.C. 2297h *et seq.* (2008) (Domenici Amendment) established import limitations through 2020 that in large part mirror the export limits instituted in the 2008 amendment to the Agreement. On February 2, 2010, Commerce issued its Statement of Administrative Intent (SAI) which provided implementation guidance related to the 2008 amendment.

On October 1, 2018, Commerce notified interested parties of the opportunity to request an administrative review of the Agreement.[3] On October 26, 2016, domestic interested party Louisiana Energy Services LLC (LES) submitted a request for an administrative review of the Agreement. On December 11, 2018, Commerce published in the **Federal Register** a notice initiating an administrative review of the Agreement.[4] The period of review (POR) is October 1, 2017 through September 30, 2018. On April 24, 2019, Commerce issued questionnaires to ROSATOM, TENEX, and any other affiliated or unaffiliated exporters and resellers, as applicable. For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[5] 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 Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content.

Scope of Review

The product covered by this Agreement is natural uranium in the form of uranium ores and concentrates; natural uranium metal and natural uranium compounds; alloys, dispersions (including cermets), ceramic products, and mixtures containing natural uranium or natural uranium compounds; uranium enriched in U^{235} and its compounds; alloys, dispersions (including cermets), ceramic products, and mixtures containing uranium enriched in U^{235} or compounds of uranium enriched in U^{235}; and any other forms of uranium within the same class or kind.

Imports of uranium ores and concentrates, natural uranium compounds, and all forms of enriched uranium are currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 2612.10.00, 2844.10.20, 2844.20.00, respectively. Imports of natural uranium metal and forms of natural uranium other than compounds are currently classifiable under HTSUS subheadings: 2844.10.10 and 2844.10.50. HTSUS subheadings are provided for convenience and Customs purposes. The written description of the scope of this proceeding is dispositive. A full description of the scope of the order is contained in the Preliminary Decision Memorandum.

Methodology and Preliminary Results

Commerce is conducting this review in accordance with section 751(a)(1)(C) of the Act, which specifies that Commerce shall ''review the current status of, and compliance with, any agreement by reason of which an investigation was suspended.'' In this case, Commerce and MINATOM (the predecessor to ROSATOM) signed the Agreement on October 16, 1992, which was subsequently amended on March 11, 1994, October 3, 1996, May 7, 1997, and February 1, 2008. Section 734(l) provides that Commerce may suspend an investigation upon acceptance of an agreement with a non-market-economy country[6] to restrict the volume of imports into the United States, if Commerce determines that such an agreement is in the public interest, effective monitoring is practicable, and the agreement ''will prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation.''

After reviewing the information submitted in initial and supplemental questionnaire responses and related new factual information and comments from interested parties in this administrative review, we preliminarily find ROSATOM, TENEX, TENEX–USA, Centrus, and Nukem to be in compliance with the terms of the Agreement and the SAI during the POR. Commerce reviewed the export certificates, invoices, contracts, contract amendments, shipment approval request documentation, Commerce contract and shipment approval memoranda, Master Export Schedules, and other information contained in questionnaire responses submitted on the record of the administrative review by the respondents for completeness and compliance. In particular, we examined compliance with the Agreement's Section IV.B.1 and IV.H export limits, with Sections IV.E, V.C,

[1] See Antidumping; Uranium from *Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan; Suspension of Investigations and Amendment of Preliminary Determinations,* 57 FR 49220, 49235 (October 30, 1992) (*1992 Suspension Agreement*).

[2] *See Amendment to Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,* 59 FR 15373 (April 1, 1994) (*1994 Amendment*); *Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,* 61 FR 56665 (November 4, 1996) (*1996 Amendments*); *Amendment to Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,* 62 FR 37879 (July 15, 1997) (*1997 Amendment*); *and Amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,* 73 FR 7705 (February 11, 2008) (*2008 Amendment*).

[3] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 83 FR 49358 (October 1, 2018).

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 63615 (December 11, 2018).

[5] *See* Memorandum to Jeffrey I. Kessler, Assistant Secretary for Enforcement and Compliance, ''Decision Memorandum for the Preliminary Results of the 2017–2018 Administrative Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,'' dated concurrently with and adopted by this notice.

[6] Because Commerce determined that the Russian Federation was a non-market economy at the time the Agreement was signed, the Agreement was entered into under section 734(l) of the Act, which applies to non-market-economy countries.

V.F, VII.D, Appendix 2, and Appendix 3 of the Agreement, with the requirements of the SAI, and with Commerce's returned feed certification requirements. Based on our review of the record evidence, we preliminarily found no evidence of non-compliance by respondents, as applicable, with regard to Sections IV.B.1, IV.H, IV.E, V.C, VII.D, Appendix 2, and Appendix 3 of the Agreement and with regard to the returned feed certification requirements. Regarding the Section V.F and SAI contract and contract amendment approval requirements, we reviewed information on the record and preliminarily found respondents to be in compliance during the POR. However, we requested clarifying information from TENEX with regard to certain contracts, contract amendments, and side letters applicable to sales and exports during the POR in a supplemental questionnaire, the response for which will be due to Commerce after these preliminary results. In addition, Commerce intends to issue a supplemental questionnaire to Centrus, the response for which will also be due after these preliminary results. As these responses, and any interested party submissions of rebuttal new factual information, will be received after issuance of these preliminary results, we intend to continue our examination of compliance in a post-preliminary analysis.

A review of information in initial and supplemental questionnaire responses also shows that effective monitoring of the Agreement is practicable. The Agreement and subsequent SAI guidance provide numerous tools for Commerce to effectively monitor compliance with the export limits, both under Section IV.B.1 (domestic consumption) and Section IV.H (re-export), for Russian Uranium Products. As discussed above, Commerce has preliminarily found respondents to be in compliance with not only the contract, contract amendment, and shipment approval requirements of Sections V.C and V.F and the SAI but also the reporting requirements in Appendix 2 and Appendix 3 of the Agreement and the SAI. The structure of the Agreement, combined with the requirements of the SAI and Commerce's contract, contract amendment, and shipment approval memoranda, provide Commerce with the necessary tools to monitor compliance with the Agreement and establish corresponding procedures, such as the reporting requirements in Appendix 3 for example, that ensure ROSATOM and its affiliates will restrict their sales and exports in compliance with the Agreement's export limits. Therefore, we preliminarily find that the Agreement continues to meet the statutory requirement, pursuant to section 734(d)(2) of the Act, of being able to be effectively monitored.

Regarding the statutory requirements of sections 734(d)(1) and 734(l)(1)(B) of the Act, Commerce finds that it requires additional time and information in order to complete its examination of whether the Agreement continues to meet these statutory requirements, particularly since interested parties still have the opportunity to submit new factual information and comments on information and supplemental questionnaire responses received, and still to be received, on the record. In light of interested parties' comments to date, the voluminous information on the record of this administrative review and from the previous administrative review still under consideration, and the complex nature of the statutory requirements, *i.e.,* that the Agreement prevent price suppression or undercutting and be in the public interest, Commerce needs more time to examine related new factual information and comments received, and to be received, from interested parties on the broader issues related to whether the Agreement remains in the public interest and whether it continues to prevent price suppression and undercutting. Therefore, we intend to continue our examination after the issuance of these preliminary results in order to reach a full preliminary determination on whether the Agreement has been complied with during the POR and whether the Agreement continues to meet the statutory requirements set forth in section 734(l) of the Act. Commerce intends to issue a post-preliminary analysis as soon as practicable. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Disclosure and Public Comment

As discussed above, Commerce needs additional information and additional time to review the information received before making a definitive preliminary finding. Therefore, we intend to issue a post-preliminary analysis on these issues as soon as practicable. The comment period on these preliminary results as well as the post-preliminary analysis will be stated with the release of the post-preliminary analysis. At that time, interested parties will have the opportunity to submit case and rebuttal briefs.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[7]

Postponement of Final Results

Section 751(a)(3)(A) of the Act, requires Commerce to complete the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2) allow Commerce to extend the time limit for the final results to a maximum of 180 days after the date on which the preliminary results are published.

We determine that it is not practicable to complete the final results of this administrative review within 120 days from the date of publication of these preliminary results. Commerce requires additional time to analyze supplemental questionnaire responses and submissions of factual information, complete our examination, issue our post-preliminary analysis, potentially conduct verification of questionnaire responses, and allow for case briefs and rebuttal briefs on our preliminary and post-preliminary results. Accordingly, Commerce is extending the deadline for the final results of this administrative review by 60 days. The final results of the review will now be due no later than 180 days from the date of publication of these preliminary results.

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(l) and 777(i)(l) of the Act and 19 CFR 351.213.

[7] *See* 19 CFR 351.310(c).

Dated: December 10, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019–27229 Filed 12–17–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–836]

Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than normal value. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Allison Hollander or Michael A. Romani, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2805 or (202) 482–0198, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 2, 2019, Commerce initiated the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate products (CTL plate) from the Republic of Korea (Korea).[1] The period of review (POR) is February 1, 2018 through January 31, 2019.

Scope of the Order

The products covered by the antidumping duty order are certain CTL plate from Korea. A full description of the scope of the order is contained in the Preliminary Decision Memorandum.[2]

Methodology

Commerce is conducting this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act). Export price and constructed export price are calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics included in the Preliminary Decision Memorandum is included in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public 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 to all parties in the Central Records Unit, located at Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of Preliminary Decision Memorandum are identical in content.

Rates for Non-Examined Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

In this review, we have preliminarily calculated weighted-average dumping margins for Dongkuk Steel Mill Co., Ltd. (Dongkuk) and Hyundai Steel Company (Hyundai Steel) that are not zero, *de minimis,* or determined entirely {on the basis of facts available. Accordingly, Commerce preliminarily has assigned to the companies not individually examined, BDP International and Sung Jin Steel Co., Ltd.,[3] a margin of 6.98 percent, which is the weighted average of Dongkuk's and Hyundai Steel's calculated weighted-average dumping margins}.[4]

Preliminary Results of the Administrative Review

We preliminarily determine that the following weighted-average dumping margins exist for the respondents for the period February 1, 2018 through January 31, 2019:

Producer/exporter	Weighted-average dumping margin (percent)
Dongkuk Steel Mill Co., Ltd	10.92
Hyundai Steel Company	5.68
BDP International	6.98
Sung Jin Steel Co., Ltd	6.98

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to the parties within five days after public announcement of the preliminary results in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[5] Parties who submit case briefs or rebuttal briefs in this proceeding 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.[6]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.[7] Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 18777, 18782 (May 2, 2019) (*Initiation Notice*).

[2] *See* Memorandum, ''Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[3] *See Initiation Notice,* 84 FR at 18782.

[4] For more information regarding the calculation of this margin, *see* Memorandum, ''Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019; Calculation of the Margin for Non-Examined Companies,'' dated concurrently with this memorandum.

[5] *See* 19 CFR 351.309(d).

[6] *See* 19 CFR 351.309(c)(2) and (d)(2).

[7] *See* 19 CFR 351.310(c).

issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

If a respondent's weighted-average dumping margin is above *de minimis* in the final results of this review, we will calculate an importer-specific assessment rate based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1).[8] If a respondent's weighted-average dumping margin or an importer-specific assessment rate is zero or *de minimis* in the final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to liquidate the appropriate entries without regard to antidumping duties in accordance with the *Final Modification for Reviews.*[9] The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise under review and for future deposits of estimated duties, where applicable.

For entries of subject merchandise during the POR produced by Dongkuk or Hyundai Steel, which Dongkuk or Hyundai (as applicable) did not know was destined for the United States, we will instruct CBP to liquidate these entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

For the companies identified above that were not selected for individual examination, we will instruct CBP to liquidate entries at the rates listed above.

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective upon publication of the notice of final results of this review for all shipments of CTL plate from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for companies subject to this review will be equal to the weighted-average dumping margins established in the final results of the review; (2) for merchandise exported by companies not covered in this review but covered in a prior segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 0.98 percent,[10] the all-others rate established in the LTFV investigation, adjusted for the export-subsidy rate in the companion countervailing duty investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

Dated: December 12, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Rates for Non-Examined Companies
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2019–27266 Filed 12–17–19; 8:45 am]

BILLING CODE 3510–DS–P

[8] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[9] *See Final Modification for Reviews,* 77 FR at 8103; *see also* 19 CFR 351.106(c)(2).

[10] *See, e.g., Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 32629, 32630 (July 13, 2018).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–806]

Silicon Metal From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that Yunnan Fuyang Trade Co., Ltd. (Fuyang) did not make a *bona fide* sale during the period of review (POR) June 1, 2017 through May 31, 2018. Therefore, we are rescinding this administrative review.

DATES: Applicable December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Eli Lovely, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1593.

SUPPLEMENTARY INFORMATION:

Background

On August 14, 2019, Commerce published the *Preliminary Results* of this review in the **Federal Register** [1] and invited parties to comment on the *Preliminary Results.* On September 13, 2019, we received case briefs from Yunnan Fuyang Trade Co., Ltd. (Fuyang) and the petitioner (*i.e.,* Globe Specialty Metals, Inc.). On September 23, 2019, we received rebuttal briefs from Fuyang and the petitioner.

Scope of the Order

The product covered by the order is silicon metal containing at least 96.00 but less than 99.99 percent of silicon by weight, and silicon metal with a higher aluminum content containing between 89 and 96 percent silicon by weight. For the full text of the scope of the order, *see* the Issues and Decision Memorandum.[2]

[1] *See Silicon Metal From the People's Republic of China: Preliminary Rescission of the Antidumping Duty Administrative Review; 2017–2018,* 84 FR 40395 (August 14, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty

Continued

Analysis of the Comments Received

All issues raised in the case and rebuttal briefs submitted in this review are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/index.html*. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Bona Fides Analysis

We preliminarily found that Fuyang's sale of subject merchandise to the United States during the POR is not a *bona fide* sale.[3] After analyzing parties' comments, we continue to find that Fuyang's sale is not a *bona fide* sale. We reached this conclusion based on multiple issues, including: (a) The atypical nature of both the price and quantity of the sale; (b) factors calling into question whether the sale was made at arm's-length; and (c) other relevant factors.

Because we have determined that Fuyang had no *bona fide* sales during the POR, we are rescinding this administrative review.

Assessment

Because Commerce is rescinding this administrative review, we have not calculated a company-specific dumping margin for Fuyang. Fuyang remains part of the China-wide entity and entries of its subject merchandise during the POR will be assessed antidumping duties at the China-wide entity rate. The China-wide entity rate is 139.49 percent.

Cash Deposit Requirements

As noted above, Commerce is rescinding this administrative review. Thus, we have not calculated a company-specific dumping margin for Fuyang. Therefore, entries of Fuyang's subject merchandise continue to be subject to the China-wide entity cash deposit rate of 139.49 percent. This cash deposit requirement shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in these segments of the proceeding. 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 Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: December 11, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Issues
  Comment: Whether Fuyang's Sole U.S. Sale During the Period of Review is *Bona Fide*
  i. Whether Sale Price Weighs in Favor of Finding Fuyang's Sale Was Not *Bona Fide*
  ii. Whether Sale Quantity Weighs in Favor of Finding Fuyang's Sale Was Not *Bona Fide*
  iii. Whether Sale Timing Weighs in Favor of Finding Fuyang's Sale Was Not *Bona Fide*
  iv. Whether the Goods were Resold at a Profit
  v. Whether the Sale was Made on an Arm's-Length Basis
  vi. Other Relevant Factors
V. Recommendation

[FR Doc. 2019–27264 Filed 12–17–19; 8:45 am]

BILLING CODE 3510–DS–P

Order on Silicon Metal from the People's Republic of China; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''2017–2018 Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Preliminary *Bona Fide* Sales Analysis for Yunnan Fuyang Trade Co., Ltd.,'' dated August 6, 2019.

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2019–0063]

Information Collection Requirement; Covered Defense Telecommunications Equipment or Services; Request for OMB Emergency Clearance; Comment Request

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: DoD is requesting the Office of Management and Budget provide emergency clearance of collections of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 17, 2020.

SUPPLEMENTARY INFORMATION: DoD is requesting the Office of Management and Budget (OMB) provide emergency clearance of collections of information associated with an interim rule to be published in the **Federal Register** under the title ''Covered Defense Telecommunications Equipment or Services (DFARS Case 2018–D022).''

Consistent with 5 CFR 1320.13, DoD has determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the Paperwork Reduction Act in view of the restrictions imposed by section 1656 of the National Defense Authorization Act (NDAA) for Fiscal year (FY) 2018 (Pub. L. 115–91), which was signed into law on December 12, 2017. Subsequently, section 889(a)(1)(A) of the NDAA for FY 2019 (Pub. L. 115–232), was signed into law on August 13, 2018, and established a similar Governmentwide prohibition. The interim DFARS rule implements the section 1656 and DoD-specific procedures associated with the section 889(a)(1)(A) prohibitions for DoD, and is structured to align with and supplement the higher-level Federal Acquisition Regulation (FAR) implementation of the section 889(a)(1)(A) Governmentwide prohibition. Immediate action is

required to implement the requirements of the statutes for DoD.

b. This collection of information is essential to DoD's mission by ensuring that DoD does not procure prohibited articles. Section 1656 provides that DoD may not procure or obtain, or extend or renew a contract to procure or obtain, any equipment, system, or service to carry out the DoD nuclear deterrence or homeland defense missions that uses covered defense telecommunications equipment or services as a substantial or essential component of any system or as a critical technology as a part of any system.

c. DoD must be able to rely on the integrity and security of equipment that is critical to the DoD nuclear deterrence and homeland defense missions. The use of normal clearance procedures would prevent the collection of information from contractors in an expeditious manner with respect to national security functions of the United States.

d. DoD cannot comply with normal clearance procedures, because public harm is reasonably likely if current clearance procedures are followed. Not only would DoD components be likely to purchase and install prohibited items, agencies could incur substantial additional costs replacing such items, as well as additional administrative costs for replacement.

DoD is requesting OMB provide emergency clearance for collection of the required information for a period of six months. Public comments on the information collection will be requested in the interim rule, which will be published in the **Federal Register**.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2019–27170 Filed 12–17–19; 8:45 am]

BILLING CODE 6820–ep–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–0K]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(5)(C) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19–0K with attached Policy Justification and Sensitivity of Technology.

Dated: December 12, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

SEP 1 2 2019

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 19-0K. This notification relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 16-46 of September 21, 2016.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosure:
1. Transmittal

BILLING CODE 5001–06–C

Transmittal No. 19-0K

REPORT OF ENHANCEMENT OR UPGRADE OF SENSITIVITY OF TECHNOLOGY OR CAPABILITY (SEC. 36(B)(5)(C), AECA)

(i) *Purchaser:* Japan
(ii) *Sec. 36(b)(1), AECA Transmittal No.:* 16–46
Date: September 21, 2016
Military Department: Air Force
(iii) *Description:* On September 21, 2016, Congress was notified by Congressional certification transmittal number 16–46 of the possible sale, under Section 36(b)(1) of the Arms Export Control Act, of four (4) KC–46 aerial refueling aircraft. Each aircraft is powered by two (2) Pratt & Whitney Model 4062 (PW4062) Turbofan engines. The sale included one (1) additional spare PW4062 engine. Each aircraft will be delivered with Global Positioning Satellite (GPS) capability and defensive systems installed plus spares, to include: Raytheon's ALR–69A Radar Warning Receiver (RWR), Raytheon's Miniaturized Airborne GPS Receiver 2000 (MAGR 2K) to provide GPS Selective Availability Anti-Spoofing Module (SAASM) capability, and Northrop Grumman's AN/AAQ–24(V) Large Aircraft Infrared Countermeasures (LAIRCM) Nemesis (N) system. Each LAIRCM system consists of the following components: three (3) Guardian Laser Terminal Assemblies (GLTA), six (6) Ultra-Violet Missile Warning System (UVMWS) Sensors AN/AAR–54, one (1) LAIRCM System Processor Replacements (LSPR), one (1) Control Indicator Unit Replacement, one (1) Smart Card Assembly, and one (1) High Capacity Card. The estimated total cost was $1.9B. Major Defense Equipment (MDE) constituted $1.5B of this total.

On April 24, 2018, Congress was notified by Congressional certification 0D–18 the inclusion of four (4)

additional ALR–69A RWR systems, which will increase the total quantity of ALR–69A RWR systems included in the Japan KC–46 sale to nine (9). The four (4) additional ALR–69A RWR systems resulted in a net increase in MDE value of $6 million. The total program estimated MDE cost remained $1.5 billion. The total estimated program value remained $1.9 billion.

This transmittal reports the addition of Major Defense Equipment (MDE) items beyond what was originally notified: four (4) KC–46 aircraft; six (6) PW4062 Turbofan Engines (includes 2 spares); twelve (12) MAGR 2K–GPS SAASM Receivers; three (3) AN/ALR–69A RWR Systems; twenty (20) GLTA for AN/AAQ–24(V)N (includes 8 spares); forty-eight (48) MWS AN/AAR–54 (includes 24 spares); eight (8) LSPR for AN/AAQ–24(V)N (includes 4 spares). The following non-MDE items will be included: fourteen (14) AN/ARC–210 UHF Radios, eight (8) APX–119 Identification Friend or Foe (IFF) transponders, one (1) Weapon System Trainer and one (1) Boom Operator Trainer, initial spares and repair parts, consumables, support equipment, technical data, engineering change, proposals, publications, Field Service Representatives' (FSRs), repair and return, depot maintenance, training and training equipment, contractor technical and logistics personnel services, U.S. Government and contractor representative support, Group A and B installation for subsystems, flight test and certification, and other related elements of logistics support.

The addition of these items will result in a net increase in cost of MDE of $920 million, resulting in a revised total MDE cost of $2.42 billion. Additional non-MDE items at a cost of $300M will increase total non-MDE costs to $700M. The total case value will increase to $3.12 billion.

(iv) *Significance:* As Japan continues with its plans to develop a robust KC–46 fleet, it has requested additional aircraft. The proposed sale increases Japan's capability to participate in Pacific region security operations and improves Japan's national security posture as a key U.S. ally.

(v) *Justification:* This proposed sale will support the foreign policy and national security of the United States by improving the security of a major ally that is a force for political stability and economic progress in the Asia-Pacific region. It is vital to U.S. national interests to assist Japan in developing and maintaining a strong and effective self-defense capability.

(vi) *Sensitivity of Technology:* The Sensitivity of Technology Statement contained in the original notification applies to items reported here.

(vii) *Date Report Delivered to Congress:* September 12, 2019

[FR Doc. 2019–27253 Filed 12–17–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Termination of the Threat Reduction Advisory Committee

AGENCY: Department of Defense (DoD).

ACTION: Termination of Federal Advisory Committee.

SUMMARY: The DoD is publishing this notice to announce it is terminating the Threat Reduction Advisory Committee (TRAC) on December 16, 2019.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The TRAC is being terminated under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 CFR 102–3.55, and the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), effective December 16, 2019.

Dated: December 13, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–27242 Filed 12–17–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–0L]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(5)(C) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19–0L with attached Policy Justification and Sensitivity of Technology.

Dated: December 12, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

SEP 1 2 2019

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 19-0L. This notification relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 15-22 of April 28, 2015.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal

Transmittal No. 19-0L

REPORT OF ENHANCEMENT OR UPGRADE OF SENSITIVITY OF TECHNOLOGY OR CAPABILITY (SEC. 36(B)(5)(C), AECA)

(i) *Purchaser:* Government of Australia
(ii) *Sec. 36(b)(1), AECA Transmittal No.:* 15–22
Date: April 28, 2015
Military Department: Navy
(iii) *Description:* On April 28, 2015, Congress was notified by Congressional certification transmittal number 15-22 of the possible sale, under Section 36(b)(1) of the Arms Export Control Act, of follow-on sustainment support and services for twenty four (24) AF/A-18Fs Super Hornet and twelve (12) AEA-18G Growler aircraft. The sustainment efforts included software and hardware updates, Engineering Change Proposals, System Configuration upgrades, system integration and testing, engine component improvement, tools and test equipment, spare and repair parts, support equipment, publications and technical documentation, personnel training and training equipment, aircrew trainer devices upgrades, U.S. Government and contractor technical assistance, and other related elements of logistics and program support. The estimated cost was $1.5 billion.

This transmittal reports Australia's request for additional sustainment and upgrades to the Australian F/A-18E/F fleet. The upgrades include up to twenty (20) AN/ASG-34(V) Infrared Search and Track (IRST) Block II systems; up to sixty (60) Distributed Targeting processor—Networked (DTP-N) assets; and up to fifty-two (52) Multifunctional Information Distribution System Joint Tactical Radio Systems (MIDS/JTRS) (6). The sale also includes system integration and testing, software development, spares, support equipment and government and contracting technical assistance. The overall MDE value will increase to $260

million and the overall total value will increase to $1.81 billion.

(iv) *Significance:* This proposed sale will allow Australia to effectively maintain its current force projection capability that enhances interoperability with U.S. forces well into the future.

(v) *Justification:* This proposed sale supports the foreign policy and national security of the United States by improving the security of an important major non-NATO ally and partner who contributes significantly to peacekeeping, humanitarian, and combat operations around the world.

(vi) *Sensitivity of Technology:* The Infrared Search and Track (IRST) system is a long-wave infrared sensor, integrated on a modified centerline fuel tank, that provides a passive, out-of-band, Alternative Fire Control System (AFCS) capable of detecting, tracking and engaging airborne targets at long range in a heavy Electronic Attack (EA) or radar-denied environment. The IRST Block II is a modified version of the IRST Block I, providing longer range detection over a wider field and enhanced warfighting capability. IRST provides critical capabilities in meeting future threats.

Distributed Targeting Processor—Networked (DTP-N) is an upgrade to the Distributed Targeting System (DTS) providing internet protocol (IP) to the F/A-18E/F and EA-18G, enabling connectivity to advanced tactical networks. The DTP-N upgrade provides the foundation for a majority of the future flight plan strike capabilities, which are related to improved targeting and networking.

DTP-N is networking hardware required for tactical use of IP based waveforms. This upgrade also provides Multi-Level Security (MLS) features, offering new capabilities to the platform through increased security assurances on data separation and data transfer.

Multifunctional Information Distribution System Joint Tactical Radio System (MIDS/JTRS) (6) provides a high capacity, low latency Internet Protocol (IP) based waveform that can quickly transmit large amounts of data. Advanced algorithms allow cooperative detection and engagement of a wider array of targets, improving fused track accuracy and increasing lethality/survivability through Situational Awareness.

(vii) *Date Report Delivered to Congress:* September 12, 2019

[FR Doc. 2019–27277 Filed 12–17–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2019–OS–0134]

Privacy Act of 1974; System of Records

AGENCY: National Geospatial-Intelligence Agency (NGA), Department of Defense (DoD).

ACTION: Rescindment of a System of Records notice.

SUMMARY: The NGA is rescinding a System of Records, TravelNet Files, B1211–04. This System of Records maintained employee and contractor records associated with foreign contracts, business engagements, and travel outside the United States. All TravelNet files were destroyed in accordance with the approved National Archives and Records Administration (NARA) records schedule.

DATES: This notice is effective upon publication. This System of Records was decommissioned on July 1, 2012 and all TravelNet files were destroyed by July 1, 2018 in accordance with the NARA-approved records schedule.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the rescinded system, please contact Mr. Charles R. Melton, Chief FOIA, National Geospatial-Intelligence Agency, Security and Installation, Attn: FOIA Office, 7500 GEOINT Drive, Springfield, VA 22150–7500, or by phone at (571) 558–3715.

SUPPLEMENTARY INFORMATION: On July 1, 2012 the TravelNet system was deactivated and all files were destroyed in accordance with records management policy and directions. NGA currently uses the Enterprise Workforce Management System to track this requirement. Enterprise Workforce Management System is associated with SORN NGA–003. The DoD SORNs subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov/.*

The proposed system reports, as required by the Privacy Act of 1974, as amended, were submitted on October 10, 2019, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and to the Office of Management and Budget (OMB) pursuant to Section 6 to OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

System Name and Number: TravelNet, B1211–04.

History: July 26, 2010, 75 FR 43497.

Dated: December 13, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–27247 Filed 12–17–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2019–ICCD–0155]

Agency Information Collection Activities; Comment Request; Fiscal Operations Report for 2019–2020 and Application To Participate 2021–2022 (FISAP) and Reallocation Form

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 18, 2020.

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–0155. 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 Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W–208D, Washington, DC 20202–4537.

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: Fiscal Operations Report for 2019–2020 and Application to Participate 2021–2022 (FISAP) and Reallocation Form.

OMB Control Number: 1845–0030.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 3,893.

Total Estimated Number of Annual Burden Hours: 89,846.

Abstract: The Higher Education Opportunity Act (HEOA) (Pub. L. 110–315) was enacted on August 14, 2008 and reauthorized the Higher Education Act of 1965, as amended, (HEA). It requires participating Title IV institutions to apply for funds and report expenditures for the Federal Perkins Loan (Perkins), the Federal Supplemental Educational Opportunity Grant (FSEOG) and the Federal Work-Study (FWS) Programs on an annual basis.

The data submitted electronically in the Fiscal Operations Report and Application to Participate (FISAP) is used by the Department of Education to determine the institution's funding need for the award year and monitor program effectiveness and accountability of fund expenditures. The data is used in conjunction with institutional program reviews to assess the administrative capability and compliance of the applicant. There are no other resources for collecting this data.

The HEA requires that if an institution anticipates not using all of its allocated funds for the FWS, and FSEOG programs by the end of an award year, it must specify the anticipated remaining unused amount to the Secretary, who reduces the institution's allocation accordingly.

The changes to the version of the FISAP update the deadline and award year references, incorporate new data fields added to capture cumulative service cancellation reimbursement activity beginning in the 19–20 award year under the Perkins Loan Program.

Dated: December 13, 2019.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2019–27259 Filed 12–17–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20–251–001.

Applicants: Public Service Company of Colorado.

Description: Tariff Amendment: OATT-Att O-PSCo, TBL 25–Depr & Amort–0.4.1–Amend to be effective 1/1/2020.

Filed Date: 12/12/19.

Accession Number: 20191212–5083.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–254–001.

Applicants: Wabash Valley Power Association, Inc., PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment to ER20–254–000 to change req'd effective date re Wabash (OATT) to be effective 12/31/9998.

Filed Date: 12/11/19.

Accession Number: 20191211–5160.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–256–001.

Applicants: Wabash Valley Power Association, Inc., PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment to ER20–256–000 to change req'd effective date re Wabash (CTOA) to be effective 12/31/9998.

Filed Date: 12/11/19.

Accession Number: 20191211–5164.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–568–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019–12–11_SA 3268 Astoria Substat BSSB In Out MPFCA (J493 J510) OTP NSP 1st Rev to be effective 11/26/2019.

Filed Date: 12/11/19.

Accession Number: 20191211–5132.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–569–000.

Applicants: Sabine Cogen, LP.

Description: Tariff Cancellation: Notice of Cancellation of Reactive Tariff to be effective 3/8/2020.

Filed Date: 12/11/19.

Accession Number: 20191211–5149.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–570–000.

Applicants: Southern California Edison Company.

Description: Tariff Cancellation: Cancel LGIA Desert Quartzite, LLC SA No. 209 to be effective 6/4/2019.

Filed Date: 12/12/19.

Accession Number: 20191212–5000.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–571–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 2891R6 AECC, Entergy Arkansas and MISO Attachment AO to be effective 12/10/2019.

Filed Date: 12/12/19.

Accession Number: 20191212–5003.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–572–000.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Resource Adequacy Compliance Filing in Response to Order Issued in EL19–101 to be effective 10/28/2019.

Filed Date: 12/12/19.

Accession Number: 20191212–5044.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–573–000.

Applicants: GridLiance Heartland LLC.

Description: § 205(d) Rate Filing: GLH Certificate of Concurrence Filing to be effective 12/12/2019.

Filed Date: 12/12/19.

Accession Number: 20191212–5045.

Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–574–000.

Applicants: Midcontinent Independent System Operator, Inc., GridLiance Heartland LLC.

Description: § 205(d) Rate Filing: 2019–12–12_SA 3389 GridLiance Heartland-TVA TIA to be effective 12/31/9998.
Filed Date: 12/12/19.
Accession Number: 20191212–5059.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–575–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: Cool Springs Solar (Cool Springs Solar & Battery) LGIA Filing to be effective 11/27/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5071.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–576–000.
Applicants: ReEnergy Fort Fairfield LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 12/13/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5085.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–577–000.
Applicants: ReEnergy Ashland LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 12/13/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5086.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–579–000.
Applicants: Lyonsdale Biomass, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 12/13/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5091.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–580–000.
Applicants: Cambria CoGen Company.
Description: Tariff Cancellation: Notice of Termination of Cambria CoGen FERC Electric Tariff No. 1 to be effective 12/12/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5102.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–581–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2019–12–12 EIM Implementation Agreement with Tacoma Power to be effective 4/1/2020.
Filed Date: 12/12/19.
Accession Number: 20191212–5104.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–582–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Third Revised Service Agreement No. 1127; Queue No. AD2–113/AD2–114 to be effective 11/12/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5106.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–583–000.
Applicants: American Transmission Company LLC.
Description: Baseline eTariff Filing: Construction Management Agreement to be effective 12/13/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5114.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–584–000.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Compliance Filing Pursuant to October 17, 2019 Order re Minimum Run-Time Req to be effective 12/3/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5125.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–585–000.
Applicants: ISO New England Inc., NSTAR Electric Company.
Description: § 205(d) Rate Filing: ISO-NE and NSTAR; TSA–EVERSOURCE–15 to be effective 10/1/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5154.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–586–000.
Applicants: ISO New England Inc., New England Power Company.
Description: Tariff Cancellation: ISO-NE and NEP; Notice of Cancellation of 1st Rev. LGIA–ISONE/NEP–17–01 to be effective 11/25/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5162.
Comments Due: 5 p.m. ET 1/2/20.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 12, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27226 Filed 12–17–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP19–1469–002.
Applicants: DTE Midstream Appalachia, LLC.
Description: Compliance filing Compliance Filing to November 26 Order to be effective 8/1/2019.
Filed Date: 12/11/19.
Accession Number: 20191211–5143.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: RP20–256–001.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Tariff Amendment: Volume No. 2—SJR SP100754 Neg-Non Conf Amend Exhibit A–4.17.3 to be effective 12/1/2019.
Filed Date: 12/11/19.
Accession Number: 20191211–5079.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: RP20–322–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: TETLP Sync-Up Filing—Stratton Ridge (CP17–56) Tariff Records to be effective 12/24/2019.
Filed Date: 12/11/19.
Accession Number: 20191211–5012.
Comments Due: 5 p.m. ET 12/23/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 12, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27227 Filed 12–17–19; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0484; FRS 16324]

Information Collection Being Submitted for Review and Approval to the 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, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The 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 January 17, 2020. 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 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 Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@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 Nicole Ongele at (202) 418–2991. 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 OMB control number 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, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection.

Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control Number: 3060–0484.

Title: Part 4 of the Commission's Rules Concerning Disruptions to Communications.

Form Number: Not applicable.

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: 965 respondents; 26,795 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: On occasion and annual reporting requirements, recordkeeping requirement and third-party disclosure requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i)–(j) & (o), 201(b), 214(d), 218, 251(e)(3), 301, 303(b), 303(g), 303(r), 307, 309(a), 316, 332, 403, 615a–1, and 615c.

Total Annual Burden: 53,590 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In accordance with 47 CFR 4.2, reports and information contained therein are presumed confidential. The filings are shared with the Department of Homeland Security through password-protected real time access to NORS. Other persons seeking disclosure must follow the procedures delineated in 47 CFR Sections 0.457 and 0.459 of the Commission's rules for requests for and disclosure of information. This information collection does not affect the confidential treatment of information provided to the Commission through outage reports filed in NORS.

Needs and Uses: The general purpose of the Commission's Part 4 rules is to gather sufficient information regarding disruptions to telecommunications to facilitate FCC monitoring, analysis, and investigation of the reliability and security of voice, paging, and interconnected Voice over Internet Protocol (interconnected VoIP) communications services, and to identify and act on potential threats to our Nation's telecommunications infrastructure. The Commission uses this information collection to identify the duration, magnitude, root causes, and contributing factors with respect to significant outages, and to identify outage trends; support service restoration efforts; and help coordinate with public safety officials during times of crisis. The Commission also maintains an ongoing dialogue with reporting entities, as well as with the communications industry at large, generally regarding lessons learned from the information collection in order to foster a better understanding of the root causes of significant outages and to explore preventive measures in the future so as to mitigate the potential scale and impact of such outages.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–27223 Filed 12–17–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1226; FRS 16322]

Information Collection Being Submitted for Review and Approval to the 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, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The 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 January 17, 2020. 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 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 Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@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 Nicole Ongele at (202) 418–2991. 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 OMB control number 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, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection.

Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control Number: 3060–1226.

Title: Receiving Written Consent for Communication with Base Stations in Canada; Issuing Written Consent to Licensees from Canada for Communication with Base Stations in the U.S.; Description of Interoperable Communications with Licensees from Canada.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: State, Local, or Tribal government agencies.

Number of Respondents and Responses: 3,224 respondents; 3,224 responses.

Estimated Time per Response: 0.5 hours–1 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Written consent from the licensee of a base station repeater is required before first responders from the other country can begin communicating with that base stations repeater. Applicants are advised to include a description of how they intend to interoperate with licensees from Canada when filing applications to operate under any of the scenarios described in Public Notice DA 16–739 in order to ensure that the application is not inadvertently rejected by Canada. Statutory authority for these collections are contained in 47 U.S.C. 151, 154, 301, 303, 307, 308, 309, 310, 316, 319, 325(b), 332, 336(f), 338, 339, 340, 399b, 403, 534, 535, 1404, 1452, and 1454 of the Communications Act of 1934.

Total Annual Burden: 5,642 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: Applicants who include a description of how they intend to interoperate with licensees from Canada need not include any confidential information with their description. Nonetheless, there is a need for confidentiality with respect to all applications filed with the Commission through its Universal Licensing System (ULS). Although ULS stores all information pertaining to the individual license via an FCC Registration Number (FRN), confidential information is accessible only by persons or entities that hold the password for each account, and the Commission's licensing staff. Information on private land mobile radio licensees is maintained in the Commission's system of records, FCC/WTB–1, ''Wireless Services Licensing Records.'' The licensee records will be publicly available and routinely used in accordance with subsection (b) of the Privacy Act. TIN Numbers and material which is afforded confidential treatment pursuant to a request made under 47 CFR 0.459 will not be available for Public inspection. Any personally identifiable information (PII) that individual applicants provide is covered by a system of records, FCC/WTB–1, ''Wireless Services Licensing Records,'' and these and all other records may be disclosed pursuant to the Routine Uses as stated in this system of records notice.

Needs and Uses: This collection will be submitted as an extension of an existing collection after this 60-day comment period to the Office of Management and Budget (OMB) in order to obtain the full three-year clearance. The purpose of requiring an agency to issue written consent before allowing first responders from the other country to communicate with its base station repeater ensures to that the licensee of that base stations repeater (host licensee) maintains control and is responsible for its operation at all times. The host licensee can use the written consent to ensure that first responders from the other country understand the proper procedures and protocols before they begin communicating with its base station repeater. Furthermore, when reviewing applications filed by border area licensees, Commission staff will use any description of how an applicant intends to interoperate with licensees from Canada, including copies of any written agreements, in order to coordinate the application with Innovation, Science and Economic Development Canada (ISED) and reduce the risk of an inadvertent rejection by ISED.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–27222 Filed 12–17–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FRS 16312]

Open Commission Meeting, Thursday, December 12, 2019

December 5, 2019.

The Federal Communications Commission held an Open Meeting on the subjects listed below on Thursday, December 12, 2019, at 10:30 a.m. in Room TW–C305, at 445 12th Street SW, Washington, DC.

Item No.	Bureau	Subject
1	WIRELINE COMPETITION	TITLE: Implementation of the National Suicide Hotline Improvement Act of 2018 (WC Docket No. 18–336). SUMMARY: The Commission will consider a Notice of Proposed Rulemaking that would propose to designate 988 as the 3-digit number for a national suicide prevention and mental health crisis hotline.
2	ENGINEERING & TECHNOLOGY	TITLE: Use of the 5.850–5.925 GHz Band (ET Docket No. 19–138). SUMMARY: The Commission will consider a Notice of Proposed Rulemaking that would take a fresh and comprehensive look at the rules for the 5.9 GHz band and propose, among other things, to make the lower 45 MHz of the band available for unlicensed operations and to permit Cellular Vehicle to Everything (C–V2X) operations in the upper 20 megahertz of the band.
3	WIRELESS TELE-COMMUNICATIONS	TITLE: Facilitating Shared Use in the 3.1–3.55 GHz Band (WT Docket No. 19–348). SUMMARY: The Commission will consider a Notice of Proposed Rulemaking that would seek comment on removing the existing non-federal allocations in the 3.3–3.55 GHz band as a step towards potential future shared use between federal incumbents and commercial users.
4	WIRELINE COMPETITION	TITLE: Connect America Fund (WC Docket No. 10–90); Developing a Unified Intercarrier Compensation Regime (CC Docket No. 01–92). SUMMARY: The Commission will consider an Order on Remand and Declaratory Ruling that would promote continued investment in IP-based networks by clarifying that a local exchange carrier partnering with a VoIP provider may assess end office switched access charges only if the carrier or its VoIP partner provides a physical connection to the last-mile facilities used to serve the end user.
5	MEDIA	TITLE: Cable Service Change Notifications (MB Docket No. 19–347); Modernization of Media Regulation Initiative (MB Docket No. 17–105); Amendment of the Commission's Rules Related to Retransmission Consent (MB Docket No. 10–71). SUMMARY: The Commission will consider a Notice of Proposed Rulemaking that would seek comment on modernizing requirements for notices cable operators must provide consumers and local franchise authorities.
6	MEDIA	TITLE: Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations (MB Docket No. 19–3). SUMMARY: The Commission will consider a Report and Order that would revise the Commission's Noncommercial Educational Broadcast Station and Low Power FM Station comparative processing and licensing rules.
7	ENFORCEMENT	TITLE: Enforcement Bureau Action. SUMMARY: The Commission will consider an enforcement action.
8	ENFORCEMENT	TITLE: Enforcement Bureau Action. SUMMARY: The Commission will consider an enforcement action.
9	ENFORCEMENT	TITLE: Enforcement Bureau Action. SUMMARY: The Commission will consider an enforcement action.

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.*

Marlene Dortch,

Secretary.

[FR Doc. 2019–27224 Filed 12–17–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Designated Reserve Ratio for 2020

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of Designated Reserve Ratio for 2020.

Pursuant to the Federal Deposit Insurance Act, the Board of Directors of the Federal Deposit Insurance Corporation designates that the Designated Reserve Ratio (DRR) for the Deposit Insurance Fund shall remain at 2 percent for 2020.[1] The Board is publishing this notice as required by section 7(b)(3)(A)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(3)(A)(i)).

FOR FURTHER INFORMATION CONTACT: Ashley Mihalik, Chief, Banking and Regulatory Policy Section, Division of Insurance and Research, (202) 898–3793, *amihalik@fdic.gov;* Robert Grohal, Chief, Fund Analysis and Pricing Section, Division of Insurance and Research, (202) 898–6939; or, Nefretete Smith, Counsel, Legal Division, (202) 898–6851, *nefsmith@fdic.gov.*

Federal Deposit Insurance Corporation.

By Order of the Board of Directors.

Dated at Washington, DC, on December 12, 2019.

Annmarie H. Boyd,

Assistant Executive Secretary.

[FR Doc. 2019–27235 Filed 12–17–19; 8:45 am]

BILLING CODE 6714–01–P

[1] Section 327.4(g) of the FDIC's regulations sets forth the DRR. *See* 12 CFR 327.4(g). There is no need to amend this provision, because the DRR for 2020 is the same as the current DRR.

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th and Constitution Avenue NW, Washington DC 20551–0001, not later than January 1, 2020.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Trenton Fairbank, Cimarron, Kansas;* to join the Butcher Family Control Group, and to acquire voting shares of First National Agency, Inc. and thereby indirectly acquire voting shares of First National Bank in Cimarron, both of Cimarron, Kansas.

B. Federal Reserve Bank of Minneapolis (Mark A. Rauzi, Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Karen Neidhardt and Ann Musser, both of Tampa, Florida, and Jane Farris, Birmingham, Alabama;* to acquire voting shares of Bozeman Bancorp, Inc. and thereby indirectly acquire voting shares of the Bank of Bozeman, both of Bozeman, Montana.

In addition, the Ann Lenore Musser Irrevocable Trust, Karen Neidhardt and Jane Farris, as co-trustees; the Ann Neidhardt Musser Irrevocable Trust, Karen Neidhardt, James Jorgenson, and Jane Farris, as co-trustees; the William John Musser Irrevocable Trust, Karen Neidhardt and Jane Farris, as co-trustees; the Sarah Ann Musser Irrevocable Trust, Karen Neidhardt and Jane Farris, as co-trustees; the Jane Ellen Neidhardt Irrevocable Trust, Karen Neidhardt and Ann Musser, as co-trustees; the Jane Neidhardt Farris Irrevocable Trust, Karen Neidhardt, James Jorgenson, and Ann Musser, as co-trustees; the Luke Jorgenson Farris Irrevocable Trust, Karen Neidhardt and Ann Musser, as co-trustees; the George Leonelli Farris Irrevocable Trust, Karen Neidhardt and Ann Musser, as co-trustees; all of Kenmare, North Dakota; as members of the Jorgenson Family Control Group to acquire voting shares of Bozeman Bancorp, Inc. and thereby indirectly acquire voting shares of Bank of Bozeman.

Board of Governors of the Federal Reserve System, December 12, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–27187 Filed 12–17–19; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 192 3093]

Global Data Vault, LLC; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 17, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: ''Global Data Vault, LLC; File No. 192 3093'' 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 D), 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 D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Megan Cox (202–326–2282), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is

hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 3, 2019), on the World Wide Web, at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 17, 2020. Write ''Global Data Vault, LLC; File No. 192 3093'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

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 through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Global Data Vault, LLC; File No. 192 3093'' 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 D), 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 D), 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 website at *https://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. *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.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. 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 January 17, 2020. 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.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Global Data Vault, LLC (''Global Data Vault'' or ''Respondent'').

The proposed consent order (''proposed order'') has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that Global Data Vault made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union (''EU''). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing ''adequate'' privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce (''Commerce''). Commerce reviews companies' self-certification applications and maintains a public website, *https://www.privacyshield.gov/list,* where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Global Data Vault provides data storage and recovery services. According to the Commission's complaint, Global Data Vault published on its website, *https://www.globaldatavault.com/privacypolicy/,* a privacy policy containing statements related to its participation in Privacy Shield. However, Global Data Vault allowed its certification to lapse and continued to claim it participated in the Privacy Shield framework.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU–U.S. Privacy Shield Framework. The proposed complaint further alleges that Respondent engaged in deceptive acts or practices by representing that it

complied with the framework when in fact it had failed to comply with certain Privacy Shield requirements.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU–U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Part II of the proposed order requires that the company affirm to Commerce that it will either continue to apply the Privacy Shield framework principles to any data it received pursuant to frameworks or will delete or return such data.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to create certain documents relating to its compliance with the order for 10 years and to retain those documents for a five-year period. Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VII is a provision ''sun-setting'' the order after 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2019–27234 Filed 12–17–19; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[File No. 192 3090]

Click Labs, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 17, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: ''Click Labs, Inc.; File No. 192 3090'' 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 D), 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 D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Megan Cox (202–326–2282), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 3, 2019), on the World Wide Web, at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 17, 2020. Write ''Click Labs, Inc.; File No. 192 3090'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

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 through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Click Labs, Inc.; File No. 192 3090'' 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 D), 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 D), 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 website at *https://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. *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.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. 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 January 17, 2020. 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.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Click Labs, Inc. (''Click Labs'' or ''Respondent'').

The proposed consent order (''proposed order'') has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that Click Labs made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union (''EU''). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing ''adequate'' privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce (''Commerce''). Commerce reviews companies' self-certification applications and maintains a public website, *https://www.privacyshield.gov/list,* where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Click Labs provides website and mobile app development and support through the website *http://www.jungleworks.com.* According to the Commission's complaint, Click Labs published on its website, *https://jungleworks.com/privacy-policy/,* a privacy policy containing statements related to its participation in Privacy Shield. However, it only initiated an application to Commerce for Privacy Shield certification, and did not complete the steps necessary to participate in the framework.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU–U.S. and the Swiss-U.S. Privacy Shield frameworks.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU–U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for 20 years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision ''sun-setting'' the order after 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2019–27243 Filed 12–17–19; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[File No. 192 3084]

TDARX, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 17, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''TDARX, Inc.; File No. 192 3084'' 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 D), 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 D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Megan Cox (202–326–2282), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 3, 2019), on the World Wide Web, at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 17, 2020. Write ''TDARX, Inc.; File No. 192 3084'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

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 through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''TDARX, Inc.; File No. 192 3084'' 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 D), 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 D), 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 website at *https://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. *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.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. 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 January 17, 2020. 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.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from TDARX, Inc. (''TDARX'' or ''Respondent'').

The proposed consent order (''proposed order'') has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that TDARX made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union (''EU''). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing ''adequate'' privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce (''Commerce''). Commerce reviews companies' self-certification applications and maintains a public website, *https://www.privacyshield.gov/list,* where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

TDARX provides IT management and security services through the websites *https://www.tdarx.com* and *http://www.nocdoc.com.* According to the Commission's complaint, TDARX published on its website, *http://www.nocdoc.com/pdf/privacy_policy.pdf,* privacy policies containing statements related to its participation in Privacy Shield. However, TDARX allowed its certification to lapse and continued to claim it participated in the Privacy Shield framework.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU–U.S. Privacy Shield Framework. The proposed

complaint further alleges that Respondent engaged in deceptive acts or practices by representing that it complied with the framework when in fact it had failed to comply with certain Privacy Shield requirements.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU–U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Part II of the proposed order requires that the company affirm to Commerce that it will either continue to apply the Privacy Shield framework principles to any data it received pursuant to frameworks or will delete or return such data.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VII is a provision ''sun-setting'' the order after 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2019–27236 Filed 12–17–19; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[File No. 192 3078]

Incentive Services, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement; Request for Comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 17, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: ''Incentive Services, Inc.; File No. 192 3078'' 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 D), 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 D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Megan Cox (202–326–2282), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 3, 2019), on the World Wide Web, at *https://www.ftc.gov/news-events/commission-actions*.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 17, 2020. Write ''Incentive Services, Inc.; File No. 192 3078'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

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 through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Incentive Services, Inc.; File No. 192 3078'' 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 D), 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 D), 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 website at *https://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. *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.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. 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 January 17, 2020. 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*.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Incentive Services, Inc. (''Incentive Services'' or ''Respondent'').

The proposed consent order (''proposed order'') has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that Incentive Services made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union (''EU''). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing ''adequate'' privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce (''Commerce''). Commerce reviews companies' self-certification applications and maintains a public website, *https://www.privacyshield.gov/list,* where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Incentive Services is a company that works with organizations to improve performance of individual employees through service award programs, performance incentives, and loyalty programs. According to the Commission's complaint, Incentive Services published on its website, *https://www.incentiveservices.com/,* a privacy policy containing statements related to its participation in Privacy Shield. However, it only initiated an application to Commerce for Privacy Shield certification, and did not complete the steps necessary to participate in the framework.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU–U.S. and the Swiss-U.S. Privacy Shield frameworks.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU–U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for 20 years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision ''sun-setting'' the order after 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2019–27237 Filed 12–17–19; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meetings

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of five AHRQ subcommittee meetings.

SUMMARY: The subcommittees listed below are part of AHRQ's Health Services Research Initial Review Group Committee. Grant applications are to be reviewed and discussed at these meetings. Each subcommittee meeting will commence in open session before closing to the public for the duration of the meeting.

DATES: See below for dates of meetings:

1. *Healthcare Effectiveness and Outcomes Research (HEOR)*
   Date: February 12–13, 2020 (Open from 8:00 a.m. to 8:30 a.m. on February 12 and closed for remainder of the meeting)
2. *Healthcare Safety and Quality Improvement Research (HSQR)*
   Date: February 20–21, 2020 (Open from 7:30 a.m. to 8:00 a.m. on February 20 and closed for remainder of the meeting)
3. *Health System and Value Research (HSVR)*
   Date: February 27–28, 2020 (Open from 8:00 a.m. to 8:30 a.m. on February 27 and closed for remainder of the meeting)
4. *Health Care Research and Training (HCRT)*

Date: February 27–28, 2020 (Open from 8:00 a.m. to 8:30 a.m. on February 27 and closed for remainder of the meeting)

5. *Healthcare Information Technology Research (HITR)*

Date: February 27–28, 2020 (Open from 8:00 a.m. to 8:30 a.m. on February 27 and closed for remainder of the meeting)

ADDRESSES: (Below specifics hotel where each meeting will be held:)

Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, Maryland 20852, (HEOR, HITR, HCRT, HSVR).

Hilton Washington DC/Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852, (HSQR).

FOR FURTHER INFORMATION CONTACT: (To obtain a roster of members, agenda or minutes of the non-confidential portions of the meetings.)

Jenny Griffith, Acting Committee Management Officer, Office of Extramural Research Education and Priority Populations, Agency for Healthcare Research and Quality (AHRQ), 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 427–1557.

SUPPLEMENTARY INFORMATION: In accordance with section 10 (a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), AHRQ announces meetings of the above-listed scientific peer review groups, which are subcommittees of AHRQ's Health Services Research Initial Review Group Committees. Each subcommittee meeting will commence in open session before closing to the public for the duration of the meeting. The subcommittee meetings will be closed to the public in accordance with the provisions set forth in 5 U.S.C. App. 2 section 10(d), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(6). 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.

Agenda items for these meetings are subject to change as priorities dictate.

Virginia L. Mackay-Smith,

Associate Director.

[FR Doc. 2019–27263 Filed 12–17–19; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10108, CMS–10243, CMS–10383, CMS–10609, CMS–R–131 and CMS–10662]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by January 17, 2020.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR* Email: *OIRA_submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

1. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Managed Care Regulations; *Use:* The requirements contained in this information collection request implement regulations that allow states greater flexibility to implement mandatory managed care programs, implement new beneficiary protections, and eliminate certain requirements viewed by state agencies as impediments to the growth of managed care programs. Information collected includes information about managed care programs, grievances and appeals, enrollment broker contracts, and managed care organizational capacity to provide health care services. Medicaid enrollees use the information collected and reported to make informed choices regarding health care, including how to access health care services and the grievance and appeal system. States use the information collected and reported as part of its contracting process with managed care entities, as well as its compliance oversight role. We use the information collected and reported in an oversight role of state Medicaid managed care programs. *Form Number:*

CMS–10108 (OMB control number: 0938–0920); *Frequency:* Occasionally; *Affected Public:* Individuals or households, Private sector (business or other for-profit and not-for-profit institutions), and State, local or Tribal Government; *Number of Respondents:* 628; *Total Annual Responses:* 22,564,877; *Total Annual Hours:* 1,371,968. (For policy questions regarding this collection contact Amy Gentile at 410–786–3499.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Testing Experience and Functional Tools: Functional Assessment Standardized Items (FASI) Based on the CARE Tool; *Use:* In 2012, CMS funded a project entitled, Technical Assistance to States for Testing Experience and Functional Tools (TEFT) Grants. One component of this demonstration is to amend and test the reliability of a setting-agnostic, interoperable set of data elements, called ''items,'' that can support standardized assessment of individuals across the continuum of care. Items that were created for use in post-acute care settings using the Continuity Assessment Record and Evaluation (CARE) tool have been adopted, modified, or supplemented for use in community-based long-term services and supports (CB–LTSS) programs. This project will test the reliability and validity of the function-related assessment items, now referred to as Functional Assessment Standardized Items (FASI), when applied in community settings, and in various populations: Elders (65 years and older); younger adults (18–64) with physical disabilities; and adults of any age with intellectual or developmental disabilities, with severe mental illness, or with traumatic brain injury.

Individual-level data will be collected two times using the TEFT FASI Item Set. The first data collection effort will collect data that can be analyzed to evaluate the reliability and validity of the FASI items when used with the five waiver populations. Assessors will conduct functional assessments in client homes using the TEFT FASI Item Set. Changes may be recommended to individual TEFT FASI items, to be made prior to releasing the TEFT FASI items for use by the states. The FASI Field Test Report will be released to the public.

The second data collection will be conducted by the states to demonstrate their use of the FASI data elements. The assessment data could be used by the states for multiple purposes. They may use the standardized items to determine individual eligibility for state programs, or to help determine levels of care within which people can receive services, or other purposes. In the second round of data collection, states will demonstrate their proposed uses, manage their FASI data collection and conduct their own analysis, to the extent they propose to do such tasks. The states have been funded under the demonstration grant to conduct the round 2 data collection and analysis. These states will submit reports to CMS describing their experience in the Round 2 data collection, including the items they collected, how they planned to use the data, and the types of challenges and successes they encountered in doing so. The reports may be used by CMS in their evaluation of the TEFT grants. *Form Number:* CMS–10243 (OMB control number: 0938–1037); *Frequency:* On occasion; *Affected Public:* Individuals and Households; *Number of Respondents:* 5,650; *Total Annual Responses:* 5,650; *Total Annual Hours:* 2,825. (For policy questions regarding this collection contact Kerry Lida at 410–786–4826.)

3. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Review and Approval Process for Waivers for State Innovation*; Use:* The information required under this collection is necessary to ensure that states comply with statutory and regulatory requirements related to the development and implementation of section 1332 waivers. States seeking waiver authority under section 1332 of the PPACA are required to meet certain requirements for applications, public notice, and reporting. The authority for these requirements is found in section 1332 of the PPACA. This information collection reflects the requirements provided in the final rules, 77 FR 11700, published February 27, 2012. Additionally, on October 24, 2018, the Departments published guidance, 83 FR 53575, that provides supplementary information about the requirements that must be met for the approval of a section 1332 waiver, the Secretaries application review procedures, the calculation of pass-through funding, certain analytical requirements, and operational considerations. This guidance supersedes the guidance related to section 1332 of the PPACA that was previously published on December 16, 2015. This information collection also reflects the requirements outlined in a state's specific terms and conditions (STCs), as part of the approval of a state's section 1332 waiver application. *Form Number:* CMS–10383 (OMB control number 0938–NEW); *Frequency:* Occasionally; *Affected Public:* State Governments; *Number of Respondents:* 12; *Total Annual Responses:* 212; *Total Annual Hours:* 4,016. (For policy questions regarding this collection contact Michelle Koltov at 301–492–4225.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Program Face-to-Face Requirements for Home Health Services and Supporting Regulations; *Use:* 42 CFR 440.70(f) and (g) requires that physicians (or for medical equipment, authorized non-physician practitioners (NPPs) including nurse practitioners, clinical nurse specialists and physician assistants) document that there was a face-to-face encounter with the Medicaid beneficiary prior to the physician making a certification that home health services are required. The burden associated with this requirement is the time and effort to complete this documentation. The burden also includes writing, typing, or dictating the face-to-face documentation and signing/dating the documentation. *Form Number:* CMS–10609 (OMB control number: 0938–1319); *Frequency:* Occasionally; *Affected Public:* Private sector (business or other for-profits); *Number of Respondents:* 381,148; *Total Annual Responses:* 1,143,443; *Total Annual Hours:* 190,955. (For policy questions regarding this collection contact Alexandra Smilow at 410–786–0790.)

5. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Advance Beneficiary Notice of Noncoverage (ABN); *Use:* The use of the written Advance Beneficiary Notice of Non-coverage (ABN) is to inform Medicare beneficiaries of their liability under specific conditions. This has been available since the ''limitation on liability'' provisions in section 1879 of the Social Security Act (the Act) were enacted in 1972 (Pub. L. 92–603). ABNs are not given every time items and services are delivered. Rather, ABNs are given only when a physician, provider, practitioner, or supplier anticipates that Medicare will not provide payment in specific cases.

An ABN may be given, and the beneficiary may subsequently choose not to receive the item or service. An ABN may also be issued because of other applicable statutory requirements other than § 1862(a)(1) such as when a beneficiary wants to obtain an item from

a supplier who has not met Medicare supplier number requirements, as listed in section 1834(j)(1) of the Act or when statutory requirements for issuance specific to HHAs are applicable.

ABNs are usually given as hard copy notices during in-person patient encounters. In some cases, notification may be done by telephone with a follow-up notice mailed. Electronic issuance of ABNs is permitted as long as the beneficiary is offered the option to receive a paper copy of the notice if this is preferred. Regardless of the mode of delivery, the beneficiary must receive a copy of the signed ABN for his/her own records. Incorporation of ABNs into other automated business processes is permitted, and some limited flexibility in formatting the notice in such cases is allowed, as discussed in the form instructions. Notifiers may choose to store the required signed copy of the ABN electronically. *Form Number:* CMS–R–131 (OMB control number: 0938–0566); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 1,589,060; *Total Annual Responses:* 382,216,385; *Total Annual Hours:* 44,593,186. (For policy questions regarding this collection contact Jennifer McCormick at 410–786–2852.)

6. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Administrative Simplification HIPAA Compliance Review; *Use:* The authority for administering and enforcing compliance with the Administrative Simplification non-privacy Health Insurance Portability and Accountability Act (HIPAA) rules has been delegated to the Centers for Medicare & Medicaid Services (CMS). (68 FR 60694 Part F, October 23, 2003) 45 CFR 160.308 states, ''that the Secretary may conduct compliance reviews to determine whether covered entities are complying with the applicable administrative simplification provisions.'' These reviews are conducted at the discretion of the Secretary. Title 45 CFR 160.310 requires that a covered entity provide records and compliance reports to the Secretary in cooperation with a compliance review. Title 45 CFR 160.310 provides that a covered entity must permit HHS, or its delegated entity, access during normal business hours to its facilities, books, records, and other information, and other information necessary to determine compliance, but also provides that if the Secretary determines that ''exigent circumstances exist, such as when documents may be hidden or destroyed,'' the covered entity must permit access at any time without notice.

The purpose of this collection is to retrieve information necessary to conduct a compliance review as described in CMS–0014–N (68 FR 60694). These forms will be submitted to the Centers for Medicare & Medicaid Services (CMS), Program Management National Standards Group, from entities covered by HIPAA Administrative Simplification regulations. This collection is not applicable to HIPAA Privacy and Security Rules. *Form Number:* CMS–10662 (OMB control number: 0938–New); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 10; *Total Annual Responses:* 10; *Total Annual Hours:* 425. (For policy questions regarding this collection contact Cecily Austin at 410–786–0895.)

Dated: December 13, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–27280 Filed 12–17–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Income Withholding Order/ Notice for Support (IWO)

AGENCY: Office of Child Support Enforcement, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a three-year extension of the form Income Withholding Order/Notice for Support (IWO) (OMB #0970–0154, expiration 8/31/2020). This request includes minor revisions to the approved forms.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The IWO is the standard form that must be used to order and notify employers and income providers to withhold child support payments from an obligor's income. It also indicates where employers and other income providers must remit the payments and other information needed to withhold correctly.

Child support agencies, courts, private attorneys, custodial parties, and others must use the IWO form to initiate an income withholding order for support and give notice of income withholding. State child support agencies are required to have automated data processing systems containing current order and case information. State child support agencies providing services to custodial and/or noncustodial parties enter the terms of a child support order established by a tribunal into the state's automated system, which automatically populates the order information into the IWO form.

Employers and income providers also use the form to respond to the order/ notice with termination or income status information. Employers and other income providers may choose to receive the IWO form from child support agencies on paper or electronically, and may respond on paper or electronically to notify the sender of termination of employment or change in the income status.

The information collection activities pertaining to the IWO form are authorized by 42 U.S.C. 666(a)(1), (a)(8), and 666(b)(6), which require the use of the IWO form to order income withholding for all child support orders.

The IWO form and instructions include these proposed changes:

1. Changed effective date from a calendar date to a text entry. This clarifies that IWOs are effective on either the date of mailing, receipt, or service to the employer.

2. Added a textbox in Remittance Information regarding payments in interstate cases.

3. Simplified and consolidated wording of required advices to employers and moved some of them from Additional Information into Remittance Information.

4. Moved a link to the Child Support Portal within Additional Information to

Lump Sum Payments and added one to Notice of Employment Termination or Income Status.

Respondents: Courts, private attorneys, custodial parties or their representatives, employers, and other parties that provide income to noncustodial parents.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Income withholding order/notice (courts, private attorneys, custodial parties or their representatives).	4,091,591	1.00	5 minutes	340,966
Income withholding orders/termination of employment/income status (employers and other income providers).	1,257,639	9.07	2 minutes	380,226
Electronic income withholding orders/termination of employment/income status (employers and other income providers).	17,985	101.73	30 seconds ..	15,247

Estimated Total Annual Burden Hours: 736,439.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 666(a)(1),(a)(8), and 666(b)(6).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–27171 Filed 12–17–19; 8:45 am]

BILLING CODE 4184–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Emergency Network Clinical Trials.

Date: December 20, 2019.

Time: 5:00 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, (301) 435–6033, *rajarams@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 12, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27190 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke, October 04, 2020, 06:00 p.m. to October 06, 2020, 12:00 p.m., Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814 which was published in the **Federal Register** on November 15, 2019, 84 FR 62543.

This meeting notice is to change October 4–6, 2020 BSC meeting date to November 22–24, 2020. The meeting is closed to the public.

Dated: December 12, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27189 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Cancer Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Advisory Board.

Date: February 11, 2020.

Open: 1:30 p.m. to 3:30 p.m.

Agenda: Program reports and presentations; business of the Board.

Closed: 3:45 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room TE406, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Paulette S. Gray, Ph.D., Executive Secretary, Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, *grayp@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/ncab/ncab.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 12, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27184 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel, Technology Projects for Natural Products Research (U24).

Date: January 6, 2020.

Time: 12:00 p.m. to 1:30 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, 6706 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ashlee Tipton, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Center for Complementary and Integrative Health, 6707 Democracy Boulevard, Room 401, Bethesda, MD 20892, 301–451–3849, *ashlee.tipton@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: December 12, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27183 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Initial Review Group TEP–3: SBIR Contract Review, February 6, 2020, 10:00 a.m. to 6:00 p.m., National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 5E030, Rockville, MD 20850 (Telephone Conference Call) which was published in the **Federal Register** on December 10, 2019, 84 FR 67467.

This meeting notice is amended to correct the meeting name from National Cancer Institute Initial Review Group TEP–3: SBIR Contract Review to National Cancer Institute Special Emphasis Panel TEP–3: SBIR Contract Review. The meeting is closed to the public.

Dated: December 12, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27185 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Nursing Research.

Date: January 14–15, 2020.

Open: January 14, 2020, 10:00 a.m. to 4:30 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institutes of Health, Building 45, Natcher, 45 Center Drive, Bethesda, MD 20894.

Closed: January 15, 2020, 9:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 45, Natcher, 45 Center Drive. Room D, Bethesda, MD 20894.

Contact Person: Kathleen C. Anderson, Ph.D., Acting Executive Secretary, National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Boulevard, Suite 710, One Democracy Plaza, Bethesda, MD 20817, 301–443–5837, *kanders1@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one

form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://www.ninr.nih.gov/aboutninr/nacnr,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: December 12, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27191 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: AIDS and Related Research.

Date: December 23, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Dimitrios Nikolaos Vatakis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3190, Bethesda, MD 20892, 301–827–7480, *dimitrios.vatakis@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 12, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27179 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting will also be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

Name of Committee: Frederick National Laboratory Advisory Committee to the National Cancer Institute.

Date: February 19, 2020.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: Ongoing and new activities at the Frederick National Laboratory for Cancer Research.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room TE406, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Caron A. Lyman, Ph.D. Executive Secretary, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Room 7W–126, Bethesda, MD 20892, 240–276–6348, *lymanc@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NCI Shady Grove has instituted stringent procedures for entrance into the NCI Shady Grove building. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/fac/fac.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 12, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27186 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Topic 110 MRI Myocardial Biopsy Review.

Date: January 14, 2020.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Melissa E. Nagelin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7202, Bethesda, MD 20892, 301–435–0297, *nagelinmh2@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 12, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27188 Filed 12–17–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–NEW]

Agency Information Collection Activities; New Collection: Sponsor Deeming and Agency Reimbursement

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed new collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 18, 2020.

ADDRESSES: All submissions received must include the OMB Control Number 1615–NEW in the body of the letter, the agency name and Docket ID USCIS–2019–0026. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2019–0026;

(2) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW, Washington, DC 20529–2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW, Washington, DC 20529–2140, telephone number 202–272–8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Proposed Collection of Information

This information collection allows federal means-tested public benefit agencies who are registered to use the Systematic Alien Verification for Entitlements (SAVE) program, and who confirm the immigration status of certain persons applying for specified licenses and benefits using sponsorship data, to provide information regarding use of sponsorship data in deeming and reimbursement processes. The purpose for collecting this information is to support Federal means-tested benefit granting agencies in the administration and oversight of their respective benefit programs as they relate to deeming and reimbursement processes in order to better monitor system and information use, and perform actions to ensure compliance regarding SAVE program rules, federal sponsorship requirements, and deeming and reimbursement obligations.

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2019–0026 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Sponsor Deeming and Agency Reimbursement.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* G–1552; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Federal Government; or State or local Government. The G–1552 is created to collect information via the Systematic Alien Verification for Entitlements (SAVE) program regarding actions that agencies adjudicating federal means-tested public benefits take to (1) deem sponsor income as part of applicant income for purposes of federal means-tested benefits eligibility and (2) seek reimbursement from sponsors for the value of federal means-tested public benefits provided to sponsored applicants.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection G–1552 is 324,737 and the estimated hour burden per response is 0.042 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 13,639 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual

cost burden associated with this collection of information is $0.

Dated: December 13, 2019.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2019–27283 Filed 12–17–19; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0135]

Agency Information Collection Activities; Revision, of a Currently Approved Collection: Application for Carrier Documentation

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 18, 2020.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0135 in the body of the letter, the agency name and Docket ID USCIS–2015–0004. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2015–0004;

(2) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW, Washington, DC 20529–2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW, Washington, DC 20529–2140, telephone number 202–272–8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2015–0004 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Carrier Documentation.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–131A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the information provided on Form I–131A to verify the status of permanent or conditional residents, and determine whether the applicant is eligible for the requested travel document.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–131A is 5,100 and the estimated hour burden per response is .92 hours; biometrics processing is 5,100 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 10,659 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $919,275.

Dated: December 13, 2019.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2019–27281 Filed 12–17–19; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–NWRS–2019–N167; FF06R0OP00–FXRS12610600000–201]

National Bison Range, MT; Availability of the Final Record of Decision for the Final Comprehensive Conservation Plan and Final Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the final record of decision for the final comprehensive conservation plan and final environmental impact statement for the National Bison Range in Montana.

ADDRESSES: You may view or obtain copies of the final ROD, the final CCP, final EIS, or other project information by any of the following methods:

- *Agency Website: https://www.fws.gov/mountain-prairie/refuges/nbrc.php.*
- *Email: scoping_nbr@fws.gov.* Include ''Request National Bison Range final ROD'' in the subject line of your email message.
- *U.S. Mail:* National Bison Range, 58355 Bison Range Road, Moiese, MT 59824.
- *Local Libraries:* The documents are available at the libraries listed under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Amy Coffman, Refuge Manager, at 406–644–2211, x204 (phone), or *amy_coffman@fws.gov* (email), or Vanessa Fields, Planning Team Leader, at 406–727–7400, x219 (phone), or *vanessa_fields@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the comprehensive conservation plan (CCP) and final environmental impact statement (EIS) process for the National Bison Range in Montana (refuge, NBR). We published a notice of intent (NOI) to develop a CCP and EIS, and a request for comments, in the **Federal Register** on May 18, 2017 (82 FR 22843), which opened a comment period until June 19, 2017. That NOI was a revision to an earlier NOI we published on January 18, 2017 (82 FR 5597), which opened a comment period that ended on February 17, 2017. After the scoping period and the development of alternatives, a draft CCP and draft EIS were made available for a 45-day public review and comment period, which closed on May 20, 2019 (April 5, 2019, 84 FR 13662). A second NOA was published in the **Federal Register** on September 6, 2019 (84 FR 46950), announcing publication of the final CCP and final EIS. The review period ended October 7, 2019. For general background on the CCP process and the NBR, please see the May 18, 2017, notice (82 FR 22844).

The primary planning area for this decision is the congressionally designated boundary of the refuge, located in Sanders and Lake Counties, Montana. The 18,800-acre NBR is located where three major geographic features merge, Mission Valley, Mission Mountain Range, and Jocko River Valley. The glacial history of the region has had a pronounced influence on the soils and landforms. Grasslands dominate the landscape at lower elevations, dotted with wetland and riparian vegetation along seasonal drainages and around seeps and springs. Mixed-conifer forest occurs at the upper elevations. The Jocko River and Mission Creek form riparian and wetland corridors along the north and south boundaries of the refuge. Invasive plant species are recognized as an important factor affecting ecosystem function and health on the refuge.

The NBR provides cover, food, water, and sufficient space for numerous native wildlife species. The NBR supports a healthy population of plains bison as well as populations of other native ungulates and a variety of predators. The refuge also supports over 200 native bird species. In addition to the federally threatened grizzly bear and bull trout, there are 43 Montana species of concern that occur on the refuge.

Although people have lived in the region for thousands of years, relatively few cultural resource sites have been formally recorded on the refuge. It is anticipated that a wide range of undocumented cultural resource types are located on the NBR. These could include, but would not be limited to, pre-contact and/or protohistoric open camps, stone circles and alignments, cairns, lithic scatters, rock shelters, trails and roads, drive-lines, kill (*i.e.,* jump or pound) sites, hunting blinds, eagle traps, fasting beds, and rock imagery, as well as historic buildings and structures associated with the mission and operation of the NBR.

Visitors come from all over the country and other parts of the world to learn about NBR and enjoy a variety of wildlife-dependent recreational activities. In 2017, NBR welcomed approximately 180,000 visitors. Annual visitation to the NBR is concentrated during spring through fall, when the full length of the Red Sleep Mountain Drive is open. Wildlife observation, photography, and hiking account for an estimated 94 percent of visits to the NBR. NBR affects the economy through the resident and nonresident visitor spending it generates, the employment it supports, and the value it adds to the surrounding area.

National Environmental Policy Act

In accordance with the National Environmental Policy Act (NEPA; 40 CFR 1506.6(b)) requirements, this notice announces the availability of the final ROD for the final CCP and final EIS for the National Bison Range. We completed a thorough analysis of the environmental, social, and economic considerations associated with our actions. The final ROD documents our selection of Alternative C, the preferred alternative.

The CCP will guide us in managing and administering the National Bison Range for the next 15 years. Alternative C, as we described in the final EIS/ROD, is the foundation for the CCP.

CCP Alternatives and Selected Alternative

Our final CCP and final EIS (84 FR 46950, September 6, 2019) addressed several issues. To address these, we developed and evaluated the following alternatives:

- Alternative A—No Action, which would continue all the current management activities and maintain funding, infrastructure, all current programs, and staffing at existing levels;
- Alternative B, which emphasizes managing habitat and wildlife populations, as well as NBR infrastructure and operations, to provide quality wildlife-dependent opportunities for the public; and
- Alternative C, which emphasizes maintaining and, where feasible, enhancing ecological communities while recognizing ever-changing environmental conditions.

After consideration of the more than 300 comments that we received on the draft CCP and draft EIS, we selected Alternative C. It is the alternative that best meets the purposes of the refuge, the mission of the National Wildlife Refuge System, and the vision and management goals set for the National Bison Range; and it adheres to Service policies and guidelines. It considers the interests and perspectives of many agencies, organizations, Tribes, and the public. Additionally, it is the environmentally preferred alternative.

Alternative C emphasizes maintaining and, where feasible, enhancing ecological communities while

recognizing ever-changing environmental conditions. In cooperation with our partners, the Service will develop and utilize a prioritization framework to identify and define future conditions that will drive management actions to build ecological community resiliency, promote species and genetic diversity, and build sustainability in management capacity and operations.

Under this alternative, the Service will seek to facilitate collaborative, cooperative, and coordinated management of NBR with our Federal, Tribal, State, local, public, and private partners. Where possible, the refuge will participate in landscape-level management of wildlife species, evaluate cross-boundary movements, and create corridors conducive to wildlife migration and movement. The Service will also seek ways to incorporate the expertise, resources, and efforts of our partners to help facilitate the benefits of a broader functioning landscape.

Public Availability of Documents

In addition to the methods in **ADDRESSES**, you can view or obtain the final ROD, the final CCP, and final EIS at the following public libraries:

Library	Address	Phone No.
Flathead County Library	247 First Avenue East, Kalispell, Montana 59901	406–758–5820
Missoula Public Library	301 Main Street, Missoula, Montana 59802	406–721–2665
Plains Public Library	P.O. Box 399, Plains, Montana 59859	406–826–3101
Ronan City Library	203 Main Street SW, Ronan, Montana 59864	406–676–3682
North Lake County Public Library	2 First Avenue East, Polson, Montana 59860	406–883–8225
St. Ignatius School—Community Library	76 Third Avenue, Saint Ignatius, Montana 59865	406–745–3811
Bigfork Library	525 Electric Avenue, Bigfork, Montana 59911	406–837–6976

Noreen Walsh,

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2019–27267 Filed 12–17–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES962000 L53200000 BJ0000 14X]

Notice of Filing of Plats of Surveys; Eastern States

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of land Management (BLM), Eastern States Office, Washington, DC, 30 days from the date of this publication. The surveys, executed at the request of the identified agencies, are required for the management of these lands.

DATES: Unless there are protests of this action, the filing of the plat described in this notice will happen on January 17, 2020.

ADDRESSES: Written notices protesting any of these surveys must be sent to the State Director, BLM Eastern States, 20 M Street SE, Suite 950, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Leon W. Chmura, Acting Chief Cadastral Surveyor for Eastern States; (202) 912–7756; email: *lchmura@blm.gov;* or U.S. Postal Service: BLM–ES, 20 M Street SE, Suite 950, Washington, DC 20003. Attn: Cadastral Survey. Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The service 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 dependent resurvey of a portion of Meadowood Farm, East of Belmont Boulevard, Fairfax County, in the State of Virginia. Survey requested by the Bureau of Land Management (BLM), Eastern States, Lower Potomac Field Office.

A person or party who wishes to protest a survey must file a written notice of protest within 30 calendar days from the date of this publication at the address listed in the **ADDRESSES** section of this notice. A notice of protest is considered filed on the date it is received by the State Director for Eastern States during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. Any notice of protest filed after the scheduled date of official filing will be untimely and will not be considered. A statement of reasons for the protest may be filed with the notice of protest and must be filed within 30 calendar days after the protest is filed. If a notice of protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the next business day after all protests have been dismissed or otherwise resolved.

Before including your address, phone number, email address, or other personal identifying information in your notice of protest or statement of reasons, please be aware that your entire protest, including your personal identifying information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

A copy of the described plats will be placed in the open files, and available to the public, as a matter of information.

Authority: 43 U.S.C. Chap. 3.

Leon W. Chmura,

Acting Chief Cadastral Surveyor for Eastern States.

[FR Doc. 2019–27201 Filed 12–17–19; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NRSS–WRD–NPS0028654; PPWONRADW0, PPMRSNR1Y.NM0000 (200); 0MB Control Number 1024–NEW]

Agency Information Collection Activities; National Park Service Watercraft Inspection Decontamination Regional Data-Sharing for Trailered Recreational Boats

AGENCY: National Park Service, Interior.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before January 17, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's (OMB) Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov*; or by

facsimile at 202–395–5806. Please provide a copy of your comments to Phadrea Ponds, Acting Information Collection Clearance Officer, National Park Service, 1201 Oakridge Drive, Fort Collins, CO 80525; or by email at *phadrea_ponds@nps.gov.* Please reference OMB Control Number 1024–NEW (Quagga) in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact John Wullschleger, Fish Program Lead, Water Resources Division, Natural Resource Stewardship and Science Directorate, National Park Service, 1201 Oakridge Dr., Suite 20, Fort Collins, CO 80525; or by email at *john_wullschleger@nps.gov.* Please reference OMB Control Number 1024–NEW (Quagga) in the subject line of your comments.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

On February 8, 2019, we published a **Federal Register** notice soliciting comments on this collection of information for 60 days, ending on April 9, 2019 (84 FR 2920). We did not receive any comments in response to the notice.

We are again soliciting comments on the proposed ICR described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the NPS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the NPS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the NPS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The NPS is authorized by the Lacey Act (18 U.S.C. 42, 16 U.S.C. 3371–3378 *et seq.*) to deter the possession and transport of zebra/quagga mussels which are listed as an invasive species under this legislation. To comply with this directive, the NPS is requesting approval to collect information from recreational boaters entering or exiting water areas managed by the agency to prevent the spread of quagga/zebra mussels through the movement of trailered watercraft. This data is necessary to document the presence of invasive species and evaluate any risks associated with the unintentional introduction of quagga/zebra mussels in waters managed by the NPS. The information collection will be administered on boat ramps using a mobile application to be filled out by NPS staff using a tablet, smartphone, or similar device. Collection of this information is mandatory for all watercrafts entering and exiting waters managed by the NPS that participate in Watercraft Inspection and Decontamination programs.

Title of Collection: National Park Service Watercraft Inspection Decontamination Regional Data-Sharing for Trailered Recreational Boats.

OMB Control Number: 1024–NEW.

Form Numbers: None.

Type of Review: Request for a new collection.

Respondents/Affected Public: Individuals and households.

Total Estimated Number of Annual Respondents: 160,000.

Total Estimated Number of Annual Responses: 160,000.

Estimated Completion Time per Response: 1 minute for 120,000 low-risk watercrafts and 3 minutes for 40,000 high-risk watercrafts.

Total Estimated Number of Annual Burden Hours: 4,000.

Respondent's Obligation: Mandatory.

Frequency of Collection: One-time per launch site.

Total Estimated Annual Non-Hour Burden Cost: None.

Activity	Responses	Annual number of responses	Completion time per response (minutes)	Total annual burden hours
Low Risk	Recreational	108,000	1	1,800
	Commercial	12,000	1	200
High Risk	Recreational	36,000	3	1,800
	Commercial	4,000	3	200
Total		160,000		4,000

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Acting, Information Collection Clearance Officer, National Park Service.

[FR Doc. 2019–27252 Filed 12–17–19; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1082]

Certain Gas Spring Nailer Products and Components Thereof;

Commission Determination To Review in Part a Remand Initial Determination Finding No Violation of Section 337; Request for Written Submissions on Remedy, Bonding, and the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''the Commission'') has determined to review in part a remand initial determination (''RID'') of the presiding administrative law judge (''ALJ'') finding no violation of section 337. The Commission is also requesting written submissions on remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 20, 2017, based on a complaint filed on behalf of Kyocera Senco Brands Inc. (''Kyocera'') of Cincinnati, Ohio. 82 FR 55118–19 (Nov. 20, 2017). The complaint, as amended and supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain gas spring nailer products and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 8,011,547 (''the '547 patent''); 8,267,296 (''the '296 patent''); 8,27,297 (''the '297 patent''); 8,387,718 (''the '718 patent''); 8,286,722 (''the '722 patent''); and 8,602,282 (''the '282 patent''). The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named as a respondent Hitachi Koki U.S.A., Ltd. (''Hitachi'') of Braselton, Georgia. The Office of Unfair Import Investigations is not participating in the investigation. The '547 patent has been terminated from the investigation and the notice of investigation was amended to add claim 30 of the '297 patent to the investigation. Order No. 13 (June 4, 2018), *unreviewed by* Comm'n Notice (June 22, 2018); Order No. 15 (June 19, 2018), *unreviewed by* Comm'n Notice (July 9, 2018), 83 FR 32685–66 (July 15, 2018). Prior to the evidentiary hearing, the parties stipulated that the '718 patent is the only remaining patent at issue since no violation could be shown as to the '296, '297, '722, and '282 patents based on an evidentiary ruling limiting the scope of testimony of Kyocera's expert. *See* ID at 1–2.

On June 7, 2019, the ALJ issued a final ID finding no violation of section 337 as to the '718 patent based on non-infringement and the failure of Kyocera to establish the existence of a domestic industry that practices the '718 patent. Specifically, the ID finds that neither Hitachi's accused products nor Kyocera's domestic products satisfy the ''system controller'' limitation of the asserted claims.

On August 14, 2019, the Commission determined to review the ID and remand in part. *See* Comm'n Notice (Aug. 14, 2019). Specifically, the Commission determined to review the ID's finding that Kyocera did not establish: (1) Either direct or induced infringement of the asserted claims of the '718 patent; and (2) practice of the asserted claims by Kyocera's DI products to satisfy the domestic industry requirement. The Commission also determined to review the ID's finding that Kyocera demonstrated sufficient activities and investments relating to the articles protected by the '718 patent to satisfy the domestic industry requirement. *Id.* Also, the Commission remanded the issues of whether Kyocera has established, by a preponderance of the evidence, that: (1) The remaining limitations (irrespective of the ''system controller'' limitation) of the asserted claims of the '718 patent are met by Hitachi's accused products; (2) the remaining limitations of the asserted claims are practiced by Kyocera's domestic industry products; and (3) Hitachi induced infringement of the asserted claims. *Id.*

On October 28, 2019, the ALJ issued the subject RID finding no violation of section 337 as to the '718 patent based on non-infringement and the failure of Kyocera to establish the existence of a domestic industry that practices the '718 patent. Specifically, the RID finds that: (1) Neither Hitachi's accused products nor Kyocera's domestic industry (''DI'') products satisfy the ''displacement volume'' limitation (*i.e.,* '' (A) a hollow cylinder comprising a cylindrical wall with a movable piston therewith, said hollow cylinder containing a displacement volume created by a stroke of said piston'') and the ''initiating a driving cycle'' limitation (*i.e.,* ''initiating a driving cycle by pressing said exit end against a workpiece and actuating said trigger, thereby causing said fastener driving mechanism to force the driver member to move toward said exit end and drive a fastener into said workpiece'') of the asserted claims and (2) Kyocera fails to establish that Hitachi possesses the requisite specific intent to induce infringement of the claims.

On November 12, 2019, Kyocera petitioned, and Hitachi contingently petitioned, for review of the RID. On November 20, 2019, Kyocera and Hitachi each filed a response in opposition to the other party's petition for review.

Having reviewed the record of the investigation, including the parties' briefing, the Commission has determined to review the subject RID in part. Specifically, the Commission has determined to review the RID's finding that Kyocera did not establish: (1) Direct infringement of the asserted claims with respect to the ''displacement volume'' and ''initiating a driving cycle'' limitations; (2) practice of the asserted claims by its DI products with respect to these limitations; and (3) induced infringement of the asserted claims. The Commission has determined not to review the remainder of the RID.

The Commission also requests that the parties brief the following questions on review:

1. With respect to the economic prong of the domestic industry requirement, did the ID address the contextual analysis required by our precedent to determine if Kyocera's investments are significant? *See, e.g., Certain Carburetors and Products Containing Such Carburetors,* Inv. No. 337–TA–1123, Comm'n Op. at 17–19 (Oct. 28, 2019). If not, does the record evidence support a finding that Kyocera satisfies this requirement?

2. Did Hitachi present any argument(s) concerning contextual analysis in its petition for review? If so, please identify the argument(s) and the relevant petition pages, evidence, and authorities cited on the issue.

3. Does the RID's interpretation and application of the ''initiating a driving cycle'' limitation exclude the embodiments depicted in Figures 1 and 16 of the '718 patent?

Responses or replies to the briefing questions should not exceed 30 pages.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that results in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respective respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

When the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* section 337(j), 19 U.S.C. 1337(j) and the Presidential Memorandum of July 21, 2005. 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues under review that specifically address the Commission's questions set forth in this notice. The submissions should be concise and thoroughly referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, bonding, and the public interest. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

Complainant is also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the asserted patent expires, the HTSUS numbers under which the accused products are imported, and to supply the names of known importers of the products at issue in this investigation. The responses to the questions on review, written submissions, and proposed remedial orders must be filed no later than close of business on January 3, 2020. Reply submissions must be filed no later than the close of business on January 10, 2020. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight true paper copies to the Office of the Secretary pursuant to Section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 337–TA–1082'') in a prominent place on the cover page and/or the first page. (*See* Handbook on Filing Procedures, *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary at (202) 205–2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records 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,[1] solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: December 12, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–27200 Filed 12–17–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[AAG/A Order No. 001/2019]

Privacy Act of 1974; Matching Program

AGENCY: Justice Management Division, United States Department of Justice.

[1] All contract personnel will sign appropriate nondisclosure agreements.

ACTION: Notice of a new matching program.

SUMMARY: The Department of Justice (DOJ) is issuing a public notice of its intent to conduct a computer matching program with the Internal Revenue Service (IRS), Department of the Treasury. Under this matching program, entitled Taxpayer Address Request (TAR), the IRS will provide information relating to taxpayers' mailing addresses to the DOJ for purposes of enabling DOJ to locate debtors to initiate litigation and/or enforce the collection of debts owed by the taxpayers to the United States.

DATES: This matching program will become effective on January 30, 2020. This matching program will continue for 18 months after the effective date. Please submit any comments by January 17, 2020.

ADDRESSES: Interested persons are invited to submit written comments regarding this notice by mail to Dennis Dauphin, Director, Debt Collection Management Staff, Justice Management Division, 145 N St. NE, Rm 6W.102, Washington, DC 20530, or by email at *Dennis.E.Dauphin2@usdoj.gov.*

FOR FURTHER INFORMATION CONTACT: Dennis Dauphin, Director, Debt Collection Management Staff, Justice Management Division, *Dennis.E.Dauphin2@usdoj.gov,* 145 N St. NE, Rm 6W.102, Washington, DC 20530.

SUPPLEMENTARY INFORMATION: This agreement re-establishes a matching program between the IRS and the DOJ to provide DOJ with the mailing address of taxpayers to assist the Department in its effort to collect or to compromise debts owed to the United States. DOJ will provide to the IRS an electronic file containing the names and Social Security Numbers (SSN) of individuals who owe debts to the U.S. and whose debts have been referred to DOJ for litigation and/or enforced collection. The IRS provides direct notice to taxpayers in the instructions to Forms 1040, 1040A, and 1040EZ, and constructive notice in the **Federal Register** system of records notice. The notice provides taxpayers that information provided to the U.S. Individual Income Tax Returns may be given to other Federal agencies, as provided by law. For the records involved in this match, both IRS and DOJ have provided constructive notice to record subjects through the publication, in the **Federal Register**, of systems of records notices that contain routine uses permitting disclosures for this matching program.

Participating Agencies: The participating agencies include: DOJ and the IRS.

Authority for Conducting the Matching Program: This matching agreement is executed pursuant to 5 U.S.C. 552a(o), the Privacy Act of 1974, as amended, and sets forth the terms under which the IRS agrees to disclose taxpayer mailing addresses to the DOJ. This matching program is being conducted under the authority of the Internal Revenue Code § 6103(m)(2), and the routine uses published in the agencies' Privacy Act systems of records notices for the systems of records used in this match. This provides for disclosure, upon written request, of a taxpayer's mailing address for use by officers, employees, or agents of a Federal agency for the purpose of locating such taxpayer to collect or compromise a Federal claim against the taxpayer in accordance with Title 31, §§ 3711, 3717, and 3718. These statutory provisions authorize DOJ to collect debts on behalf of the United States through litigation.

Purposes: The purpose of this program is to provide DOJ with the most current addresses of taxpayers, to notify debtors of legal actions that may be taken by DOJ and the rights afforded them in the litigation, and to enforce collection of debts owed to the United States.

Categories of Individuals: Individuals who owe debts to the United States and whose debts have been referred to the DOJ for litigation and/or enforced collection.

Categories of Records: DOJ will submit the nine-digit SSN and four-character Name Control (the first four letters of the surname) of each individual whose current address is requested. IRS will provide:

a. Nine-digit SSN and four-character Name Control; and

b. The latest street address, P.O. Box, or other address, city, State and ZIP Code, only if the input SSN and Name Control both match the Individual Master File (IMF); or

c. A code explaining that no match was found on the IMF.

Systems of Records: DOJ will provide records from the Debt Enforcement System, JUSTICE/DOJ–016, last published in its entirety at 77 FR 9965–9968 (February 21, 2012). This system of records contains information on persons who owe debts to the United States and whose debts have been referred to the DOJ for litigation and/or enforced collection. DOJ records will be matched against records contained in Treasury's Privacy Act System of Records: Customer Account Data Engine (CADE) IMF, Treasury/IRS 24.030, last published at 77 FR 47948 (Aug. 10, 2012). This system of records contains, among other information, the taxpayer's name, SSN, and most recent address known by IRS. CADE is maintained at the Martinsburg Computing Center (MCC), and the notice for this system of records was last published at 80 FR 54082 (September 8, 2015).

In accordance with 5 U.S.C. 552a(o)(2)(A) and 5 U.S.C. 552a(r), the Department has provided a report to the Office of Management and Budget (OMB) and Congress on this new Computer Matching Program.

Dated: November 4, 2019.

Lee J. Lofthus,

Assistant Attorney General for Administration, United States Department of Justice.

[FR Doc. 2019–27174 Filed 12–17–19; 8:45 am]

BILLING CODE 4410–CN–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 19–10]

Report on the Selection of Eligible Countries for Fiscal Year 2020

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This report is provided in accordance with section 608(d)(2) of the Millennium Challenge Act of 2003, as amended (the ''Act''), 22 U.S.C. 7707(d)(2).

Dated: December 13, 2019.

Christopher J. Dunn,

Acting VP/General Counsel and Corporate Secretary.

Report on the Selection of Eligible Countries for Fiscal Year 2020

Summary

This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, as amended (the Act) (22 U.S.C. 7707(d)(1)).

The Act authorizes the provision of assistance under section 605 of the Act (22 U.S.C. 7704) to countries that enter into compacts with the United States to support policies and programs that advance the progress of such countries in achieving lasting economic growth and poverty reduction, and are in furtherance of the Act. The Act requires the Millennium Challenge Corporation (MCC) to determine the countries that will be eligible to receive assistance for the fiscal year, based on their

demonstrated commitment to just and democratic governance, economic freedom, and investing in their people, as well as on the opportunity to reduce poverty and generate economic growth in the country. The Act also requires the submission of reports to appropriate congressional committees and the publication of notices in the **Federal Register** that identify, among other things:

1. The countries that are ''candidate countries'' for assistance for fiscal year (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 (22 U.S.C. 7707(a)));

2. The criteria and methodology that the Board of Directors of MCC (the Board) will use to measure and evaluate the policy performance of the ''candidate countries'' consistent with the requirements of section 607 of the Act 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 with which of the eligible countries the Board will seek to enter into compacts (section 608(d) of the Act (22 U.S.C. 7707(d))).

This is the third of the above-described reports by MCC for FY 2020. It identifies countries determined by the Board to be eligible under section 607 of the Act (22 U.S.C. 7706) for FY 2020 with which the MCC will seek to enter into compacts under section 609 of the Act (22 U.S.C. 7708), as well as the justification for such decisions. The report also identifies countries selected by the Board to receive assistance under MCC's threshold program pursuant to section 616 of the Act (22 U.S.C. 7715).

Eligible Countries

The Board met on December 9, 2019, to select those eligible countries with which the United States, through MCC, will seek to enter into a Millennium Challenge Compact pursuant to section 607 of the Act (22 U.S.C. 7706). The Board selected the following eligible country for such assistance for FY 2020: Mozambique. The Board also selected the following previously-selected countries for compact assistance for FY 2020: Benin, Burkina Faso, Côte d'Ivoire, Indonesia, Lesotho, Malawi, Niger, Timor-Leste, and Tunisia.

Criteria

In accordance with the Act and with the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2020'' formally submitted to Congress on September 18, 2019, selection was based primarily on a country's overall performance in three broad policy categories: *Ruling Justly, Encouraging Economic Freedom,* and *Investing in People.* The Board relied, to the fullest extent possible, upon transparent and independent indicators to assess countries' policy performance and demonstrated commitment in these three broad policy areas. The Board compared countries' performance on the indicators relative to their income-level peers, evaluating them in comparison to either the group of countries with a GNI per capita equal to or less than $1,925, or the group with a GNI per capita between $1,925 and $3,995.

The criteria and methodology used to assess countries on the annual scorecards are outlined in the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2020 [1]''. Scorecards reflecting each country's performance on the indicators are available on MCC's website at *www.mcc.gov/scorecards.*

The Board also considered whether any adjustments should be made for data gaps, data lags, or recent events since the indicators were published, as well as strengths or weaknesses in particular indicators. Where appropriate, the Board took into account additional quantitative and qualitative information, such as evidence of a country's commitment to fighting corruption, investments in human development outcomes, or poverty rates. In keeping with legislative directives, the Board also considered the opportunity to reduce poverty and promote economic growth in a country, in light of the overall information available, as well as the availability of appropriated funds.

The Board sees the selection decision as an annual opportunity to determine where MCC funds can be most effectively used to support poverty reduction through economic growth in relatively well-governed, poor countries. The Board carefully considers the appropriate nature of each country partnership—on a case-by-case basis—based on factors related to economic growth and poverty reduction, the sustainability of MCC's programs, and the country's ability to attract and leverage public and private resources in support of development.

This was the second year the Board considered the eligibility of countries for concurrent compacts. In addition to the considerations for compact eligibility detailed above, the Board considered whether a country being considered for a concurrent compact is making considerable and demonstrable progress in implementing the terms of its existing Compact.

This was the eleventh year the Board considered the eligibility of countries for subsequent compacts, as permitted under section 609(l) of the Act. MCC's engagement with partner countries is not open-ended, and the Board is deliberate when selecting countries for follow-on partnerships, particularly regarding the higher bar applicable to subsequent compact countries. In making these selection decisions, the Board considered—in addition to the criteria outlined above—the country's performance implementing its first compact, including the nature of the country's partnership with MCC, the degree to which the country has demonstrated a 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. To the greatest extent possible, these factors were assessed using pre-existing monitoring and evaluation targets and regular quarterly reporting. This information was supplemented with direct surveys and consultation with MCC staff responsible for compact implementation, monitoring, and evaluation. MCC published a Guide to Supplemental Information [2] and a Guide to the Compact Survey Summary [3] in order to increase transparency about the type of supplemental information the Board uses to assess a country's policy performance and compact implementation performance. The Board also considered a country's commitment to further sector reform, as well as evidence of improved scorecard policy performance.

In addition, this is the fourth year where the Board considered an explicit higher bar for those countries close to the upper end of the candidate pool, looking closely in such cases at a country's access to development

[1] Available at *https://www.mcc.gov/resources/doc/report-selection-criteria-methodology-fy20.*

[2] Available at *https://www.mcc.gov/resources/doc/guide-to-supplemental-information-fy20.*

[3] Available at *https://www.mcc.gov/resources/doc/guide-to-the-compact-survey-summary-fy20.*

financing, the nature of poverty in the country, and its policy performance.

Countries Newly Selected for Compact Assistance

Using the criteria described above, one candidate country under section 606(a) of the Act (22 U.S.C. 7705(a) was newly selected for assistance under section 607 of the Act (22 U.S.C. 7706): Mozambique. In accordance with section 609(k) of the Act, no candidate countries were newly selected to explore development of a concurrent compact program under section 607 of the Act (22 U.S.C. 7706).

Mozambique: Mozambique successfully completed its first MCC compact in September 2013 and has recently demonstrated encouraging policy improvement on the MCC scorecard, passing 13 of 20 indicators, with clear improvement on its Control of Corruption score. A new compact would build on the country's continued commitment to sector reform and MCC's strong relationship with the country developed under the first compact partnership. By selecting Mozambique for a compact, MCC will support the government's efforts to strengthen economic growth to reduce poverty.

Countries Selected To Continue Compact Development

Nine of the countries selected for compact assistance for FY 2020 were previously selected for FY 2019. Burkina Faso, Indonesia, Lesotho, Malawi, Timor-Leste, and Tunisia were selected to continue developing bilateral compacts. Benin, Burkina Faso, Côte d'Ivoire, and Niger were selected to continue developing concurrent compacts for the purpose of regional integration. Selection of these countries for FY 2020 was based on their continued or improved policy performance since their prior selection.

Countries Selected To Receive Threshold Program Assistance

The Board selected Kenya to receive threshold program assistance.

Kenya: Kenya offers MCC the opportunity to engage with the country on policy and institutional reform. Kenya is an important partner in East Africa, where MCC's presence is growing. Although Kenya has not previously passed the Control of Corruption indicator on the MCC scorecard, its performance rose to the 50th percentile this year (a country must score above the 50th percentile to pass the indicator). More broadly, Kenya passes 15 of 20 indicators overall on the scorecard, including the Democratic Rights ''hard hurdle'' indicators.

Countries Selected To Continue Developing Threshold Programs

The Board selected Ethiopia and Solomon Islands to continue developing threshold programs. Ethiopia has continued on its reform path and saw improvements on the democratic rights ''hard hurdle'' indicators of political rights and civil liberties this year. Solomon Islands held successful elections in April 2019 and continues apace with program development.

Ongoing Review of Partner Countries' Policy Performance

The Board emphasized the need for all partner countries to maintain or improve their policy performance. If it is determined during compact implementation that a country has demonstrated a significant policy reversal, MCC can hold it accountable by applying MCC's Suspension and Termination Policy.[4]

[FR Doc. 2019–27284 Filed 12–13–19; 4:15 p.m.]

BILLING CODE 9211–03–P

[4] Available at *https://www.mcc.gov/resources/doc/policy-on-suspension-and-termination.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–19–0018; NARA–2020–014]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: NARA must receive comments by February 3, 2020.

ADDRESSES: You may submit comments by either of the following methods. You must cite the control number, which appears on the records schedule in parentheses after the name of the agency that submitted the schedule.

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *Mail:* Records Appraisal and Agency Assistance (ACR); National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001.

FOR FURTHER INFORMATION CONTACT: Records Management Operations by email at *request.schedule@nara.gov,* by mail at the address above, or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule. We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we have made to the proposed records schedule. We will then send the schedule for final approval by the Archivist of the United States. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the

Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Homeland Security, Agency-wide, Administrative and Operational Records Common to All Offices (DAA–0563–2019–0008).

2. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Engineering and Research Records (DAA–0571–2015–0015).

3. Commodity Futures Trading Commission, Agency-wide, External Outreach Records (DAA–0180–2018–0007).

4. Office of Personnel Management, Agency-wide, Records of the Agency Compliance and Evaluation Program (DAA–0478–2019–0001).

5. Securities and Exchange Commission, Division of Corporation Finance, Confidential Treatment Materials (DAA–0266–2019–0002).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2019–27203 Filed 12–17–19; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Ocean Sciences

Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Proposal Review Panel for Ocean Sciences OCE (#10752).

Date and Time: February 26–28, 2020; 9:00 a.m. to 5:00 p.m.

Place: JOIDES Resolution Science Operator (JRSO), 1000 Discovery Drive, College Station, TX 77840.

Type of Meeting: Part Open.

Contact Person: James Allan, Program Director, Division of Ocean Science; National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone: (703) 292–8583.

Purpose of Meeting: To provide advice and recommendations regarding Operations and Management of the Drilling Vessel JOIDES Resolution for the International Ocean Discovery Program (IODP) and JR100 program relating to performance in FY2019 under Cooperative Agreement Award 1326927.

Agenda

Wednesday, February 26, 2020

9:00 a.m.–9:15 a.m. NSF and panel introduction
9:15 a.m.–11:00 a.m. Initial Report of the JOIDES Resolution Science Operator (JRSO)—(Open)
11:00 a.m.–12:00 p.m. Co-Chief Review Report for FY2019—(Open)
12:00 p.m.–1:00 p.m. Lunch
1:00 p.m.–3:00 p.m. JRSO response to Co-Chief Review Report—(Open)
3:00 p.m.–4:00 p.m. Meet with JRSO Staff—(Open)
4:00 p.m.–5:00 p.m. Site Visit Panel discussion of presentations and overnight questions to JRSO—(Closed)

Thursday, February 27, 2020

9:00 a.m.–11:00 a.m. JRSO discussion of major challenges and successes in operational context, and how they are responding—(Open)
11:00 a.m.–12:00 p.m. Effectiveness of IODP Programmatic Planning Structure—(Open)
12:00 p.m.–1:00 p.m. Lunch
1:00 p.m.–2:00 p.m. JRSO discussion of major challenges in providing services and innovation to IODP science community, and how they are responding—(Open)
2:00 p.m.–3:00 p.m. Response of JRSO to any remaining Panel questions—(Open)
3:00 p.m.–3:30 p.m. Break
3:30 p.m.–5:00 p.m. Site Visit Panel Discussion on panel report structure and overnight questions to JRSO—(Closed)

Friday, February 28, 2020

9:00 a.m.–10:00 a.m. Site Visit Panel discussion; work on report—(Closed)
10:00 a.m.–11:00 a.m. Response of JRSO to Panel questions—(Open)
11:00 a.m.–12:00 p.m. Site Visit Panel discussion; work on report—(Closed)
12:00 p.m.–1:00 p.m. Lunch—(Closed)
1:00 p.m.–3:30 p.m. Site Visit Panel discussion; work on report—(Closed)
3:30 p.m.–4:00 p.m. Break
4:00 p.m.–5:00 p.m. Site Visit Panel presents report and recommendations to JRSO—(Closed)

Reason for Closing: The program being reviewed during closed portions of the meeting will include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the program. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: December 12, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–27180 Filed 12–17–19; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–293; NRC–2019–0247]

Holtec Decommissioning International, LLC; Pilgrim Nuclear Power Station

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of exemptions that would permit the licensee to reduce its emergency planning (EP) activities at the Pilgrim Nuclear Power Station (Pilgrim). Specifically, the licensee is seeking exemptions that would eliminate the requirements for the licensee to maintain offsite radiological emergency plans and reduce some of the onsite EP activities based on the reduced risks at Pilgrim, which is permanently shut down and defueled. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities would be retained. In addition, offsite EP provisions would still exist through State and local government use of a comprehensive emergency management plan process, in accordance with the Federal Emergency Management Agency's (FEMA's) Comprehensive Preparedness Guide (CPG) 101, ''Developing and Maintaining Emergency Operations Plans.'' The NRC staff is issuing a final Environmental Assessment (EA) and final Finding of No Significant Impact (FONSI) associated with the proposed exemptions.

DATES: The EA and FONSI referenced in this document are available on December 18, 2019.

ADDRESSES: Please refer to Docket ID NRC–2019–0247 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0247. 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.
- *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. In addition, for the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the AVAILABILITY OF DOCUMENTS section of 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.

FOR FURTHER INFORMATION CONTACT: Scott P. Wall, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2855; email: *Scott.Wall@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated November 10, 2015 (ADAMS Accession No. ML15328A053), Entergy Nuclear Operations, Inc. (ENOI) certified to the NRC that it planned to permanently cease power operations at Pilgrim no later than June 1, 2019. By letter dated June 10, 2019 (ADAMS Accession No. ML19161A033), ENOI certified to the NRC that power operations permanently ceased at Pilgrim on May 31, 2019, and that the fuel was permanently removed from the Pilgrim reactor vessel and placed in the spent fuel pool (SFP) on June 9, 2019. Accordingly, pursuant to section 50.82(a)(2) of title 10 of the *Code of Federal Regulations* (10 CFR), the Pilgrim renewed facility operating license no longer authorizes operation of the reactor or emplacement or retention of fuel in the reactor vessel. The facility is still authorized to possess and store irradiated (*i.e.,* spent) nuclear fuel. Spent fuel is currently stored onsite at the Pilgrim facility in the SFP and in a dry cask independent spent fuel storage installation (ISFSI).

By letter dated July 3, 2018 (ADAMS Accession No. ML18186A635), as supplemented by letters dated November 30 and December 4, 2018, and February 14 and February 18, 2019 (ADAMS Accession Nos. ML18338A205, ML18341A219, ML19050A298, and ML19056A260, respectively), ENOI requested exemptions from certain EP requirements in 10 CFR part 50 for Pilgrim.

By letter dated November 16, 2018 (ADAMS Accession No. ML18320A031), ENOI, on behalf of itself and Entergy Nuclear Generation Company (ENGC) (to be known as Holtec Pilgrim, LLC), Holtec International (Holtec), and Holtec Decommissioning International, LLC (HDI, the licensee) (together, Applicants), requested that the NRC consent to: (1) The indirect transfer of control of Renewed Facility Operating License No. DPR–35 for Pilgrim, as well as the general license for the Pilgrim ISFSI (together, the Licenses), to Holtec; and (2) the direct transfer of ENOI's operating authority (*i.e.,* its authority to conduct licensed activities at Pilgrim) to HDI. In addition, the Applicants requested that the NRC approve a conforming administrative amendment to the Licenses to reflect the proposed direct transfer of the Licenses from ENOI to HDI; a planned name change for ENGC from ENGC to Holtec Pilgrim, LLC; and deletion of certain license conditions to reflect satisfaction and termination of all ENGC obligations after the license transfer and equity sale.

By Order dated August 22, 2019 (ADAMS Accession No. ML19170A265), the NRC staff approved the direct and indirect transfers requested in the November 16, 2018, application. Additionally, on August 22, 2019, HDI informed the NRC (ADAMS Accession No. ML19234A357) that:

> HDI will assume responsibility for all ongoing NRC regulatory actions and reviews currently underway for Pilgrim Nuclear Power Station. HDI respectfully requests NRC continuation of these regulatory actions and reviews.

On August 26, 2019, ENOI informed the NRC that the license transfer transaction closed on August 26, 2019 (ADAMS Accession No. ML19239A037). On August 27, 2019 (ADAMS Accession No. ML19235A050), the NRC staff issued Amendment No. 249 to reflect the license transfer. Accordingly, HDI is now the licensee for decommissioning operations at Pilgrim.

The NRC regulations concerning EP do not recognize the reduced risks after a reactor is permanently shut down and defueled. As such, a permanently shut down and defueled reactor must continue to maintain the same EP requirements as an operating power reactor under the existing regulatory requirements. To establish a level of EP commensurate with the reduced risks of a permanently shut down and defueled reactor, the licensee requires exemptions from certain EP regulatory requirements before it can change its emergency plans.

The NRC is considering issuing to the licensee exemptions from portions of 10 CFR 50.47, ''Emergency plans,'' and appendix E to 10 CFR part 50, ''Emergency Planning and Preparedness for Production and Utilization

Facilities,'' which would eliminate the requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR, ''Emergency Management and Assistance,'' part 350, ''Review and Approval of State and Local Radiological Emergency Plans and Preparedness,'' and reduce some of the onsite EP activities based on the reduced risks 10 months after Pilgrim has permanently ceased power operations.

Consistent with 10 CFR 51.21, the NRC has determined that an EA is the appropriate form of environmental review for the requested action. Based on the results of the EA, which is provided in Section II of this document, the NRC has determined not to prepare an environmental impact statement for the proposed action, and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would exempt the licensee from (1) certain standards as set forth in 10 CFR 50.47(b) regarding onsite and offsite emergency response plans for nuclear power reactors; (2) requirements in 10 CFR 50.47(c)(2) to establish plume exposure and ingestion pathway emergency planning zones (EPZs) for nuclear power reactors; and (3) certain requirements in 10 CFR part 50, appendix E, section IV, which establishes the elements that make up the content of emergency plans. The proposed action of granting these exemptions would eliminate the requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR part 350 and reduce some of the onsite EP activities at Pilgrim, based on the reduced risks once the reactor has been permanently shut down for a period of 10 months. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities would be retained to an extent consistent with the approved exemptions. Additionally, if necessary, offsite protective actions could still be implemented using a comprehensive emergency management plan (CEMP) process. A CEMP in this context, also referred to as an emergency operations plan (EOP), is addressed in FEMA's CPG 101, ''Developing and Maintaining Emergency Operations Plans.'' The CPG 101 is the foundation for State, territorial, tribal, and local EP in the United States under the National Preparedness System. It promotes a common understanding of the fundamentals of risk-informed planning and decision making, and assists planners at all levels of government in their efforts to develop and maintain viable, all-hazards, all-threats emergency plans. An EOP is flexible enough for use in all emergencies. It describes how people and property will be protected; details who is responsible for carrying out specific actions; identifies the personnel, equipment, facilities, supplies, and other resources available; and outlines how all actions will be coordinated. A CEMP is often referred to as a synonym for ''all-hazards'' planning. The proposed action is in accordance with the licensee's application dated July 3, 2018, as supplemented by letters dated November 30 and December 4, 2018, and February 14 and February 18, 2019.

Need for the Proposed Action

The proposed action is needed for the licensee to revise the Pilgrim Emergency Plan once the reactor has been permanently shutdown for a period of 10 months. The EP requirements currently applicable to Pilgrim are for an operating power reactor. Since the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel have been docketed, pursuant to 10 CFR 50.82(a)(2), the Pilgrim license no longer authorizes use of the facility for power operation or emplacement or retention of fuel into the reactor vessel and, therefore, the occurrence of postulated accidents associated with reactor operation is no longer credible. However, there are no explicit regulatory provisions distinguishing EP requirements for a power reactor that has been permanently shut down and defueled from those for an operating power reactor.

In its exemption request, the licensee identified four possible radiological accidents at Pilgrim in its permanently shutdown and defueled condition. These are: (1) A fuel-handling accident; (2) a radioactive waste-handling accident; (3) a loss of SFP normal cooling (*i.e.,* boil off); and (4) an adiabatic heat up of the hottest fuel assembly. The NRC staff evaluated these possible radiological accidents in the Commission Paper (SECY) 19–0078, ''Request by Entergy Nuclear Operations, Inc. for Exemptions from Certain Emergency Planning Requirements for the Pilgrim Nuclear Power Station,'' dated August 9, 2019 (ADAMS Package Accession No. ML18347A717). In SECY–19–0078, the NRC staff verified that the licensee's analyses and calculations provided reasonable assurance that if the requested exemptions were granted, then: (1) For a design-basis accident (DBA), an offsite radiological release will not exceed the early phase protective action guides (PAGs) at the site boundary, as detailed in Table 1–1 to the U.S. Environmental Protection Agency's (EPA's), ''PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents,'' EPA–400/R–17/001, dated January 2017, and (2) in the highly unlikely event of a beyond DBA resulting in a loss of all SFP cooling, there is sufficient time to initiate appropriate mitigating actions, and in the event a radiological release has or is projected to occur, there would be sufficient time for offsite agencies to take protective actions using a CEMP to protect the health and safety of the public if offsite governmental officials determine that such action is warranted. The Commission approved the NRC staff's recommendation to grant the exemptions based on this evaluation in its Staff Requirements Memorandum (SRM) to SECY–19–0078, dated November 4, 2019 (ADAMS Accession No. ML19308A034).

Based on these analyses, the licensee states that complete application of the EP rule to Pilgrim 10 months after its permanent cessation of power operations would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule. The licensee also states that it would incur undue costs in the application of operating plant EP requirements for the maintenance of an emergency response organization in excess of that actually needed to respond to the diminished scope of credible accidents for Pilgrim 10 months after its permanent cessation of power operations.

Environmental Impacts of the Proposed Action

The NRC staff has completed its evaluation of the environmental impacts of the proposed action.

The proposed action consists mainly of changes related to the elimination of requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR part 350 and reduce some of the onsite EP activities at Pilgrim, based on the reduced risks once the reactor has been permanently shutdown for a period of 10 months. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities will be retained and offsite EP provisions to protect public health and safety will still exist through State and local government use of a CEMP.

With regard to potential nonradiological environmental impacts, the proposed action would have no direct impacts on land use or water resources, including terrestrial and aquatic biota, as it involves no new construction or modification of plant operational systems. There would be no changes to the quality or quantity of nonradiological effluents and no changes to the plants' National Pollutant Discharge Elimination System permits would be needed. In addition, there would be no noticeable effect on socioeconomic conditions in the region, no environment justice impacts, no air quality impacts, and no impacts to historic and cultural resources from the proposed action. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

With regard to potential radiological environmental impacts, as stated above, the proposed action would not increase the probability or consequences of radiological accidents. Additionally, the NRC staff has concluded that the proposed action would have no direct radiological environmental impacts. There would be no change to the types or amounts of radioactive effluents that may be released and, therefore, no change in occupational or public radiation exposure from the proposed action. Moreover, no changes would be made to plant buildings or the site property from the proposed action. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered the denial of the proposed action (*i.e.,* the ''no-action'' alternative). The denial of the application would result in no change in current environmental impacts. Therefore, the environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies or Persons Consulted

No additional agencies or persons were consulted regarding the environmental impact of the proposed action. On November 5, 2019, the Commonwealth of Massachusetts representative was notified of this EA and FONSI.

III. Finding of No Significant Impact

The licensee has proposed exemptions from: (1) Certain standards in 10 CFR 50.47(b) regarding onsite and offsite emergency response plans for nuclear power reactors; (2) requirement in 10 CFR 50.47(c)(2) to establish plume exposure and ingestion pathway EPZs for nuclear power reactors; and (3) certain requirements in 10 CFR part 50, appendix E, section IV, which establishes the elements that make up the content of emergency plans. The proposed action of granting these exemptions would eliminate the requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR part 350 and reduce some of the onsite EP activities at Pilgrim, based on the reduced risks once the reactor has been permanently shutdown for a period of 10 months. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities will be retained and offsite EP provisions to protect public health and safety will still exist through State and local government use of a CEMP.

The NRC is considering issuing the exemptions. The proposed action would not significantly affect plant safety, would not have a significant adverse effect on the probability of an accident occurring, and would not have any significant radiological or nonradiological impacts. This FONSI incorporates by reference the EA in Section II of this document. Therefore, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

The related environmental document is the ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Pilgrim Nuclear Power Station, Final Report,'' NUREG–1437, Supplement 29, Volumes 1 and 2, which provides the latest environmental review of current operations and description of environmental conditions at Pilgrim.

The finding and other related environmental documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Publicly-available records are accessible electronically from ADAMS Public Electronic Reading Room on the internet at the NRC's website: *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by email to *pdr.resource@nrc.gov.*

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS accession No./web link
Federal Emergency Management Agency, Developing and Maintaining Emergency Operations Plans, Comprehensive Preparedness Guide (CPG) 101, Version 2.0, November 2010.	*https://www.fema.gov/media-library-data/20130726-1828-25045-0014/cpg_101_comprehensive_preparedness_guide_developing_and_maintaining_emergency_operations_plans_2010.pdf.*
Halter, Mandy K., Entergy Nuclear Operations, Inc., ''Request for Exemptions from Portions of 10 CFR 50.47 and 10 CFR Part 50, Appendix E,'' July 3, 2018.	ML18186A635.
Halter, Mandy K., Entergy Nuclear Operations, Inc., ''Response to Request for Additional Information—Exemption from the Requirements of 10 CFR 50.47 and Appendix E to 10 CFR Part 50,'' November 30, 2018.	ML18338A205.
Halter, Mandy K., Entergy Nuclear Operations, Inc., ''Response to Request for Additional Information—Exemption from the Requirements of 10 CFR 50.47 and Appendix E to 10 CFR Part 50,'' December 4, 2018.	ML18341A219.
Halter, Mandy K., Entergy Nuclear Operations, Inc., ''Response to Request for Additional Information—Exemption from the Requirements of 10 CFR 50.47 and Appendix E to 10 CFR Part 50,'' February 14, 2019.	ML19050A298 (Package).

Document	ADAMS accession No./web link
Halter, Mandy K., Entergy Nuclear Operations, Inc., ''Response to Request for Additional Information—Exemption from the Requirements of 10 CFR 50.47 and Appendix E to 10 CFR Part 50,'' February 18, 2019.	ML19056A260 (Package).
Bakken III, A. Christopher, Entergy Nuclear Operations, Inc., ''Application for Order Consenting to Direct and Indirect Transfers of Control of Licenses and Approving Conforming License Amendment; and Request for Exemption from 10 CFR 50.82(a)(8)(i)(A),'' November 16, 2018.	ML18320A031.
Ventosa, John, Entergy Nuclear Operations, Inc., ''Notification of Permanent Cessation of Power Operations,'' November 10, 2015.	ML15328A053.
Sullivan, Brian R., Energy Nuclear Operations, Inc., ''Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel,'' June 10, 2019.	ML19161A033.
U.S. Environmental Protection Agency, PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents, January 2017.	*https://www.epa.gov/sites/production/files/2017-01/documents/epa_pag_manual_final_revisions_01-11-2017_cover_disclaimer_8.pdf.*
SECY–19–0078, ''Request by Entergy Nuclear Operations, Inc. for Exemptions from Certain Emergency Planning Requirements for the Pilgrim Nuclear Power Station,'' August 9, 2019.	ML18347A717 (Package).
Staff Requirements Memorandum to SECY–19–0078, ''Request by Entergy Nuclear Operations, Inc. for Exemptions from Certain Emergency Planning Requirements for the Pilgrim Nuclear Power Station,'' November 4, 2019.	ML19308A034.
NUREG–1437, Supplement 29, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Pilgrim Nuclear Power Station,'' Volumes 1 and 2, July 2007.	ML071990020, ML071990027.

Dated at Rockville, Maryland, this 13th day of December, 2019.

For the Nuclear Regulatory Commission.

Scott P. Wall,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–27278 Filed 12–17–19; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2015–8; Order No. 5351]

Market Dominant Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing requesting the removal of Return Receipt for Merchandise Service from the Market Dominant product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 9, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Notice of Commission Action
III. Ordering Paragraphs

On December 10, 2019, the Postal Service filed a renewed request to remove Return Receipt for Merchandise (RRM) service from the Mail Classification Schedule (MCS).[1] For the reasons discussed below, the Commission reopens the docket to consider matters concerning this request.

I. Background

The Postal Service filed its original request to remove the RRM service from the MCS on November 17, 2014.[2] The Commission approved the request but found that the removal was subject to adjustments to the unused rate adjustment authority for the Special Services class.[3] Subsequently, the Postal Service provided notice that it elected to indefinitely defer the removal.[4] After a series of appeals, the D.C. Circuit issued its opinion on April 6, 2018, vacating the Commission's previous orders on the removal of the RRM service.[5]

On August 29, 2019, the Commission closed Docket Nos. MC2015–8 and MC2015–8R because it had been more than one year since the RRM Opinion and the Postal Service had not indicated a renewed intent to discontinue the RRM service.[6] The Commission directed the Postal Service to file a request in a new docket if it decided to discontinue RRM service in the future. Order No. 5214 at 3. The Commission also held that it would evaluate any future requests to remove a product from the MCS in light of the RRM Opinion. *Id.*

In its renewed request, the Postal Service asks the Commission to reopen this docket because it contains the record on which the Postal Service relies in renewing its request.[7] Moreover, the Postal Service seeks expedited review of this request. *Id.* The Postal Service states that the Commission has already held that the removal of the RRM service comports with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* and therefore, no new Section 3642 analysis is necessary. *Id.* In

[1] Renewed Request of the United States Postal Service to Remove Return Receipt for Merchandise and Motion to Reopen Docket, December 10, 2019 (Renewed Request).

[2] Request of the United States Postal Service to Remove Return Receipt for Merchandise Service from the Mail Classification Schedule, November 17, 2014.

[3] Order Conditionally Approving Removal of Return Receipt for Merchandise Service from Mail Classification Schedule, January 15, 2015 (Order No. 2322).

[4] Response of the United States Postal Service to Order No. 2322, January 28, 2015.

[5] *See United States Postal Serv.* v. *Postal Reg. Comm'n,* No. 16–14 (D.C. Cir. Apr. 6, 2018) (RRM Opinion).

[6] Order Closing Dockets, August 29, 2019, at 3 (Order No. 5214).

[7] Renewed Request at 1 (citing Order No. 2322).

addition, the Postal Service asserts that there have been no material changes concerning RRM service since 2015 that require revisiting the Commission's findings in Order No. 2322 on removal. *Id.* at 3. Thus, the Postal Service requests that the Commission reinstate its original finding that the removal of RRM service comports with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq. Id.* The Postal Service attached proposed changes to the MCS should the Commission approve the request. *See* Renewed Request, Attachment A.

II. Notice of Commission Action

Although the Commission directed the Postal Service to file a request to discontinue RRM service in a new docket, the Commission finds that the Postal Service has set forth good cause to reopen this docket. In support of its Renewed Request, the Postal Service relies on the information previously provided, and approved by the Commission, in its original request for removal of the RRM service. Accordingly, the Postal Service's motion to reopen the docket is granted.

The Postal Service requests expedited review, but does so without suggesting a time period for comments or Commission decision. Nor does the Postal Service discuss why expedition is necessary, especially in light of the time that has passed since its original request and Order No. 5214.

More than five years has passed since the original request for removal and the Commission has since stated that it would evaluate future requests in light of the RRM Opinion. The Commission will provide interested persons the opportunity to comment on the renewed request for removal of the RRM service.

Pursuant to 39 CFR 3001.45 and 3020.33, the Commission reopens Docket No. MC2015–8 to consider the Postal Service's renewed request to remove RRM service. The Commission invites comments from interested persons on the Renewed Request. Comments are due no later than January 9, 2020.

Pursuant to 39 U.S.C. 505, the Commission appoints R. Tim Boone to represent the interests of the general public (Public Representative) in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission grants the Postal Service's motion and reopens Docket No. MC2015–8 to consider the Renewed Request.

2. Comments by interested persons are due by January 9, 2020.

3. Pursuant to 39 U.S.C. 505, R. Tim Boone is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

4. The Commission directs the Secretary of the Commission to arrange for prompt publication of this notice in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2019–27287 Filed 12–17–19; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 12, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 583 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–70, CP2020–69.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–27178 Filed 12–17–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 12, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 584 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–71, CP2020–70.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–27177 Filed 12–17–19; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87721; File No. SR–NASDAQ–2019–049]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the Definition of Family Member in Listing Rule 5605(a)(2) for Purposes of the Definition of Independent Director

December 12, 2019.

On May 29, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposal to modify the definition of a ''Family Member'', for purposes of the independence of directors, under Nasdaq Rule 5605(a)(2). The proposed rule change was published for comment in the **Federal Register** on June 18, 2019.[3] On August 1, 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 disapprove the proposed rule change.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86095 (June 12, 2019), 84 FR 28379.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 86545 (August 1, 2019), 84 FR 38704 (August 7, 2019). The Commission designated September 16, 2019, as the date by which it should approve, disapprove, or

Continued

On September 13, 2019, the Commission issued an order instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received one comment letter, from Nasdaq, in response to the OIP.[8]

Section 19(b)(2) of the Act[9] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on June 18, 2019. The 180th day after publication of the Notice is December 15, 2019, and February 13, 2020 is an additional 60 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change and the comment letter. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[10] designates February 13, 2020 as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NASDAQ–2019–049).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27196 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

institute proceedings to determine whether to disapprove the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 86969 (September 13, 2019), 84 FR 49353 (September 19, 2019).

[8] *See* letter from Jeffrey S. Davis, Senior Vice President and Senior Deputy General Counsel, Nasdaq, to Vanessa A. Countryman, Secretary, Commission, dated November 12, 2019.

[9] 15 U.S.C. 78s(b)(2).

[10] *Id.*

[11] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87725; File No. SR–FINRA–2019–029]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Securities Transaction Credits Applicable to FINRA/Nasdaq TRF Participants

December 12, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 5, 2019, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as ''establishing or changing a due, fee or other charge'' under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 7610A to modify the securities transaction credits that apply to FINRA members that utilize the FINRA/Nasdaq Trade Reporting Facility Carteret (the ''FINRA/Nasdaq TRF Carteret'') and the FINRA/Nasdaq Trade Reporting Facility Chicago (the ''FINRA/Nasdaq TRF Chicago'') (collectively, the ''FINRA/Nasdaq TRFs'').

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The FINRA/Nasdaq TRFs are facilities of FINRA that are operated by Nasdaq, Inc. (''Nasdaq''). In connection with the establishment of the FINRA/Nasdaq TRFs, FINRA and Nasdaq entered into a limited liability company agreement (the ''LLC Agreement''). Under the LLC Agreement, FINRA, the ''SRO Member,'' has sole regulatory responsibility for the FINRA/Nasdaq TRFs. Nasdaq, the ''Business Member,'' is primarily responsible for the management of the FINRA/Nasdaq TRFs' business affairs, including establishing pricing for use of the FINRA/Nasdaq TRFs, to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA. Additionally, the Business Member is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from the operation of the FINRA/Nasdaq TRFs.

Pursuant to FINRA Rule 7610A, FINRA members that report over-the-counter (''OTC'') trades in NMS stocks to the FINRA/Nasdaq TRFs (''Participants'') may qualify for revenue sharing payments, in the form of transaction credits, based upon those transactions that are attributable to such Participants.[5] This rule is administered by Nasdaq, in its capacity as the Business Member and operator of the FINRA/Nasdaq TRFs on behalf of FINRA.[6]

Rule 7610A sets forth tiered schedules of transaction credits that describe, for reports in transactions in each Tape (A, B and C), the percentage of attributable revenue sharing that a Participant will receive if it achieves specified percentages of market share. The schedules provide for ''Retail Participants''[7] to receive higher revenue

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A transaction is attributable to a Participant if the Participant is identified as the Executing Party in a trade report submitted to a FINRA/Nasdaq TRF that the FINRA/Nasdaq TRF subsequently submits to the Consolidated Tape Association or the Nasdaq Securities Information Processor. Credits are paid on a quarterly basis.

[6] FINRA's oversight of this function performed by the Business Member is conducted through a recurring assessment and review of TRF operations by an outside independent audit firm.

[7] Supplementary Material .01 to Rule 7620A defines a ''Retail Participant'' as a ''participant in the FINRA/Nasdaq Trade Reporting Facility for

sharing percentages than other FINRA members at the two lowest tiers for transactions in each Tape. For reference purposes, the existing transaction credit schedules are as follows:

TAPE A

Percentage market share	Percent of attributable revenue shared	Percent of attributable revenue shared (retail participants)
Greater than or equal to 2%	98	98
Less than 2% but greater than or equal to 1%	95	95
Less than 1% but greater than or equal to 0.50%	75	75
Less than 0.50% but greater than or equal to 0.10%	20	75
Less than 0.10%	0	75

TAPE B

Percentage market share	Percent of attributable revenue shared	Percent of attributable revenue shared (retail participants)
Greater than or equal to 2%	98	98
Less than 2% but greater than or equal to 1%	90	90
Less than 1% but greater than or equal to 0.35%	70	70
Less than 0.35% but greater than or equal to 0.10%	10	70
Less than 0.10%	0	70

TAPE C

Percentage market share	Percent of attributable revenue shared	Percent of attributable revenue shared (retail participants)
Greater than or equal to 2%	98	98
Less than 2% but greater than or equal to 1%	95	95
Less than 1% but greater than or equal to 0.50%	75	75
Less than 0.50% but greater than or equal to 0.10%	20	75
Less than 0.10%	0	75

Nasdaq, as the Business Member, has determined to modify the schedule of transaction credits applicable to the FINRA/Nasdaq TRFs to provide a more competitive distribution of pricing incentives and benefits among Participants to the extent that they engage in a substantial volume of Executing Party activity. The proposed amended schedule is also designed to be more competitive with the schedule of transaction credits applicable to the other FINRA TRF.[8] FINRA proposes to amend Rule 7610A accordingly.

The proposed rule change would amend the third revenue sharing tier for both Retail and non-Retail Participants (*i.e.,* Participants that achieve market shares of less than 1.0% but greater than or equal to 0.50% for Tape A and C securities, and less than 1.0% but greater than or equal to 0.35% for Tape B securities) by increasing the percentage of revenue shared with Participants that qualify for the tier. Specifically, Participants that achieve a market share of less than 1.0% but greater than or equal to 0.50% in securities in Tapes A and C (or greater than or equal to 0.35% for Tape B securities) will be eligible to receive 85% of attributable revenues for securities in all Tapes.

Nasdaq, as the Business Member, estimates that 13 Participants currently qualify for the existing revenue sharing tier. Assuming that these Participants continue to qualify for this tier, Nasdaq estimates, based on current trade reporting activity, that all of these Participants will experience an increase in the amount of the credits that they receive. Based on a review of trade reporting activity for the period July 2018 to June 2019, Nasdaq estimates that these Participants could potentially receive between $10,000 and $190,000 more credits than they receive today. No new product or service will accompany the proposed changes to revenue sharing credits.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be January 1, 2020.

which substantially all of its trade reporting activity on the FINRA/Nasdaq Trade Reporting Facility comprises Retail Orders.'' The term ''Retail Order'' is also defined under Rule 7620A.01.

[8] Pursuant to FINRA Rule 7610B, the FINRA/NYSE TRF presently shares with its participants, for all Tapes, 100% of attributable revenue for market shares greater than or equal to 2.0%, 95% of attributable revenue for market shares greater than or equal to 0.5% but less than 2.0%, 85% of attributable revenue for market shares greater than or equal to 0.1% but less than 0.5%, and 0% of attributable revenue for market shares of less than 0.1%.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[9] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. All similarly situated members are subject to the same fee structure and access to the FINRA/Nasdaq TRFs is offered on fair and nondiscriminatory terms.

The Proposal Is Reasonable

The proposed change to modify the revenue sharing credits for the FINRA/Nasdaq TRFs is reasonable in several respects. As a threshold matter, the FINRA/Nasdaq TRFs are subject to significant competitive forces in the market for trade reporting services for OTC trades in NMS stocks that constrain its pricing determinations in that market. The competing FINRA TRF presently offers a similar tiered pricing structure to that of the FINRA/Nasdaq TRFs, including a schedule of revenue sharing credits that apply based upon its participants achieving certain levels of market share.[10] Participants can freely and do shift their trade reporting activity between the various FINRA TRFs in response to pricing, product or service changes. The proposed rule change renders more generous the FINRA/Nasdaq TRFs' revenue sharing credits to maintain and increase activity and market share.

The Proposal Is an Equitable Allocation of Credits and Charges

The proposed rule change will allocate revenue sharing credits fairly among FINRA/Nasdaq TRF Participants. Nasdaq, as the Business Member, has determined to increase the revenue sharing credits that the FINRA/Nasdaq TRFs offer to their Participants as a means of rewarding those Participants that engage in substantial amounts of trade reporting activity on the FINRA/Nasdaq TRFs, reducing the costs to such Participants of reporting trades to the FINRA/Nasdaq TRFs, and improving the competitive standing of the FINRA/Nasdaq TRFs relative to their competitor, which offers similar credits to its participants. Nasdaq believes it is equitable to target such increases only to Participants with market shares of less than 1.0% but greater than or equal to 0.50% (for securities in Tapes A and C) and 0.35% (for securities in Tape B). The tier selected accounts for 5% of the Transaction Credit eligible Participant base and 17% of trade reporting volume of the FINRA/Nasdaq TRFs and it is a tier that is particularly vulnerable to competition from the other FINRA TRF, which presently offers to share 95% of attributable revenues with its participants that achieve market shares of equal to or greater than 0.5% and less than 2.0%. The proposed rule change will render the FINRA/Nasdaq TRFs more competitive with its competitors in terms of revenue sharing for Participants in this market segment.

The Proposal Is Not Unfairly Discriminatory

The proposed rule change is not unfairly discriminatory. As an initial matter, nothing about the volume-based tiered pricing model of the FINRA/Nasdaq TRFs is inherently unfair. Instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries—from co-branded credit cards to grocery stores to cellular telephone data plans—that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that FINRA TRFs have long employed under FINRA rules filed with the Commission.

Nasdaq, as the Business Member, intends for the proposal to increase incentives to FINRA/Nasdaq TRF Participants to engage in substantial trade reporting activity on the FINRA/Nasdaq TRFs. The increased incentive will be available to all Participants with market shares of less than 1.0% but greater than or equal to 0.50% (Tapes A and C securities) and 0.35% (Tape B securities).

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

Nasdaq, as the Business Member, does not believe that the proposed rule change will place any category of Participant at a competitive disadvantage. As discussed above, all Participants that currently qualify for credits will continue to qualify for credits under the proposed rule change and will receive higher rates of credits than they do today. Meanwhile, Participants that do not qualify for the proposed tiers (or that do not qualify for the higher of the proposed tiers) may grow or modify their businesses so that they will do so. Participants are free to report their OTC trades in NMS stocks to the competing TRF to the extent they believe that the credits provided are not attractive. Price competition between the TRFs is substantial, with trade reporting activity and market share moving freely between them in reaction to fee and credit changes.

Intermarket Competition

Nasdaq believes that the proposed modifications to the schedule of credits applicable to the FINRA/Nasdaq TRFs will not impose a burden on competition among the FINRA trade reporting facilities because use of the FINRA/Nasdaq TRFs is completely voluntary and subject to competition.[11] Currently, with the exception of FINRA/Nasdaq TRF Retail Participants in the lowest tier, the competing FINRA TRF provides higher transaction credits to its participants than the FINRA/Nasdaq TRFs for engaging in similar levels of trade reporting activity. Nasdaq, as the Business Member, seeks to increase the credits that the FINRA/Nasdaq TRFs provide to market participants so that these credits are more competitive. Nasdaq believes that the proposed increase in credits is necessary to retain reported volume. Indeed, firms that report OTC trades in NMS stocks can readily favor competing facilities if they deem fee levels at a particular facility to be excessive, or credit opportunities available at other facilities to be more favorable.

The competition, in turn, is free to modify its own fees and credits in response to this proposed rule change to maintain or increase its attractiveness to participants. Accordingly, Nasdaq believes that the risk that this proposed rule change will impose any burden on intermarket competition is extremely limited.

If market participants determine that the changes proposed herein are inadequate or unattractive, it is likely that the FINRA/Nasdaq TRFs will lose market share as a result. Accordingly, the proposed rule change will not impair the ability of the other FINRA

[9] 15 U.S.C. 78o–3(b)(5).

[10] Because the FINRA/Nasdaq TRFs and the FINRA/NYSE TRF are operated by different business members competing for market share, FINRA does not take a position on whether the pricing for one TRF is more favorable or competitive than the pricing for the other TRF.

[11] Because the FINRA/Nasdaq TRFs and the FINRA/NYSE TRF are operated by different business members competing for market share, FINRA does not take a position on whether the pricing for one TRF is more favorable or competitive than the pricing for the other TRF.

TRF to maintain its competitive standing.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and paragraph (f)(2) of Rule 19b–4 thereunder.[13] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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–FINRA–2019–029 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–FINRA–2019–029. 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 such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2019–029 and should be submitted on or before January 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27198 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87728; File No. SR–Phlx–2019–51]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Securities Traded Pursuant to Unlisted Trading Privileges

December 12, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 3, 2019, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete Phlx Rules 800–853, 867 and 868, under the title ''Standards for Trading Securities Pursuant to Unlisted Trading Privileges.'' Phlx Rules 860–866 are being relocated to new PSX Rules 3236–3242, respectively. The Exchange proposes to amend Phlx Rule 1000, titled ''Applicability, Definitions and References,'' PSX Rule 3100, titled ''Limit Up-Limit Down Plan and Trading Halts on PSX,'' and Rule 3202, titled ''Application of Other Rules of the Exchange.'' The Exchange proposes to adopt a new PSX Rule 3204, titled ''Securities Traded under Unlisted Trading Privileges,'' PSX Rule 3232, titled ''Advertising Practices,'' PSX Rule 3233, titled ''Prevention of the Misuse of Material, Nonpublic Information'' and PSX Rule 3234, titled ''Additional Requirements for Securities Issued by Nasdaq or its Affiliates.'' Phlx Rule 136, titled ''Trading Halts in Certain Exchange Traded Funds,'' is being deleted and replaced with new proposed rules. PSX Rule 3234 is being added to the PSX Rules to specify that equity Affiliate Securities will not be listed on the Exchange. Finally, the Exchange is amending Phlx Rule 990, ''Additional Requirements for Securities Listed on the Exchange Issued by Nasdaq or its Affiliates'' to make clear the rule is applicable to equities and options.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delete Phlx Rules 800–853, 867 and 868, under the title ''Standards for Trading Securities Pursuant to Unlisted Trading Privileges.'' Phlx Rules 860–866 are being relocated to new PSX Rules 3236–3242, respectively. The Exchange proposes to amend Phlx Rule 1000, titled ''Applicability, Definitions and References,'' PSX Rule 3100, titled ''Limit Up-Limit Down Plan and Trading Halts on PSX,'' and Rule 3202, titled ''Application of Other Rules of the Exchange.'' The Exchange proposes to adopt a new PSX Rule 3204, titled ''Securities Traded under Unlisted Trading Privileges,'' PSX Rule 3232, titled ''Advertising Practices,'' PSX Rule 3233, titled ''Prevention of the Misuse of Material, Nonpublic Information'' and PSX Rule 3234, titled ''Additional Requirements for Securities Issued by Nasdaq or its Affiliates.'' Phlx Rule 136, titled ''Trading Halts in Certain Exchange Traded Funds,'' is being deleted and replaced with new proposed rules. PSX Rule 3234 is being added to the PSX Rules to specify that equity Affiliate Securities will not be listed on the Exchange. Finally, the Exchange is amending Phlx Rule 990, ''Additional Requirements for Securities Listed on the Exchange Issued by Nasdaq or its Affiliates'' to make clear the rule is applicable to equities and options.

Today, Nasdaq PSX (''PSX'') does not list equity securities. Rather, PSX trades NMS stocks listed on other exchanges on an unlisted trading privileges basis. PSX Rule 3202 notes that Phlx Rule 803, titled ''Listing Standards for Unlisted Trading Privileges,'' is applicable to market participants trading on PSX. Phlx Rule 803 supports unlisted trading privileges for NMS stocks on PSX, but it also contains listing standards that are not currently applicable because PSX does not list equity securities. The Exchange proposes to delete Phlx Rule 803 and remove cross-references to this Rule within Phlx Rule 1000 and PSX Rule 3202. The Exchange notes that it is retaining the rule text within Phlx Rule 803(o)(2) and relocating that rule text within PSX Rule 3204(a)(3) as described below in greater detail.

In addition to deleting Rule 803 and the cross-reference to Rule 803 from PSX Rule 1000 and 3202, the Exchange proposes to delete Phlx Rules 800, 802, 804–853,[3] 867 and 868 which contain listing standards for equity securities. The Exchange's proposal to adopt proposed PSX Rule 3204 will provide for the trading of equity securities pursuant to unlisted trading privileges. If at a later date PSX determines to list equity securities, it would file a proposed rule change with the Commission.

Proposed Rule 3204

PSX proposes to adopt a new PSX Rule 3204, titled ''Securities Traded under Unlisted Trading Privileges'' to describe the manner in which PSX will trade securities pursuant to unlisted trading privileges. As noted above, while today Phlx Rule 803 permits the trading of securities pursuant to unlisted trading privileges, proposed new PSX Rule 3204 will make clear the applicability of PSX's unlisted trading privileges to any security that is an NMS Stock (as defined in Rule 600 of Regulation NMS under the Act) that is listed on another national securities exchange. Proposed Rule 3204 is similar to NYSE National, Inc. (''NYSE National'') Rule 5.1.

Proposed PSX Rule 3204(a) provides ''Only such securities admitted pursuant to unlisted trading privileges shall be dealt in on the Exchange. The Exchange will not list equity securities pursuant to any Rule until the Exchange files a proposed rule change under Section 19(b)(2) under the Exchange Act to amend its Rules to make any changes needed to comply with Rules 10A–3 and 10C–1 under the Exchange Act and to incorporate additional qualitative and other listing criteria, and such proposed rule change is approved by the Commission. Therefore, the provisions of the Exchange's Rules are not effective to permit the listing of equity securities.'' This is the case today and this proposed new rule text, which replaces current Phlx Rule 803, makes clear that PSX is not a listing venue. The rule would further specify in proposed Rule 3204(a)(1) that the Exchange may extend unlisted trading privileges to any security that is an NMS Stock that is listed on another national securities exchange or with respect to which unlisted trading privileges may otherwise be extended in accordance with Section 12(f) of the Exchange Act and any such security shall be subject to all Exchange rules applicable to trading on the Exchange, unless otherwise noted.

This proposed rule text states the Exchange's authority to trade securities on an UTP basis and provides that the Exchange may extend UTP to any security that is an NMS Stock that is listed on another national securities exchange or with respect to which UTP may otherwise be extended in accordance with Section 12(f) of the Exchange Act.[4] This proposed text is based on NYSE National Rule 5.1.

The proposed rule defines a UTP Security within proposed Rule 3100(b)(7) 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. The Exchange describes the manner in which it distributes an information circular prior to the commencement of trading in each UTP Exchange Traded Product within Rule 3204(a)(2). The circular would generally include the same information as is contained in the information circular provided by the listing exchange, including (a) the special risks of trading the new Exchange Traded Product, (b) the Exchange Rules that will apply to the new Exchange Traded Product, and (c) information about the dissemination of value of the underlying assets or indices.

Proposed Rule 3204(a)(2)(B) also sets forth member organization prospectus delivery requirements. In addition, the Exchange requires that member organizations provide each purchaser of UTP Exchange Traded Products a written description of the terms and characteristics of those securities, in a form approved by the Exchange or prepared by the open-ended management company issuing such securities, not later than the time a confirmation of the first transaction in such securities is delivered to such purchaser. A member organization carrying an omnibus account for a non-member organization is required to inform such non-member organization that execution of an order to purchase UTP Exchange Traded Products for such omnibus account will be deemed to constitute an agreement by the non-member organization to make such written description available to its customers on the same terms as are directly applicable to the member organization under this Rule. Upon request of a customer, a member organization will also provide a prospectus for the particular UTP Exchange Traded Product.

Proposed Rule 3204(a)(2)(C) indicates that trading halts for UTP Exchange Traded Products will be pursuant to

[3] The Exchange notes that Phlx Rules 800–868 do not apply to the options market. The rule text of Phlx Rules 801, 803(o)(2) and 860–866 are being relocated within the new rule text.

[4] 15 U.S.C. 78l(f).

PSX Rule 3100, which is described below. Proposed Rule 3204(a)(2)(D) provides for certain Market Maker restrictions that exist today for market makers. Proposed Rule 3204(a)(2)(D) requires certain restrictions for any member organization registered as a market maker in an UTP Exchange Traded Product that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies or commodities, or is based on a basket or index composed of currencies or commodities (collectively, ''Reference Assets''). Specifically, such a Market Maker must file with the Exchange and keep current a list identifying all accounts for trading the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives (collectively with Reference Assets, ''Related Instruments''), which the member organization acting as registered market maker may have or over which it may exercise investment discretion.[5] As noted above, these restrictions are applicable today.

Proposed Rule 3204(a)(2)(E) provides that the Exchange will enter into comprehensive surveillance sharing agreements with markets that trade components of the index or portfolio on which the UTP Exchange Traded Product is based to the same extent as the listing exchange's rules require the listing exchange to enter into comprehensive surveillance sharing agreements with such markets.

The Exchange proposes to relocate rule text from Phlx Rule 803(o)(2) into proposed new PSX Rule 3204(a)(3). This rule text provides that prior to the commencement of trading of contingent value rights (''CVRs'') on the Exchange, the Exchange will distribute a circular providing guidance to its member organizations regarding compliance responsibilities (including suitability recommendations and account approval) when handling transactions in CVRs.

PSX Rule 3100

The Exchange proposes to amend Rule 3100, ''Limit Up-Limit Down Plan and Trading Halts on PSX''. The Exchange proposes to amend PSX Rule 3100(a)(1) to remove the following provision, ''(A) during a trading halt imposed by such exchange to permit the dissemination of material news; or (B).'' A provision regarding dissemination of material news is included in proposed Rule 3100(d). Further, the Exchange proposes to amend the next sentence to clarify the sentence by stating, ''In the event that the Exchange initiates a trading halt based on another exchange's operational trading halt, PSX may resume trading and permit PSX Participants to commence entry of orders and quotations and trading at any time following initiation of the other exchange's operational trading halt.'' The Exchange is not substantively amending this rule text, rather the rule text is being clarified. The Exchange proposes to remove the ''without regard to procedures for resuming trading set forth in paragraph (c),'' because the Exchange would follow the procedure in subparagraph (c) in the event that a trading halt were initiated.

The Exchange proposes to eliminate the rule text within Rule 3100(a)(2)[6] and (4).[7] The rule text within Rule 3100(a)(2) applies to listed securities which are no longer applicable. The rule text within Rule 3100(a)(4) is outdated.

Halting of securities is covered by Rule 3100(a)(1) and (2) as well as proposed rule text within 3100(d) through (f). The Exchange proposes to eliminate the rule text within Rule 3100(a)(3)[8] because that rule is being replaced by Rule 3100(f) which is substantially similar to NYSE National Rule 7.18(c) and describes the halting of trading in a UTP Exchange Traded Product. Removing repetitive and outdated rule text will bring greater clarity to the manner in which PSX may halt pursuant to Rule 3100. The Exchange proposes to renumber PSX Rule 3100(a)(5) as (a)(2).

The Exchange proposes to delete the text currently in Rule 3100(b)(1)–(3) and retain the text currently in Rule 3100(b)(4) as new ''(b)'' as the new proposed rule text within Rule 3100(f) is generally duplicative of the rule text within Rule 3100(b)(1)–(3) as explained below. The Exchange is replacing references to ''Trust Shares,'' ''Index Fund Shares,'' ''Managed Fund Shares,'' and ''Trust Issued Receipts'' within Rule 803(i), (j), (l), and (n), with definitions of those terms,[9] which are proposed to be added to Rule 3100(b)(1)(A)–(D). Further, the definition of ''Required Value'' is being removed as this definition is obsolete and is not utilized within the PSX Rules with the addition and deletion of rule text as proposed herein. The Exchange proposes to define the term ''UTP Listing Market'' the same as NYSE National Rule 1.1(jj) within Rule 3100(b)(5). The Exchange proposes to define the term ''UTP Regulatory Halt'' the same as NYSE National 1.1(kk) within Rule 3100(b)(6). Also, the Exchange proposes to define the term ''UTP Security'' the same as NYSE National 1.1(ii) within Rule 3100(b)(7).[10]

The Exchange proposes to add a new Rule 3100(d) which provides for UTP Regulatory Halts. Substantially identical to NYSE National Rule 7.18, the Exchange proposes that if the UTP Listing Market declares a UTP Regulatory Halt, the Exchange will halt trading in that security until it receives notification from the UTP Listing Market that the halt or suspension is no longer in effect or as provided for in Rule 3100(a)(2) and Phlx Rule 133 provided that, during Regular Market Session, the Exchange will halt trading

[5] The proposed rule would also, more specifically, require a market maker to file with the Exchange and keep current a list identifying any accounts (''Related Instrument Trading Accounts'') for which related instruments are traded (1) in which the market maker holds an interest, (2) over which it has investment discretion, or (3) in which it shares in the profits and/or losses. In addition, a market maker would not be permitted to have an interest in, exercise investment discretion over, or share in the profits and/or losses of a Related Instrument Trading Account that has not been reported to the Exchange as required by the proposed rule.

[6] PSX Rule 3100(a)(2) provides, ''The Exchange may halt trading in an index warrant on PSX whenever Exchange staff shall conclude that such action is appropriate in the interests of a fair and orderly market and to protect investors. Among the factors that may be considered are the following: (A) Trading has been halted or suspended in underlying stocks whose weighted value represents 20% or more of the index value; (B) the current calculation of the index derived from the current market prices of the stocks is not available; (C) other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present; or''

[7] PSX Rule 3100(a)(4) provides, ''If a primary listing market issues an individual stock trading pause in any of the Circuit Breaker Securities, as defined herein, the Exchange will pause trading in that security until trading has resumed on the primary listing market. If, however, trading has not resumed on the primary listing market and ten minutes have passed since the individual stock trading pause message has been received from the responsible single plan processor, the Exchange may resume trading in such stock. The provisions of this paragraph (a)(4) shall be in effect during a pilot set to end on February 4, 2014. During the pilot, the term ''Circuit Breaker Securities'' shall mean all NMS stocks other than NMS stocks subject to the Regulation NMS Plan to Address Extraordinary Market Volatility.''

[8] PSX Rule 3100(a)(3) provides, ''The Exchange shall halt trading in Derivative Securities Products (as defined in Rule 3100(b)(4)(A)) for which a net asset value (''NAV'') (and in the case of Managed Fund Shares or actively managed exchange-traded funds, a Disclosed Portfolio, as defined in Rule 803(n)) is disseminated if the Exchange becomes aware that the NAV (or, if applicable, the Disclosed Portfolio) is not being disseminated to all market participants at the same time. The Exchange will maintain the trading halt until such time as trading resumes in the listing market.''

[9] The definitions are unchanged from the rules which are being deleted.

[10] While the definitions of ''UTP Listing Market,'' ''UTP Regulatory Halt,'' and ''UTP Security'' are new, these concepts are contained within existing PSX Rules.

until it receives the first Price Band [11] in that security. If a UTP Regulatory Halt was issued for the purpose of dissemination of material news, the Exchange will assume that adequate publication or dissemination has occurred upon the expiration of one hour after initial publication in a national news dissemination service of the information that gave rise to an UTP Regulatory Halt and may, at its discretion, reopen trading at that time, notwithstanding notification from the UTP Listing Market that the halt or suspension is no longer in effect.

The Exchange proposes new rule text at Rule 3100(e) to provide that there would be no halt cross or re-opening cross in a UTP Security. NYSE National Rule 7.18 provides for detail concerning orders' acceptance and cancellations following a UTP Regulatory Halt. PSX similarly proposes a rule to describe the manner in which its system will handle interest in the event of a trading halt. PSX's rules differ from NYSE National in that each market has different order types and system handling related to each respective equity market. The Exchange proposes herein to provide similar information with respect to the manner in which PSX would conduct a re-opening in a UTP Security. The Exchange will process new and existing orders in a UTP Security during a trading halt as follows:

(1) Cancel any unexecuted portion of Midpoint Peg and Midpoint Peg Post-Only Orders;

(2) maintain all other resting Orders in the Exchange Book at their last ranked price and displayed price;

(3) accept and process all cancellations; and

(4) Orders, including Order modifications, entered during the trading halt or pause will not be accepted.

The Exchange believes that providing this detail will bring greater transparency to the Exchange's Rules with respect to trading halts and the handling of Orders.

Today, the Exchange does not cancel Midpoint Peg [12] and Midpoint Peg Post-Only [13] Orders during a trading halt. At this time, the Exchange proposes to begin to cancel Midpoint Peg and Midpoint Peg Post-Only Orders in conjunction with a trading halt similar to The Nasdaq Stock Market LLC (''Nasdaq'').[14] Midpoint Peg and Midpoint Peg Post-Only Orders are pegged to the midpoint of the NBBO, relying on current market conditions. During a trading halt, there is no updated NBBO and therefore information becomes stale. Today Nasdaq does not accept these Orders when there is no NBBO.[15] Further, today PSX rejects these Orders if there is no NBBO.[16] Once a trading halt occurs, and some time has passed, market conditions can change and expose a market participant to risk. The Exchange believes that cancelling Midpoint Peg and Midpoint Peg Post-Only Orders after a trading halt will reduce risk for market participants as it does today on Nasdaq.

With respect to the remainder of proposed Rule 3100(e), the Exchange notes that today resting Orders are maintained in the Exchange Book, cancellations are processed and Orders, including Order modifications, are not accepted. The Exchange is memorializing this system behavior within Rule 3100(e).

Finally, the Exchange proposes new rule text within Rule 3100(f) which describes trading halts for UTP Exchange Traded Products, which the Exchange has defined within the Rule similar to NYSE National 1.1(m).[17] Rules proposed within the provisions of 3100(f) are similar to NYSE National Rule 7.18(c). The Exchange provides in Rule 3100(f)(1), ''If a UTP Exchange Traded Product begins trading on the Exchange in the Pre-Market Session and subsequently a temporary interruption occurs in the calculation or wide dissemination of the Intraday Indicative Value (''IIV'') or the value of the underlying index, as applicable, to such UTP Exchange Traded Product, by a major market data vendor, the Exchange may continue to trade the UTP Exchange Traded Product for the remainder of the Pre-Market Session.'' The Exchange provides in Rule 3100(f)(2), ''Regular Market Session. During the Regular Market Session, if a temporary interruption occurs in the calculation or wide dissemination of the applicable IIV or value of the underlying index by a major market data vendor and the listing market halts trading in the UTP Exchange Traded Product, the Exchange, upon notification by the primary listing market of such halt due to such temporary interruption, also shall immediately halt trading in the UTP Exchange Traded Product on the Exchange.''

The Exchange also proposes to adopt Post-Market Session and Pre-Market Session rules which provide if the IIV or the value of the underlying index continues not to be calculated or widely available after the close of the Regular Market Session, the Exchange may trade the UTP Exchange Traded Product in the Post-Market Session only if the listing market traded such securities until the close of its regular trading session without a halt. Further, if the IIV or the value of the underlying index continues not to be calculated or widely available as of the commencement of the Pre-Market Session on the next business day, the Exchange shall not commence trading of the UTP Exchange Traded Product in the Pre-Market Session that day. If an interruption in the calculation or wide dissemination of the IIV or the value of the underlying index continues, the Exchange may resume trading in the

[11] Price Band shall mean the Price Band as described within PSX Rule 3100(a)(2).

[12] *See* PSX Rule 3301B(d) which provides, ''Pegging is an Order Attribute that allows an Order to have its price automatically set with reference to the NBBO; provided, however, that if PSX is the sole market center at the Best Bid or Best Offer (as applicable), then the price of any Displayed Order with Primary Pegging (as defined below) will be set with reference to the highest bid or lowest offer disseminated by a market center other than PSX. An Order with a Pegging Order Attribute may be referred to as a ''Pegged Order.'' For purposes of this rule, the price to which an Order is pegged will be referred to as the Inside Quotation, the Inside Bid, or the Inside Offer, as appropriate.'' Further, PSX Rule 3301B(d) provides, ''Midpoint Pegging means Pegging with reference to the midpoint between the Inside Bid and the Inside Offer (the ''Midpoint'').''

[13] *See* PSX Rule 3301A(b)(6)(A) which provides, ''A ''Midpoint Peg Post-Only Order'' is an Order Type with a Non-Display Order Attribute that is priced at the midpoint between the NBBO and that will execute upon entry only in circumstances where economically beneficial to the party entering the Order. The Midpoint Peg Post-Only Order is available during the Regular Market Session only.''

[14] *See* Nasdaq Rule 4702(b)(5)(C), which provides that Midpoint Peg Post-Only Orders will be cancelled by the System when a trading halt is declared, and any Midpoint Peg Post-Only Orders entered during a trading halt will be rejected. *See also* Nasdaq Rule 4703(d).

[15] *See* Nasdaq Rule 4702(b)(5)(A), which provides, ''A Midpoint Peg Post-Only Order must be assigned a limit price. When a Midpoint Peg Post-Only Order is entered, it will be priced at the midpoint between the NBBO, unless such midpoint is higher than (lower than) the limit price of an Order to buy (sell), in which case the Order will be priced at its limit price. If the NBBO is locked, the Midpoint Peg Post-Only Order will be priced at the locking price, if the NBBO is crossed or if there is no NBBO, the Order will not be accepted.'' *See also* Nasdaq Rule 4703(d).

[16] *See* PSX Rule 3301A(b)(6), which states, ''When a Midpoint Peg Post-Only Order is entered, it will be priced at the midpoint between the NBBO, unless such midpoint is higher than (lower than) the limit price of an Order to buy (sell), in which case the Order will be priced at its limit price. If the NBBO is locked, the Midpoint Peg Post-Only Order will be priced at the locking price, if the NBBO is crossed, it will nevertheless be priced at the midpoint between the NBBO (provided, however, that the Order may execute as described below), and if there is no NBBO, the Order will be rejected.'' *See also* PSX Rule 3301(B)(d).

[17] The proposed definition of UTP Exchange-Traded Products is substantially similar to NYSE National Rule 1.1(m), except that it also includes Index Fund Shares and NextShares within its definition of a UTP Exchange Traded Product because these are also ETPs that the Exchange can trade on a UTP basis.

UTP Exchange Traded Product only if calculation and wide dissemination of the IIV or the value of the underlying index resumes or trading in the UTP Exchange Traded Product resumes in the primary listing market. The Exchange believes that adopting new rule text and eliminating obsolete and redundant rule text within PSX Rule 3100 will bring greater transparency to UTP trading on the Exchange.

PSX Rule 3232

The Exchange also proposes to adopt new PSX Rule 3232 to govern advertising practices, which is substantively identical to NYSE National Rule 11.3.5. The rule provides that no member organization either directly or indirectly, in connection with the purchase or sale of any security that has listed or unlisted trading privileges on the Exchange, may publish, circulate or distribute any advertisement, sales literature or market letter or make oral statements or presentations which the member organization knows, or in the exercise of reasonable care should know, contain any untrue statement of material fact or which is otherwise false or misleading. Exaggerated or misleading statements or claims are prohibited.

Advertisements, sales literature and market letters shall contain the name of the member organization, the person or firm preparing the material, if other than the member organization, and the date on which it was first published, circulated or distributed (except that in advertisements only the name of the member organization need be stated). No cautionary statements or caveats, often called hedge clauses, may be used if they could mislead the reader or are inconsistent with the content of the material. Advertising, sales literature, and market letter must be approved by a designated officer, partner or other official of the member organization. A file of the advertising, sales literature, and market letter and the preparer and approver need to be retained for 3 years. Member organizations must file with the Exchange, or the designated self-regulatory organization, within 5 business days after initial use, each advertisement unless such advertisement may be published under the rules of another self-regulatory organization regulating the member organization under the Act. Testimonial material based on experience with the member organization or concerning any advice, analysis, report or other investment related service rendered by the member organization must make clear that such testimony is not necessarily indicative of future performance or results obtained by others. Testimonials also shall state whether any compensation has been paid to the maker, directly or indirectly, and if the material implies special experience or expert opinion, the qualifications of the maker of the testimonial should be given. Any statement to the effect that a report or analysis or other service will be furnished free or without any charge shall not be made unless it will be furnished entirely free and without condition or obligation. Finally, no claim or implication may be made for research or other facilities beyond those which the member organization actually possesses or has reasonable capacity to provide.

The Exchange believes that this Rule will guide member organizations as to the manner in which they may advertise, including specifically with respect to UTP Securities. The rule is intended to prevent misleading, confusing or untrue statements from enticing sales of products. The Exchange would bring action against a member organization that violated this rule pursuant to the Exchange's disciplinary rules within the Phlx 8000 and 9000 series.

PSX Rule 3233

The Exchange also proposes to adopt new PSX Rule 3233, titled ''Prevention of the Misuse of Material, Nonpublic Information,'' which is substantively identical to NYSE National Rule 11.5.5. Proposed PSX Rule 3233 would require every member organization to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by such member or member organizations. For purposes of this requirement, the misuse of material, nonpublic information would include, without limitation, the following: (a) Trading in any securities issued by a corporation, or in any related securities or related options or other derivatives securities while in possession of material, non-public information concerning that issuer; or (b) trading in a security or related options or other derivatives securities, while in possession of material, non-public information concerning imminent transactions in the security or related securities; or (c) disclosing to another person or entity any material, non-public information involving a corporation whose shares are publicly traded or an imminent transaction in an underlying security or related securities for the purpose of facilitating the possible misuse of such material, non-public information.

Further, the Rule provides that each member organization for which the Exchange is the DEA should establish, maintain, and enforce written policies and procedures similar to the following, as applicable: All members must be advised in writing of the prohibition against the misuse of material, non-public information; and all members must sign attestations affirming their awareness of, and agreement to abide by the aforementioned prohibitions. These signed attestations must be maintained for at least three years, the first two years in an easily accessible place; and each member organization must receive and retain copies of trade confirmations and monthly account statements for each account in which a member: Has a direct or indirect financial interest or makes investment decisions. The activity in such brokerage accounts should be reviewed at least quarterly by the member organization for the express purpose of detecting the possible misuse of material, non-public information; and all members must disclose to the member organization whether they, or any person in whose account they have a direct or indirect financial interest, or make investment decisions, are an officer, director or 10% shareholder in a company whose shares are publicly traded. Any transaction in the stock (or option thereon) of such company shall be reviewed to determine whether the transaction may have involved a misuse of material non-public information.

Finally, the Exchange notes that member organizations acting as a registered Market Maker in UTP Exchange Traded Products, and their affiliates, shall also establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments.

This rule is intended to prevent misuse of material information by member organizations, including specifically with respect to UTP Exchange Traded Products. The Exchange would bring action against a member organization that violated this rule pursuant to the Exchange's disciplinary rules within the Phlx 8000 and 9000 series.

PSX Rule 3234

The Exchange proposes to replicate the term ''Nasdaq Affiliate'' from Phlx Rule 990(a)(1) into PSX Rule 3234(a)(1)

and replicate and amend the term ''Affiliate Security'' from Rule 990(a)(2) into PSX Rule 3234(a)(2). The Exchange proposes to not include the exception for Trust Shares and Index Fund Shares in the proposed definition of Affiliate Security. The Exchange also proposes to add new PSX Rule 3234(b) to specify that equity Affiliate Securities will not be listed on the Exchange. Finally, the Exchange proposes to add rule text to PSX Rule 3234(c) to note that throughout the trading of the Affiliate Security on the Exchange, the Exchange will prepare a quarterly report on the Affiliate Security for the Exchange's Regulatory Oversight Committee that describes Exchange regulatory staff's monitoring of the trading of the Affiliate Security including summaries of all related surveillance alerts, complaints, regulatory referrals, adjusted trades, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's trading rules. This proposed rule is substantively identical to NYSE National Rule 3.1.

The Exchange will retain current Phlx Rule 990 with some amendments to reflect that Phlx Rule 990 is applicable to both equities and options. In addition, references to Rule 803(i) and (l) are being replaced with definitions for Trust Shares and Index Fund Shares from those portions of the rule. Finally, references to the 800 series are removed from the rule text.

Rulebook Reorganization

The Exchange has undertaken a Rulebook reorganization. As part of this reorganization, the Exchange has filed a new Rulebook shell that clearly identifies rules associated with its equity product separate from rules applicable to options products. The Exchange proposes to relocate rules applicable to PSX within the equity portions of the Rules. The relocation of the new rules into PSX Rules will make clear the applicability of these rules to the equity product.

Deletions and Cross-References

The Exchange proposes to delete Phlx Rule 136, titled ''Trading Halts in Certain Exchange Traded Funds,'' which is obsolete as it applies to listed securities.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Section 6(b)(5) of the Act,[19] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by adopting a new PSX Rule that governs UTP trading. Currently, Phlx Rule 803 governs PSX's trading of securities pursuant to unlisted trading privileges but also includes listing standards that are not applicable to PSX because PSX does not list equity securities.[20] The Exchange's proposal to adopt proposed PSX Rule 3204 will more concisely provide for UTP trading. The Exchange believes that adopting proposed PSX Rule 3204 is consistent with the Act because the proposed rule will provide greater transparency as to the manner in which PSX will trade securities pursuant to unlisted trading privileges and the type of information that will be provided to Members. In addition, the rule provides information as to other relevant requirements that Members must abide by when trading in securities pursuant to unlisted trading privileges. Finally, the Exchange's obligation with respect to surveillance is specified.

The Exchange's proposal to delete Phlx Rules 800–853, 867 and 868 is consistent with the Act because these rules do not currently reflect PSX's practice of trading securities pursuant to unlisted trading privileges, with the exception of Phlx Rule 801 which rule text is being retained and relocated within the proposed rules. The Exchange's proposal to relocate Phlx Rules 860–866 into PSX Rules 3236–3242, respectively, will bring greater transparency to these equity rules which would now be located within the PSX Rules. The Exchange's proposal to amend PSX Rules 1000 and 3202 to remove the cross-reference to Phlx Rule 803 is a conforming change because the Exchange is deleting Phlx Rule 803, except for the text within Rule 803(o)(2) which is being relocated to PSX Rule 3204(a)(3).

The Exchange has undertaken a Rulebook reorganization. As part of this reorganization, the Exchange has filed a new Rulebook shell that clearly identifies rules associated with its equity product separate from rules applicable to options products. The Exchange proposes to delete obsolete text and adopt new PSX Rule 3204 for trading securities pursuant to unlisted trading privileges in the PSX portion of the Rulebook to clarify the applicability of these rules to equity trading thereby protecting investors and the public interest. The Exchange notes that if at a later date PSX determines to list securities, it would file a proposed rule change with the Commission.

The Exchange's proposal to amend Rule 3100 to remove obsolete rule text and add rule text to describe UTP Regulatory Halts, the processing of new and existing orders in a UTP Security during a trading halt, and halts in UTP Exchange Traded Products will provide Members with greater transparency in each of these circumstances. Phlx Rule 136 is no longer necessary as the Rule applies to listed securities. This rule is being deleted and replaced with new proposed rules. The rule text within proposed Rule 3100(e) proposes a change to the treatment of Midpoint Peg and Midpoint Peg Post-Only Orders during a trading halt. Today, the Exchange does not cancel Midpoint Peg and Midpoint Peg Post-Only Orders during a trading halt. With this proposal, the Exchange proposes to begin to cancel Midpoint Peg and Midpoint Peg Post-Only Orders in conjunction with a trading halt similar to Nasdaq.[21] Midpoint Peg and Midpoint Peg Post-Only Orders are pegged to the midpoint of the NBBO. These Orders rely on current market conditions. During a trading halt, there is no updated NBBO and therefore information becomes stale. Today Nasdaq does not accept these orders when there is no NBBO.[22] Further, today PSX rejects these Orders if there is no NBBO.[23] Once a trading halt occurs, and some time has passed, market conditions can change and expose a market participant to risk. The Exchange believes that cancelling Midpoint Peg and Midpoint Peg Post Only Orders after a trading halt is consistent with the Act and the protection of investors and the public interest because it will reduce risk for market participants as it does today on Nasdaq.

With respect to the remainder of proposed Rule 3100(e), the Exchange notes that today resting Orders are maintained in the Exchange Book, cancellations are processed and Orders, including Order modifications,[24] are not accepted. The Exchange's proposal memorializes current system behavior

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] Current Phlx Rule 803 provides for certain initial and continued listing requirements which do not apply today.

[21] *See* note 14 above.

[22] *See* note 15 above.

[23] *See* note 16 above.

[24] Order modifications are comprised of a cancellation and resubmission of a new Order.

within Rule 3100(e). While the Exchange does not cancel all Orders it does allow a market participant to elect which Orders to cancel. Providing this information within proposed PSX Rule 3100(e) is consistent with the Act and the protection of investors and the public interest because all market participants will have more transparency as to the expected system behavior during a trading halt. This information will allow market participants to make informed decisions about their Orders on PSX.

The adoption of new PSX Rules 3232 (Advertising Practices) and PSX Rule 3233 (Prevention of the Misuse of Material, Nonpublic Information) will provide clear guidance within PSX Rules for Members with respect to advertising practices and utilization of non-public information for the protection of investors and the general public who are harmed by such behavior.

PSX Rule 3234

The Exchange's proposal to adopt a new PSX Rule 3234 to define the terms ''Nasdaq Affiliate'' and ''Affiliate Security'' similar to Phlx Rule 990(a)(1) and (2) and not include the exception for Trust Shares and Index Fund Shares in the relocated definition of Affiliate Security will bring greater transparency to the proposed new rule which seeks to specify that equity Affiliate Securities (including any Trust Shares and Index Fund Shares) will not be listed on the Exchange.

The amendments to current Phlx Rule 990 are consistent with the Act because they properly reflect the applicability of the rule to both equities and options. The remainder of the rule changes to Phlx Rule 990 are non-substantive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that clarifying the Phlx Rules that are applicable to the equity product and removing obsolete rules will bring greater transparency to the Rulebook. The rules regarding unlisted trading privileges, advertising practices and use of non-public information apply equally to all PSX Members. Further, updating PSX Rule 3100 will bring greater information to the manner in which the system handles trading halts for all PSX Members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [25] and Rule 19b–4(f)(6) thereunder.[26]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [27] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [28] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange may immediately adopt rules that govern UTP trading, delete obsolete rules in its rulebook, and reorganize its rules for greater clarity. The Commission also notes that, as discussed above, certain proposed rules are substantially similar to NYSE National Rules 1.1, 3.1, 5.1, 7.18, 11.3.5 and 11.5.5, and NYSE National is similar to PSX in that it trades securities only pursuant to unlisted trading privileges. Moreover, as discussed above, the proposal to cancel Midpoint Peg and Midpoint Peg Post-Only Orders during a trading halt is based on current Nasdaq functionality. The Commission believes that the proposal does not raise any new or novel regulatory issues. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[29]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2019–51 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–Phlx–2019–51. 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

[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[27] 17 CFR 240.19b–4(f)(6).

[28] 17 CFR 240.19b–4(f)(6)(iii).

[29] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–Phlx–2019–51, and should be submitted on or before January 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–27204 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87733; File No. SR–NYSECHX–2019–26]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Fee Schedule To Adopt Fees for Orders That Are Routed to Other Markets for Execution, and Delete Text That Became Obsolete Upon the Exchange's Transition to the Pillar Trading Platform

December 12, 2019.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 11, 2019 the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of NYSE Chicago, Inc. (the ''Fee Schedule'') to adopt fees for orders that are routed to other markets for execution, and delete text that became obsolete upon the Exchange's transition to the Pillar trading platform. The Exchange proposes to implement the fee change effective December 11, 2019. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt fees for orders that are routed to other markets for execution, and delete text that became obsolete upon the Exchange's transition to the Pillar trading platform. The Exchange proposes to implement the fee change effective December 11, 2019.[4]

On November 4, 2019, the Exchange transitioned to trading on Pillar.[5] Pillar is an integrated trading technology platform designed to use a single specification for connecting to the equities and options markets operated by the Exchange and its affiliates, NYSE Arca, Inc. (''NYSE Arca''), NYSE American, LLC (''NYSE American''), NYSE National, Inc. (''NYSE National''), and New York Stock Exchange LLC (''NYSE'').

Background

The Exchange operates in a highly competitive environment. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.''[6]

As the Commission itself recognized, the market for trading services in NMS stocks has become ''more fragmented and competitive.''[7] Indeed, equity trading is currently dispersed across 13 exchanges,[8] 31 alternative trading systems,[9] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single equities exchange has more than 18% market share (whether including or excluding auction volume).[10] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, in October 2019, the Exchange had 0.43% market share of executed volume of non-auction equity trading.[11]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which a firm routes order flow.

Proposed Rule Change

In May 2015, the Chicago Stock Exchange, Inc. (''CHX''), the Exchange's predecessor, launched outbound routing functionality called CHX Routing

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on December 2, 2019 (SR–NYSECHX–2019–25). SR–NYSECHX–2019–25 was subsequently withdrawn and replaced by this filing.

[5] *See* Trader Update, available at *https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSEChicago_Migration_FINAL.pdf. See also* Securities Exchange Act Release No. 87264 (October 9, 2019), 84 FR 55345 (October 16, 2019) (SR–NYSECHX–2019–08).

[6] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[7] *See* Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks Final Rule).

[8] *See* Cboe U.S Equities Market Volume Summary at *https://markets.cboe.com/us/equities/market_share. See generally https://www.sec.gov/fast-answers/divisionsmarketregmrexchanges shtml.html.*

[9] *See* FINRA ATS Transparency Data, *available at https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is *available at https://www.sec.gov/foia/docs/atslist.htm.*

[10] *See* Cboe Global Markets U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/.*

[11] *See id.*

Service.[12] Due to infrequent use of this functionality by Participants, CHX decommissioned the functionality in December 2018.[13] When the Exchange transitioned to trading to Pillar, the Exchange again began to provide outbound routing service to Participants but without charging a fee for such service. As a result, the Exchange currently does not charge a fee for orders that are routed to another market for execution. The Exchange now proposes to adopt fees for routing. Specifically, the Exchange proposes to add a new column under Section E.1 titled ''Routing Fees'' which would provide the fees applicable to all orders that are routed. For executions in securities with a price at or above $1.00 that route to and execute on an Away Market,[14] the Exchange proposes to charge a fee of $0.0030 per share.

For securities priced below $1.00 that route to and execute on an Away Market, the Exchange proposes to charge a fee of 0.30% of the total dollar value of the transaction.

Additionally, the Exchange proposes non-substantive, clarifying amendments to the Fee Schedule. First, the Exchange proposes to delete the term ''Matching System'' throughout the Fee Schedule and replace it with the term ''Exchange.'' When the Exchange transitioned to trading to Pillar, the term ''Matching System'' became obsolete. Second, the Exchange proposes to delete the words ''in either of the Exchange's data centers'' in Section D.1 of the Fee Schedule. With the Exchange's move to the Mahwah data center, the Exchange now only has one data center. The Exchange believes that these proposed changes would promote clarity and transparency of the Fee Schedule, without making any substantive changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[16] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [17]

As the Commission itself recognized, the market for trading services in NMS stocks has become ''more fragmented and competitive.'' [18] Indeed, equity trading is currently dispersed across 13 exchanges,[19] 31 alternative trading systems,[20] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 18% market share (whether including or excluding auction volume).[21] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, as noted earlier, the Exchange averaged less than 1% market share of executed volume of equity trades (excluding auction volume) [22] for October 2019.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an Exchange, Participants can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In particular, the Exchange believes that the proposed rule change is reasonable because it seeks to recoup costs incurred by the Exchange when routing orders to Away Markets. In determining its proposed routing fees, the Exchange took into account transaction fees assessed by the Away Markets to which the Exchange routes orders. Additionally, the proposed routing fees are similar to fees currently charged by the Exchange's affiliates, NYSE, NYSE Arca, NYSE National and NYSE American, and are also comparable to the fees in place at other exchanges, such as Cboe BZX Exchange, Inc. (''Cboe BZX'').[23] The Exchange believes that because the proposed fees are same as, or comparable to, fees charged on other exchanges, Participants may choose to continue to send routable orders to the Exchange, thereby directing order flow to be entered on the Exchange.

As noted above, the Exchange's proposal to charge a fee of $0.0030 per share for orders in securities priced at or above $1.00 that are routed to an Away Market is consistent with fees charged by the Exchange's affiliate NYSE,[24] NYSE Arca,[25] NYSE

[12] *See* Securities Exchange Act Release No. 73150 (September 10, 2014), 79 FR 57603 (September 25, 2014) (SR–CHX–2014–15).

[13] *See* Securities Exchange Act Release No. 84852 (December 19, 2018), 83 FR 66808 (December 27, 2018) (SR–CHX–2018–09). *See also* Securities Exchange Act Release No. 85248 (March 5, 2019), 84 FR 8773 (March 11, 2019) (SR–NYSECHX–2019–01) (Amending the Fee Schedule to Eliminate Fees Related to the CHX Routing Service).

[14] The term ''Away Market'' is defined in Rule 1.1(b) to mean any exchange, alternative trading system (''ATS'') or other broker-dealer (1) with which the Exchange maintains an electronic linkage and (2) that provides instantaneous responses to orders routed from the Exchange.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4) and (5).

[17] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[18] *See* Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7–05–18) (Final Rule).

[19] *See* Cboe Global Markets, U.S Equities Market Volume Summary, available at *https://markets.cboe.com/us/equities/market_share.*

[20] *See* FINRA ATS Transparency Data, available at *https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is *available at https://www.sec.gov/foia/docs/atslist.htm.*

[21] *See* Cboe Global Markets U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/.*

[22] *See* note 10, *supra.*

[23] *See* Cboe BZX U.S. Equities Exchange Fee Schedule, at *https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[24] *See* New York Stock Exchange Price List, Routing Fee, at *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.* NYSE charges a routing fee of $0.0035 per share, except that for member organizations that have adding ADV in Tapes A, B, and C combined that is at least 0.20% of Tapes A, B and C CADV combined, the routing fee is $0.0030 per share.

[25] *See* NYSE Arca Equities Fees and Charges, Tiers 1, 2 and 3, at *https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf.*

National [26] and NYSE American,[27] and the fee charged on other exchanges.[28]

Further, the proposal to charge a fee of 0.30% of total dollar value for transactions in securities with a price under $1.00 that are routed to an Away Market is reasonable because it is consistent with fees charged by the Exchange's affiliates, NYSE, NYSE Arca, NYSE National and NYSE American and other exchanges.[29]

With respect to the proposed deletion of obsolete text, the Exchange believes that the proposed change would remove impediments to and perfect the mechanisms of a free and open market by eliminating references to terms that are no longer applicable, thereby improving the clarity of the Exchange's rules and enabling market participants to more easily navigate the Fee Schedule. The Exchange also believes that the proposed change would protect investors and the public interest because the deletion of obsolete text would make the Fee Schedule more accessible and transparent and facilitate market participants' understanding of the fees charged for services currently offered by the Exchange.

The Proposed Rule Change Is an Equitable Allocation of Fees

The Exchange believes that the proposed rule change constitutes an equitable allocation of reasonable fees because the proposed fee is designed to reflect the costs incurred by the Exchange for orders submitted by Participants that remove liquidity from away markets and would apply equally to all Participants that choose to use the Exchange to route liquidity removing orders to an Away Market. Furthermore, the Exchange notes that routing through the Exchange is voluntary, and, because the Exchange operates in a highly competitive environment as discussed below, Participants that do not favor the proposed pricing can readily direct order flow directly to an Away Market or through competing venues or providers of routing services.

The proposed change may impact the submission of orders to a national securities exchange, and to the extent that Participants continue to submit liquidity removing orders to the Exchange, the proposed rule change would not have a negative impact to Participants trading on the Exchange because the proposed fee would be in line with the routing fee charged by other exchanges. However, without having a view of Participant's activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in a change in trading behavior by Participants.

With respect to the proposed deletion of obsolete text, the Exchange believes that the proposed change would protect investors and the public interest because it would permit the Exchange to streamline the Fee Schedule by removing references to obsolete terms from the Fee Schedule and make the Fee Schedule easier to read, understand and administer.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, Participants are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The proposal to adopt routing fees for orders that are routed to an Away Market for execution and to delete obsolete text from the Fee Schedule neither targets nor will it have a disparate impact on any particular category of market participant. The proposal does not permit unfair discrimination because the proposed fees would be applied to all Participants, who would all be charged the same fee on an equal basis. Accordingly, no Participant already operating on the Exchange would be disadvantaged by this allocation of fees.

Finally, the submission of orders to the Exchange is optional for Participants in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. The Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition. For 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,[30] 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. Instead, the Exchange believes that the proposed rule change could promote competition between the Exchange and competing venues or providers of routing services. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [31]

Intramarket Competition

The Exchange does not believe the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the Exchange would uniformly assess the proposed routing fee on all Participants who choose to route orders through the Exchange to an Away Market. The Exchange does not believe that the proposed rule change will impair the ability of Participants to compete in the financial markets. There are 13 exchanges, 31 alternative trading systems, and numerous broker-dealer internalizers and wholesalers, all competing for order flow from which Participants may choose to send their quotes and trades. The Exchange also does not believe the proposed rule change would impact intramarket competition as the proposed rule change would apply to all Participants equally that transact on the Exchange, and therefore the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition

The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee and rebate levels at those other venues to be more favorable. As noted

[26] *See* NYSE National Schedule of Fees and Rebates, Section II, Routing Fees, at *https://www.nyse.com/publicdocs/nyse/regulation/nyse/NYSE_National_Schedule_of_Fees.pdf.*

[27] *See* NYSE American Equities Price List, Section III, Fees for Routing for all ETP Holders, at *https://www.nyse.com/publicdocs/nyse/markets/nyse-american/NYSE_America_Equities_Price_List.pdf.*

[28] *See supra,* note 23. Additionally, the NASDAQ Stock Market LLC (''NASDAQ'') charges a rate of $0.0030 per share to remove liquidity for shares executed at or above $1.00. *See* NASDAQ Fee Schedule at *http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.*

[29] *See supra,* notes 23–27. Additionally, NASDAQ charges a fee of 0.30% (*i.e.* 30 basis points) of total dollar volume to remove liquidity for shares executed below $1.00. *See* NASDAQ Fee Schedule at *http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.*

[30] 15 U.S.C. 78f(b)(8).

[31] *See* Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

earlier, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) was 0.43% in October 2019. In such an environment, the Exchange must carefully consider any increases to its fees, balancing its desire to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges, while also considering its need to cover the costs associated with providing a well-regulated market. In particular, the proposed rule change is a response to this competitive environment where the Exchange is adopting a fee for functionality that is widely available among its competitors. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe the proposed change can impose any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [32] of the Act and subparagraph (f)(2) of Rule 19b–4 [33] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [34] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSECHX–2019–26 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–NYSECHX–2019–26. 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–NYSECHX–2019–26 and should be submitted on or before January 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–27216 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

[32] 15 U.S.C. 78s(b)(3)(A).

[33] 17 CFR 240.19b–4(f)(2).

[34] 15 U.S.C. 78s(b)(2)(B).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87724; File No. SR–NYSE–2019–69]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List

December 12, 2019.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 2, 2019, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to (1) adopt a new Step Up Tier 3 Adding Credit in Tape A, B and C securities; (2) revise the requirements for the Remove Tier 1 for Tape B and C securities; and (3) revise the credits available to Supplemental Liquidity Providers (''SLPs'') under SLP Provide Tier 1 for adding liquidity to the Exchange in Tapes B and C securities. The Exchange also proposes certain non-substantive changes to the Price List. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to (1) adopt a new Step Up Tier 3 Adding Credit in Tape A, B and C securities; (2) revise the requirements for the Remove Tier 1 for Tape B and C securities; and (3) revise the credits available to SLPs under SLP Provide Tier 1 for adding liquidity to the Exchange in Tapes B and C securities. The Exchange also proposes certain non-substantive changes to the Price List.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing orders by offering further incentives for member organizations to send additional displayed liquidity to the Exchange.

The Exchange proposes to implement the fee changes effective December 2, 2019.

Competitive Environment

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [4]

As the Commission itself recognized, the market for trading services in NMS stocks has become ''more fragmented and competitive.'' [5] Indeed, equity trading is currently dispersed across 13 exchanges,[6] 31 alternative trading systems,[7] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 18% market share (whether including or excluding auction volume).[8] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, for the month of November 2019, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) in Tapes A, B and C securities was only 9.4%.[9]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. With respect to non-marketable order flow that would provide displayed liquidity on an Exchange, member organizations can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

In response to this competitive environment, the Exchange has established incentives for its member organizations who submit orders that provide and remove liquidity on the Exchange, including cross-tape incentives for member organizations and SLPs based on submission of orders that provide displayed and non-displayed liquidity in Tapes B and C securities. The proposed fee change is designed to attract additional order flow to the Exchange by:

- Offering a new pricing tier to incentivize member organizations to step up their liquidity-providing orders on the Exchange on all tapes;
- revising the requirements to achieve the current Remove Tier 1 rate in Tape B and C securities for removing liquidity from the Exchange to require that a percentage of the removing ADV requirement represent an increase over November 2019; and
- restructuring the credits for SLPs that provide displayed liquidity to the Exchange in Tapes B and C securities for Tapes B and C combined by lowering the credit for SLPs meeting the current requirements and requiring adding liquidity in all assigned securities of at least 0.30% of Tape B and Tape C CADV combined in order for SLPs to qualify for the current $0.0033 credit per share per tape.

Proposed Rule Change

Proposed Step Up Tier 3 Adding Credit [10]

The Exchange proposes to adopt a ''Step Up Tier 3 Adding Credit'' that would offer a credit to member organizations providing displayed liquidity to the Exchange in Tapes A, B and C securities.

As proposed, a member organization that sends orders, except Mid-Point Liquidity Orders (''MPL'') and Non-Displayed Limit Orders, that add liquidity (''Adding ADV'') in Tape A, B and C securities would receive a credit of $0.0029 in Tape A, B and C securities if:

- The member organization quotes at least 15% of the National Best Bid or Offer (''NBBO'') [11] in 300 or more Tape A securities on a monthly basis, and
- the member organization's Adding ADV in Tapes A, B and C securities as a percentage of Tapes A, B and C consolidated average daily volume (''US CADV''),[12] excluding any liquidity added by a Designated Market Maker (''DMM''), is at least two times more than the member organization's July 2019 Adding ADV in Tapes A, B and C securities as a percentage of US CADV, and
- the member organization's Adding ADV as a percentage of US CADV, excluding any liquidity added by a DMM, exceeds that member organization's Adding ADV in Tapes A, B and C securities in July 2019 as a percentage of US CADV by at least 0.20% of US CADV, and
- add liquidity as an SLP in Tape A securities of at least 0.10% of NYSE CADV.

In addition, member organizations that meet these requirements and qualify for the $0.0029 credit in Tape A, B and C securities would be eligible to receive an additional $0.00005 per share for adding liquidity in Tape A securities if trades in Tapes B and C securities against the member organization's orders that add liquidity, excluding orders as an SLP, equal to at least 0.20% of Tape B and Tape C CADV combined.

For example, Member Organization A has an Adding ADV of 18 million shares when US CADV (Tape A) was 6.0 billion, or 0.30% of US CADV in all

[4] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7–10–04) (Final Rule) (''Regulation NMS'').

[5] *See* Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks Final Rule) (''Transaction Fee Pilot'').

[6] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/. See generally https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html.*

[7] *See* FINRA ATS Transparency Data, *available at https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is *available at https://www.sec.gov/foia/docs/atslist.htm.*

[8] *See* Cboe Global Markets U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/.*

[9] *See id.*

[10] The Exchange proposes the non-substantive change to the current Step Up Adding Tier 2 Credit of deleting the Adding ADV requirements for the November 2019 billing month from the first bullet of the rule and the introductory language in the second bullet as obsolete. The applicable requirements going forward will remain unchanged.

[11] *See* Rule 1.1(q) (defining ''NBBO'' to mean the national best bid or offer).

[12] The terms ''ADV'' and ''CADV'' are defined in footnote * of the Price List.

securities, in the baseline month of July 2019 (the ''Baseline Month''). Member Organization A also has an Adding ADV of 33 million shares or 0.55% of US CADV in Tape A securities in December 2019 when US CADV was also 6.0 billion.

Based on the foregoing, Member Organization A would meet the 0.20% step up requirement for December 2019 with an increase of 0.25% but fall short of the two times Adding ADV as a percentage of US CADV requirement in order to qualify for the proposed tier. In order to qualify for the proposed rate in December 2019, Member Organization A would need two times its 0.20% of US CADV in the Baseline Month or at least 0.60% of US CADV.

The purpose of this proposed change is to incentivize member organizations to increase the liquidity-providing orders in the Tape A, B and C securities they send to the Exchange, which would support the quality of price discovery on the Exchange and provide additional liquidity for incoming orders. The Exchange notes that this tier provides an alternative way for Member Organizations to qualify for a $0.0029 credit in Tape A Securities, in addition to Step Up Adding Tier 2. As noted above, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. Because, as proposed, the tier requires a member organization to increase the volume of its trades in orders that add liquidity over that member organization's July 2019 baseline and add liquidity as an SLP in Tape A securities of at least 0.10% of NYSE CADV, the Exchange believes that the proposed credit would provide an incentive for member organizations to send additional liquidity to the Exchange in order to qualify for it.

The Exchange does not know how much order flow member organizations choose to route to other exchanges or to off-exchange venues. There are currently no firms that qualify for the proposed higher Step Up Tier 3 Adding Credit based on their current trading profile on the Exchange, but the Exchange believes that at least 4 member organizations could qualify for the tier if they so choose. However, without having a view of member organization's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any member organization directing orders to the Exchange in order to qualify for the new tier.

Tape B and C Securities [13]

For Tape B and C securities, the Exchange currently offers a Remove Tier for securities at or above $1.00 for member organizations that have a minimum amount of Adding ADV in non-SLP and Floor broker order flow. Further, the Exchange offers several levels of credits for SLP orders that provide liquidity to the Exchange in Tape B and C securities priced at or above $1.00 based on the volume of orders that member organizations send to the Exchange. The SLP Provide Tier credits (Non Tier, Tier 2, Tier 1 and Tape A Tier) range from $0.00005 to $0.0033.

Remove Tier 1 Fee For Securities At or Above $1.00

Currently, under Remove Tier 1 for securities at or above $1.00 in Tape B and C securities, the Exchange charges a per tape fee of $0.0026 per share to remove liquidity from the Exchange for member organizations that either have:

- 0.175% of Removing ADV in Tapes B and C combined as a percentage of Tape B and C CADV, or
- 0.075% of Removing ADV in Tapes B and C combined as a percentage of Tape B and C CADV, and execute an ADV of Market-on-Close (''MOC'') and Limit-on-Close (''LOC'') Orders combined on the NYSE in Tape A securities of at least 0.35% of NYSE CADV.

In order for member organizations to achieve the current Remove Tier 1 per tape fee of $0.0026 per share to remove liquidity from the Exchange, the Exchange proposes the additional requirement that the member organization's removing ADV in Tapes B and C combined as a percentage of Tape B and C CADV represent an increase of at least 0.050% over the member organization's removing ADV in November 2019, taken as a percentage of Tape B and C combined.

For example, if Member Organization B averaged a Removing ADV in Tape B and C securities of 6 million shares in a month where the Tape B and C CADV is 3 billion shares, Member Organization B would have a Removing ADV of 0.20% of Tape B and C CADV and would previously qualify for the reduced fee of $0.0026 per share for removing liquidity from the Exchange in both Tapes B and C. Further assume that Member Organization B averaged also Removing ADV of 0.20% of Tape B and C CADV in the baseline month of November 2019. Under the proposed change, Member Organization B would need a Removing ADV of at least 7.5 million shares in the billing month to qualify, assuming Tape B and C CADV was again 3 billion shares.

Assume that Member Organization B instead averaged a Removing ADV in Tape B and C securities of 3 million shares in a month where the Tape B and C CADV is 3 billion shares, or 0.10% of Tape B and C CADV, and an ADV of MOC and LOC Orders in Tape A securities of 14 million shares in a month where NYSE CADV was 3.5 billion shares, or 0.40% of NYSE CADV. Under the proposed change, Member Organization B would need a Removing ADV of at least 4.5 million shares in the billing month to qualify, assuming Tape B and C CADV was again 3 billion shares, for an increase in Removing ADV of 0.05%.

There are currently 5 member organizations that qualify for the current Removing Tier 1 based on their current trading profile on the Exchange. There are currently no firms that qualify for the proposed Removing Tier 1 as the additional requirement requires a step up in Removing ADV over November 2019, but the Exchange believes that at least 12 additional member organizations could qualify for the proposed tier if they so choose. However, without having a view of member organization's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any member organization directing orders to the Exchange in order to qualify for this tier.

Displayed Liquidity Under SLP Provide Tier 1

Under current SLP Provide Tier 1, SLPs that add displayed liquidity to the Exchange in securities with a per share price at or above $1.00 and that:

- Add liquidity for all assigned Tape B securities of a CADV of at least 0.10% for Tape B or for all assigned Tape C Securities of a CADV of at least 0.075% for Tape C, and
- meet the 10% average or more quoting requirement in 400 or more assigned securities in Tapes B and C combined pursuant to Rule 107B are eligible for a $0.0033 per share credit

[13] The Exchange proposes two additional non-substantive changes to the Price List. First, under the heading ''Credit Applicable to Supplemental Liquidity Providers ('SLPs'),'' the Exchange proposes to replace the current list of applicable credits with the general phrase ''applicable Non-Tier or Tiered non-SLP Adding Credit'' to reference current and future non-SLP Non-Tiered and Tiered credits, rather than specifying each such credit. Second, the Exchange proposes to delete ''Traded Pursuant to Unlisted Trading Privileges (Tapes B and C) on the Pillar Trading Platform'' from the heading relating to fees and credits applicable to trading in Tape B and C securities.

per tape in an assigned Tape B or C security.

The Exchange proposes that SLPs meeting the above current requirements would be eligible for a $0.0031 per share credit per tape in an assigned Tape B or C security. Further, as proposed, SLPs that meet the additional requirement of adding liquidity for all assigned securities of at least 0.30% of Tape B and Tape C CADV combined, would be eligible for a $0.0033 per share credit per tape in an assigned Tape B or C security.

For example, assume in the billing month that SLP C adds an average of 1.0 million shares in Tape B securities and 1.5 million shares in Tape C securities in a month where Tape B CADV was 1 billion shares and Tape C CADV was 2 billion shares. SLP C would meet the current requirements by having an Adding ADV of 0.10% of Tape B and 0.075% in Tape C securities. SLP C would then need an Adding ADV of at least 9 million shares across both Tape B and Tape C securities combined to meet the proposed 0.30% Adding ADV requirement of Tapes B and C.

There are currently 2 SLPs that qualify for the proposed SLP Tier 1 based on their current trading profile on the Exchange, but the Exchange believes that at least 5 more SLPs could qualify for the tier if they so choose. However, without having a view of SLP's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any SLP directing orders to the Exchange in order to qualify for this tier.

The proposed changes are not otherwise intended to address other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[15] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Change is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [16]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an Exchange, member organizations can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange. As noted, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) for the month of November 2019, in Tapes A, B and C securities was only 9.4%.[17]

Specifically, the Exchange believes that the proposed Step Up Tier 3 Adding Credit would provide an incentive for member organizations to send additional liquidity providing orders to the Exchange in Tape A securities. As noted above, the Exchange operates in a highly competitive environment, particularly for attracting non-marketable order flow that provides liquidity on an exchange. The Exchange believes that requiring member organizations to quote at least 15% of the NBBO in 300 or more securities on a monthly basis in order to qualify for the proposed Step Up Tier 3 Adding Credit is reasonable because it would encourage additional displayed liquidity on the Exchange and because market participants benefit from the greater amounts of displayed liquidity present on the Exchange. The Exchange notes that this tier provides an alternative way for Member Organizations to qualify for a $0.0029 credit in Tape A Securities, in addition to Step Up Tier 2. Similarly, the Exchange believes that it is reasonable to provide an incremental credit to member organizations that meet the requirements of the proposed Step Up Tier 3 that add additional liquidity in Tapes B and C securities.

Since the proposed Step Up Tier 3 would be new with a step up requirement, no member organization currently qualifies for the proposed pricing tier. As previously noted, there are a number of member organizations that could qualify for the proposed higher credit but without a view of member organization activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether the proposed rule change would result in any member organization qualifying for the tier. The Exchange believes the proposed credit is reasonable as it would provide an additional incentive for member organizations to direct their order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the higher credit, thereby contributing to depth and market quality on the Exchange.

The Exchange also believes that revising the requirements for the current Remove Tier 1 rate for removing liquidity from the Exchange to require that a percentage of the removing ADV requirement represent an increase over November 2019 is reasonable because it would incentivize member organizations to remove additional liquidity from the Exchange, thereby increasing the number of orders adding liquidity that are executed on the Exchange and improving overall liquidity on a public exchange and resulting in lower costs for member organizations that qualify for the rates.

Without having a view of a member organization's activity on other markets and off-exchange venues, the Exchange believes the proposed revised Remove Tier 1 would provide an incentive for member organizations to remove additional liquidity from the Exchange in Tape B and C securities. As previously noted, a number of member organizations can qualify for the Remove Tier fee and additional member organizations could qualify for the new tiered rate under either proposed criteria if they choose to direct order flow to, and increase quoting on, the Exchange

The Exchange believes lowering the credit under SLP Provide Tier 1 for member organizations that are SLPs that meet the current requirements and

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4) & (5).

[16] *See* Regulation NMS, 70 FR at 37499.

[17] *See* note 9 *supra.*

requiring adding liquidity in all assigned securities of at least 0.30% of Tape B and Tape C CADV combined in order for SLPs to qualify for the current $0.0033 credit per share per tape is reasonable because it would provide further incentives for such member organizations to provide additional liquidity to a public exchange in Tape B and C securities to reach the proposed Adding ADV requirement of 0.30%, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. All member organizations would benefit from the greater amounts of liquidity that will be present on the Exchange, which would provide greater execution opportunities. The Exchange believes the proposal would provide an incentive for member organizations that are SLPs to route additional liquidity-providing orders to the Exchange in Tape B and C securities. As noted above, the Exchange operates in a highly competitive environment, particularly for attracting non-marketable order flow that provides liquidity on an exchange. The Exchange believes it is reasonable to provide a higher credit for orders that provide additional liquidity.

Without having a view of a member organization's activity on other markets and off-exchange venues, the Exchange believes the proposed additional requirement to qualify for the higher SLP credit would provide an incentive for member organizations who are SLPs to submit additional adding liquidity to the Exchange in Tape B and C securities. As previously noted, a number of SLPs are qualifying for the SLP Provide Tier 1credit for adding. Based on the profile of liquidity-providing SLPs generally, the Exchange believes additional SLPs could qualify for the displayed and non-displayed SLP Provide Tier 1credits if they choose to direct order flow to, and increase quoting on, the Exchange.

The Exchange notes that the proposed credits remains in line with the credits the Exchange currently credits SLPs for adding displayed and non-displayed liquidity in Tape A securities. The Exchange notes that in Tape A securities, SLPs can qualify for an adding credit of $0.0032 per share by qualifying for the SLP Tier 1 credit of $0.0029 per share and also qualifying for the Step Up Tier 1 credit of $0.0003, for a combined credit of $0.0032.[18]

Finally, the Exchange also believes the proposed non-substantive changes are reasonable and would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased clarity and transparency on the Price List, thereby reducing potential confusion.

The Proposal Is an Equitable Allocation of Fees

The Exchange believes its proposal equitably allocates its fees among its market participants. The Exchange believes its proposal equitably allocates its fees among its market participants by fostering liquidity provision and stability in the marketplace. Moreover, the proposal is an equitable allocation of fees because it would reward SLPs for their increased risks and heightened quoting and other obligations.

The Exchange believes that the proposed Step Up Tier 3 is equitable because the magnitude of the additional credit is the same as the current Step Up Tier 2 credit in Tape A securities. Moreover, the proposed credit is not unreasonably high relative to the other non-SLP adding tier credits, which as range from $0.0015 to $0.0026, in comparison to the credits paid by other exchanges for orders that provide additional step up liquidity.[19] The Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more liquidity to the Exchange, thereby improving market wide quality and price discovery. The Exchange believes that requiring member organizations to quote at least 15% of the NBBO in 300 or more Tape A securities on a monthly basis in order to qualify for the proposed credit would also encourage additional displayed liquidity on the Exchange and is same as the current Step Up Tier 2 quoting requirement.

Since the proposed Step Up Tier 3 would be new and includes a step up Adding ADV requirement, no member organization currently qualifies for it. As noted, there are currently a number of member organizations that could qualify for the proposed tier, but without a view of member organization activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any member organization qualifying for the tier. The Exchange believes the proposed credit is reasonable as it would provide an additional incentive for member organizations to direct their order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the higher credit, thereby contributing to depth and market quality on the Exchange.

The proposal neither targets nor will it have a disparate impact on any particular category of market participant. All member organizations would be eligible to qualify for the credit proposed in Step Up Tier 3 if they increase their Adding ADV over their own baseline of order flow. The Exchange believes that offering a step up credit for providing liquidity if the step up requirements for Tape A, B and C securities are met, along with the SLP and quoting requirements, will continue to attract order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not presently qualify for the adding liquidity credits, the proposal will not adversely impact their existing pricing or their ability to qualify for other credits provided by the Exchange.

The Exchange believes that, for the reasons discussed above, the proposed changes to the Remove Tier 1 fee would incentivize member organizations to remove additional liquidity from the Exchange, thereby increasing the number of orders adding liquidity that are executed on the Exchange and improving overall liquidity on a public exchange. As previously noted, a number of member organizations are qualifying for the Remove Tier 1 fee. Based on the profile of liquidity-removing firms generally, the Exchange believes additional member organizations could qualify for the new tiered rate under either proposed criteria if they choose to direct order flow to, and increase quoting on, the Exchange.

The Exchange believes that revising the credits for SLPs for adding displayed liquidity to the Exchange in Tapes B and C securities will encourage the SLPs to add liquidity to the market in Tape B and C securities, thereby providing customers with a higher quality venue for price discovery, liquidity, competitive quotes and price improvement. The proposed change will thereby encourage the submission of additional liquidity to a national securities exchange, thus promoting price discovery and transparency and enhancing order execution opportunities for member organizations from the substantial amounts of liquidity present on the Exchange. All member organizations would benefit from the greater amounts of liquidity

[18] *See* page 5 of the current NYSE Price List, available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.*

[19] *See* Cboe BZX Fee Schedule, which has adding credits ranging from $0.0025 to $0.0032, at *https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

that will be present on the Exchange, which would provide greater execution opportunities. As the Exchange previously noted that, a number of the current SLP firms are qualifying for the SLP Provide Tier 1credit based on adding displayed liquidity and adding non-displayed liquidity. Based on the profile of liquidity-providing SLPs generally, the Exchange believes that additional SLPs could qualify for the displayed and non-displayed SLP Provide Tier 1credits if they choose to direct order flow to, and increase quoting on, the Exchange.

The proposed rebates are also equitable because they would apply equally to all existing and potential SLPs. The Exchange believes the proposed rebates could provide an incentive for other market participants to become SLPs on the Exchange. The Exchange believes that the proposal would provide an equal incentive to all member organizations to become SLPs, and that the proposal constitutes an equitable allocation of fees because all similarly situated member organizations would be eligible for the same rebates.

The Proposal Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, member organizations are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The Exchange believes it is not unfairly discriminatory to provide an additional per share step up credit, as the proposed credit would be provided on an equal basis to all member organizations that add liquidity by meeting the new proposed Step Up 3 Tier's requirements. For the same reason, the Exchange believes it is not unfairly discriminatory to provide a higher adding credit to member organizations that satisfy the Step Up Tier 3 requirements and add liquidity that include Tapes B and C securities, as the higher credit of $0.0029 applies in Tape A, B and C securities and is in line with the $0.0029 Tape A credit for Step Up 2 tier. Further, the Exchange believes the proposed Step Up Tier 3 credit would incentivize member organizations that meet the current tiered requirements to send more orders to the Exchange to qualify for higher credits. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume. Finally, the submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard.

The proposed changes to the Remove Tier 1 fee are also not unfairly discriminatory because the enhanced step up requirement to achieve the fee would be applied to all similarly situated member organizations and other market participants, who would all be eligible for the same credit on an equal basis. Accordingly, no member organization already operating on the Exchange would be disadvantaged by this allocation of fees. Further, the Exchange believes the proposal would provide an incentive for member organizations to remove additional liquidity from the Exchange in Tape B and C securities, to the benefit of all market participants.

Similarly, the Exchange believes that the proposed credits for SLP Provide Tier 1 would incentivize member organizations that are SLPs to send more orders to the Exchange to qualify for higher credits. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume. Finally, the submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For 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. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for member organizations. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [21]

Intramarket Competition. The proposed changes are designed to attract additional order flow to the Exchange. The Exchange believes that the proposed changes would continue to incentivize market participants to direct displayed order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages member organizations to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants on the Exchange. The current and proposed credits would be available to all similarly-situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) for the month of November 2019, in Tapes A, B and C securities was only 9.4%.[22] In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution. The Exchange also believes that the proposed change is designed to provide the public and investors with a Price List that is clear and consistent, thereby reducing burdens on the marketplace and facilitating investor protection.

[20] 15 U.S.C. 78f(b)(8).

[21] Regulation NMS, 70 FR at 37498–99.

[22] *See* note 9 *supra.*

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [23] of the Act and subparagraph (f)(2) of Rule 19b–4 [24] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [25] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2019–69 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–2019–69. 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–2019–69 and should be submitted on or before January 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27199 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f)(2).

[25] 15 U.S.C. 78s(b)(2)(B).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87722; File No. SR–ICEEU–2019–027]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Partial Amendment No. 1, Relating to Amendments to the ICE Clear Europe CDS Procedures

December 12, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2019, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II and III below, which Items have been prepared by ICE Clear Europe. On December 10, 2019, ICE Clear Europe filed Partial Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Partial Amendment No. 1 (hereafter referred to as the ''proposed rule change''), from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe proposes to make certain changes to its CDS Procedures [4] to incorporate amendments to the industry-standard ISDA 2014 Credit Derivatives Definitions (the ''2014 Definitions'') that are being adopted in the broader CDS market to address so-called narrowly tailored credit events and related matters.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe proposes amendments to its CDS Procedures to incorporate changes to the 2014 Definitions that are intended to address so-called ''narrowly tailored credit events''. In the wake of certain credit events and potential credit events in the CDS market in recent years, the International Swaps and Derivatives Association, Inc. (''ISDA''), in consultation with market participants, has developed and published the 2019 Narrowly Tailored Credit Event Supplement to the 2014 ISDA Credit Derivatives Definitions (the ''NTCE

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Partial Amendment No. 1 amended the filing to remove from the filed Exhibit 5 certain dates in brackets and replace them with new dates and remove other language left in brackets; update page numbering in the filed Exhibit 2 so that the page numbering in the filed Exhibit 2 states ''of 59'' instead of ''of 60''; and update a reference to paragraph 8(c) of the CDS Procedures in the original filing so that it instead refers to paragraph 8.1(c) of the CDS Procedures.

[4] Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Rules or CDS Procedures.

Supplement'').[5] The NTCE Supplement, if applied to a CDS transaction, effects two principal changes to the 2014 Definitions: (1) A change to the definition of the ''Failure to Pay'' credit event designed to exclude certain narrowly tailored credit events and (2) a change to the process for determining the Outstanding Principal Balance of an obligation to address certain obligations of a reference entity that were issued at a discount.

As described by ISDA in the attached guidance to the NTCE Supplement, the supplement was published in light of concerns among market participants and regulators about ''instances of (CDS) market participants entering into arrangements with corporations that are narrowly tailored to trigger a credit event for CDS contracts while minimizing the impact on the corporation, in order to increase payment to the buyers of CDS protection.'' [6] ISDA has expressed concern that ''narrowly tailored defaults . . . could negatively impact the efficiency, reliability and fairness of the overall CDS market.'' Regulators have also expressed concern with narrowly tailored or manufactured credit events, including a joint statement by the heads of the Commission, the Commodity Futures Trading Commission and the UK Financial Conduct Authority that such strategies ''may adversely affect the integrity, confidence and reputation of the credit derivatives markets, as well as markets more generally. These opportunistic strategies raise various issues under securities, derivatives, conduct and antifraud laws, as well as policy concerns.'' [7]

With respect to the Failure to Pay credit event, the NTCE Supplement adopts a concept of a ''Credit Deterioration Requirement.'' If applicable, this requirement will provide that a failure of a reference entity to make a payment on an obligation will not constitute a Failure to Pay Credit Event if the failure ''does not directly or indirectly either result from, or result in, a deterioration in the creditworthiness or financial condition'' of the reference entity. As such, a ''narrowly tailored'' or ''manufactured'' failure to pay, which does not reflect or result in a credit deterioration, would not constitute a Credit Event for CDS Contracts that incorporate the NTCE Supplement and apply the Credit Deterioration Requirement. The NTCE Supplement also includes guidance as to factors relevant to the determination of whether credit deterioration has occurred. That determination would, under the 2014 Definitions, in the ordinary course be made by the relevant Credit Derivatives Determinations Committee.

The NTCE Supplement also amends the method of calculating the Outstanding Principal Balance of obligations. The amendments are intended to address a potential scenario where a corporation agrees to issue a bond at a substantial discount to its principal amount, where the bond could be delivered in settlement of a CDS at its full principal amount. Under the 2014 Definitions, the Quantum of the Claim (which is used to determine the Outstanding Principal Balance used in calculating settlement obligations) is determined taking into account any applicable laws insofar as they reduce the size of the claim to reflect the original issue price or accrued value of the obligation. The NTCE Supplement clarifies that the applicable laws to be considered include any bankruptcy or insolvency law or other law affecting creditors' rights to which the relevant obligation is or may become subject. In addition, the NTCE Supplement includes the concept of ''Fallback Discounting,'' which if designated to be applicable, provides a method for discounting the Quantum of the Claim (where it is not otherwise reduced under applicable law or pursuant to its own terms) of an obligation that is issued at less than 95% of its principal amount, based on straight-line interpolation between the issue price and the principal amount.

ICE Clear Europe has been advised that CDS market participants are expected to commence transacting in CDS incorporating the NTCE Supplement (with Credit Deterioration Requirement and Fallback Discounting applicable) on or about January 27, 2020. In addition, ISDA has published, and opened for adherence, an NTCE Protocol pursuant to which parties may, on a multilateral basis, agree to amend outstanding, non-cleared CDS transactions to incorporate the NTCE Supplement. The amendments made by the NTCE Protocol are also expected to have an implementation date of on or about January 27, 2020. Adherence to the protocol will thus make existing transactions fungible with transactions on the new terms. Accordingly, ICE Clear Europe is proposing to amend its CDS Procedures for relevant products to incorporate the NTCE Supplement, both for new and existing cleared transactions. For this purpose, the proposed ICE Clear Europe amendments would apply to all cleared CDS contracts with corporate (*i.e.,* non-sovereign) reference entities, consistent with the NTCE Protocol and the expected approach for new CDS transactions. ICE Clear Europe proposes to make such changes effective by the industry implementation date.

Specifically, ICE Clear Europe would amend paragraph 1 of the CDS Procedures to include new definitions for ''2019 NTCE Protocol'', ''2019 NTCE Supplement'' and ''NTCE Protocol Effective Date'', which will be the date of implementation of the amendment. The NTCE Protocol Effective Date will be January 27, 2020 (or such later date as designated by ICE Clear Europe by Circular). ICE Clear Europe would renumber the remaining provisions of paragraph 1 of the CDS Procedures accordingly.

ICE Clear Europe would further amend relevant subparts of the CDS Procedures to implement the NTCE Supplement for 2014-type CDS Contracts cleared by ICE Clear Europe. In this regard, in paragraph 8.1(c) of the CDS Procedures, a new subparagraph (iii) would be added to provide that for 2014-type CDS Contracts in effect as of the NTCE Protocol Effective Date or cleared one or after that date, the Applicable Credit Derivatives Definitions include the 2019 NTCE Supplement. Certain other amendments would apply to index CDS transactions and certain other amendments would apply to single-name CDS transactions.

For index CDS transactions, for iTraxx Europe transactions, in paragraph 9 of the CDS Procedures, the definitions of iTraxx Terms Supplement and iTraxx Legacy Terms Supplement would be amended to include the new standard terms supplement and confirmations for such transactions, which incorporate the NTCE Supplement (or any electronic equivalent thereto or other applicable document specified by the Clearing House). Pursuant to paragraphs 9.2 and 9.3, the applicable new documentation would apply to iTraxx Contracts submitted for clearing on or after the NTCE Protocol Effective Date. Conforming changes to other provisions to include references to such definitions would be made. In addition, a new paragraph 9.8 would be added to provide that existing open positions in iTraxx Contracts that are 2014-type CDS Contracts or that include a Component

[5] The NTCE Supplement is published on the ISDA website at *https://www.isda.org/a/KDqME/Final-NTCE-Supplement.pdf.*

[6] NTCE Supplement, Guidance on the interpretation of the definition of ''Failure to Pay''.

[7] Securities and Exchange Commission, Commodity Futures Trading Commission and UK Financial Conduct Authority, Joint Statement on Opportunistic Strategies in the Credit Derivatives Markets (June 24, 2019); see also Update to June 2019 Joint CFTC–SEC–FCA Statement on Opportunistic Strategies in the Credit Derivatives Market (Sept. 19, 2019).

Transaction that is a 2014-type CDS Contract, would be amended, as of the NTCE Protocol Effective Date, to reference the applicable new standard terms supplement and confirmation in lieu of the standard terms supplement and confirmation previously in effect. This will have the effect of converting existing iTraxx Contracts to reference the new standard terms incorporating the NTCE Supplement, such that they will be fungible with new iTraxx Contracts, which will also reference the new standard terms supplement and confirmation.

Substantially similar changes for CDX.NA Contracts would be made in paragraph 10 of the CDS Procedures.

In the case of Single Name Contracts, the CDS Procedures would be amended by adding a new paragraph 11.8, which provides that existing open positions in all Single Name Contracts (other than Single Name Contracts for which the Relevant Transaction Type is ''Standard Western European Sovereign'') that are 2014-type CDS Contracts would be amended, effective as of the NTCE Protocol Effective Date, to reference the new relevant ISDA physical settlement matrix, to be published as of the NTCE Protocol Effective Date. The amendments will have the effect of converting existing Single Name Contracts to reference the updated physical settlement matrix, such that they will be fungible with new Single Name Contracts, which will also reference that matrix. The amendments would also provide that the amendments would be effective regardless of whether any transaction record in the Deriv/SERV warehouse is updated to reflect the change. Conforming changes would be made throughout paragraph 11 to reflect this change.

(b) Statutory Basis

ICE Clear Europe believes that the proposed rule changes are consistent with the requirements of Section 17A of the Act [8] and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad–22.[9] In particular, Section 17A(b)(3)(F) of the Act requires that the rule change be consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICE Clear Europe, the safeguarding of securities and funds in the custody or control of ICE Clear Europe or for which it is responsible, and the protection of investors and the public interest.[10]

The amendments incorporate changes to the standard terms of CDS Contracts that are being widely adopted by market participants to address potential concerns that have arisen with so-called narrowly tailored credit events. The amendments reflect amendments to the 2014 Definitions, specifically with respect to the Failure to Pay and Outstanding Principal Balance definitions, that have been developed by ISDA, in consultation with market participants in both the cleared and uncleared CDS markets, and are set out in the NTCE Supplement. ICE Clear Europe understands that for the uncleared swap market, these amendments are expected to be widely implemented through the NTCE Protocol. ICE Clear Europe notes that the heads of the Commission, the Commodity Futures Trading Commission and the UK Financial Conduct Authority have stated that they welcome the efforts to implement the amendments set out in the NTCE Supplement and NTCE Protocol.[11] ICE Clear Europe is proposing to adopt amendments to its CDS Procedures to implement these same changes for both new and existing contracts cleared by it. As a result, in ICE Clear Europe's view, the amendments will enhance the integrity of the credit derivatives markets and the confidence of market participants in those markets, and will therefore facilitate the prompt and accurate clearance and settlement of such contracts at ICE Clear Europe and will further facilitate the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act. ICE Clear Europe does not believe the amendments will materially affect the safeguarding of securities and funds in the custody or control of ICE Clear Europe or for which it is responsible.

The amendments will also satisfy relevant requirements of Rule 17Ad–22,[12] as set forth in the following discussion.

Legal Framework. Rule 17Ad–22(e)(1) [13] requires a clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to ''provide for a well-founded, transparent and enforceable legal framework for each aspect of its activities in all relevant jurisdictions.'' [14] The amendments to the CDS Procedures are designed to supplement the contractual terms, consistent with industry initiatives, to address and reduce the likelihood of certain situations involving narrowly tailored credit events that have given rise to concerns among market participants and regulators, as described above. As such, ICE Clear Europe believes that the amendments will enhance the legal framework for clearing of CDS Contracts, consistent with the requirements of Rule 17Ad–22(e)(1).[15]

Risk Management. Rule 17Ad–22(e)(3) [16] requires a clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to ''maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, custody and other risks that arise in or are borne by the'' clearing agency.[17] ICE Clear Europe believes the amendments, by implementing the NTCE Supplement for existing and new CDS Contracts, will be consistent with, and eliminate basis risk as compared to, changes being made in the uncleared CDS markets. The changes will also ensure the fungibility of new and existing contracts in light of the NTCE Supplement amendments, which will facilitate ongoing risk management by the clearing house and market participants. As a result, in ICE Clear Europe's view, the amendments are consistent with the requirements of Rule 17Ad–22(e)(3).[18]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. The amendments reflect an industry-wide initiative designed to apply to all CDS market participants, in both the cleared and uncleared markets. ICE Clear Europe's specific amendments to its CDS Procedures will apply consistently across all Clearing Members, their customers and other market participants. ICE Clear Europe further expects that other market participants will make similar changes to their contracts and terms of trading. As a result, ICE Clear Europe does not expect that the proposed changes will

[8] 15 U.S.C. 78q–1.

[9] 17 CFR 240.17Ad–22.

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] Update to June 2019 Joint CFTC–SEC–FCA Statement on Opportunistic Strategies in the Credit Derivatives Markets (Sept. 19, 2019).

[12] 17 CFR 240.17Ad–22.

[13] 17 CFR 240.17Ad–22(e)(1).

[14] 17 CFR 240.17Ad–22(e)(1).

[15] 17 CFR 240.17Ad–22(e)(1).

[16] 17 CFR 240.17Ad–22(e)(3).

[17] 17 CFR 240.17Ad–22(e)(3).

[18] 17 CFR 240.17Ad–22(e)(3).

adversely affect access to clearing or the ability of Clearing Members, their customers or other market participants to continue to clear contracts, including CDS Contracts. ICE Clear Europe also does not believe the amendments would materially affect the cost of clearing or otherwise limit market participants' choices for selecting clearing services. Accordingly, ICE Clear Europe does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

ICE Clear Europe has conducted a public consultation on the amendments to its CDS Procedures set forth herein.[19] ICE Clear Europe received two written responses to the consultation pursuant to which certain definitional clarifications and minor typographical corrections were requested. ICE Clear Europe has made certain drafting clarifications to the proposed rules as a result of these requests. Certain comments in these responses related to the standard terms supplements and confirmations referenced in the revised CDS Procedures, and ICE Clear Europe determined that no changes to the proposed rules themselves were appropriate as a result of such comments. One commenter also questioned whether there was a need to explicitly amend Customer-CM Transactions as a result of the proposed rule changes; ICE Clear Europe determined that no such change was necessary to effectuate the proposed rule amendments. ICE Clear Europe will notify the Commission of any further written comments with respect to the proposed rules received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2019–027 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–ICEEU–2019–027. 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 such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.* 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–ICEEU–2019–027 and should be submitted on or before January 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27197 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

[19] ICE Clear Europe Circular C19/175 (November 12, 2019), available at *https://www.theice.com/publicdocs/clear_europe/circulars/C19175.pdf.*

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87729; File No. SR–DTC–2019–011]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Distributions Guide and the Fee Guide Relating to Tax Events

December 12, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 5, 2019, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rules 19b–4(f)(2) and (f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change[5] of DTC would (i) revise the Distributions Guide to enhance the DTC announcements (''Announcements'') feature within the DTC distributions service (''Distributions Service'')[6] with respect

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2) and (f)(4).

[5] Each capitalized term not otherwise defined herein has its respective meaning as set forth in the Rules, By-Laws and Organization Certificate of The Depository Trust Company (the ''DTC Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx,* and the DTC Corporate Actions Distributions Service Guide (''Distributions Guide''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Service%20Guide%20Distributions.pdf.*

[6] The Distributions Service includes DTC's announcement, collection, allocation and reporting of dividend, interest and certain principal payments on behalf of Participants holding Securities at DTC. *See* Distributions Guide, *id.,* at 9.

to corporate action events that do not involve the payment of funds or distribution of Securities through DTC, but which may result in a taxable event for holders (''Tax Events''), to accommodate the announcement of Tax Events subject to provisions of Section 871(m) of the Internal Revenue Code (''Section 871(m)''),[7] and (ii) amend the Guide to the DTC Fee Schedule (''Fee Guide'')[8] to change the name and amount of the fee relating to the announcement of Tax Events (''Tax Event Fee''), as discussed below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would (i) revise the Distributions Guide to enhance the Announcements feature within the Distributions Service with respect to Tax Events, to accommodate the announcement of Tax Events subject to provisions of Section 871(m), and (ii) amend the Fee Guide to change the name and amount of the Tax Event Fee, as discussed below.

Distributions Service Announcements Feature

The Distributions Service includes the announcement, collection, allocation and reporting by DTC, on behalf of its Participants, of dividend, interest and principal payments for Eligible Securities held by Participants at DTC. This centralized processing provides efficiency for Participants for their receipt of (i) payment information and (ii) payments on distributions covered by Announcements (''Distribution Event''),[9] from multiple issuers and agents.[10] In this regard, Announcements provide Participants with information pertaining to their record date (''Record Date'')[11] positions for Distribution Events.[12] This information facilitates Participants' ability to reconcile their records with DTC before the date DTC has been instructed by the issuer or issuer's agent to allocate a distribution (''Payable Date'').[13]

Tax Events

Pursuant to a DTC rule change[14] that became effective in October 2017, DTC implemented the Announcements feature for Tax Events and the Tax Event Fee relating to the announcement of distributions subject to Section 305(c) of the Internal Revenue Code (''Section 305(c)'').[15] Section 305(c) states that holders of convertible Securities may be deemed to have received a distribution because of a corporate action on common stock into which the convertible Security may be converted.[16] A lack of information relating to these deemed distributions and other Tax Events may affect Participants' ability to comply with applicable federal tax withholding requirements and applicable DTC Rules requirements relating to the use of DTC services.[17]

Pursuant to the Tax Event Rule Filing, the Distributions Guide was revised to enable DTC to distribute to Participants the Tax Event information for a deemed distribution in the same standardized manner that DTC uses to announce distributions. The Tax Event Rule Filing also added text to (a) describe and define Tax Events and Tax Event announcements, and (b) describe the systemic data fields (''Fields'') that DTC uses to provide relevant Tax Event information for a Security to Participants, including: (1) ''Event Type'' shown as ''Tax Event,'' (2) ''Sub Event Type,'' which is used to classify the type of Tax Event, (3) Payable Date, (4) Record Date, (5) ''Cash Rate,'' to provide the amount of the deemed distribution, and (6) ''Comments,'' which is used to provide any other pertinent information regarding the Tax Event.[18]

Tax Event Fee

Fees are charged by DTC to Participants, pursuant to the Fee Guide,[19] to offset the cost of processing corporate action events, including the announcement processing, the actual processing of payments, and book-entries associated with the corporate action. Pursuant to the Tax Event Rule Filing, the Fee Guide was revised so that a Participant that holds Securities subject to a Tax Event would be charged a flat Tax Event Fee of $40 per announcement for a Section 305(c) announcement.[20] As indicated in the Tax Event Rule Filing, the addition of the Tax Event Fee to the Fee Guide aligned DTC's revenue with its costs for retrieval of Tax Event information from issuers and announcing that information to Participants.[21] The Tax Event Fee was added to the Fee Guide underneath the section for U.S. tax withholding services, which is a feature of the Distributions Service, for reference purposes, and is in the Fee Guide in the same place as other fees charged for tax-related processing performed by DTC.[22]

Section 871(m) of the Internal Revenue Code

Like a Section 305(c) Tax Event, an event subject to the provisions of Section 871(m) is also a corporate action event in which no cash or security entitlement is allocated to a Participant but may trigger a taxable event for DTC to perform tax withholding and reporting.

Section 871(m), which was enacted in 2010, imposes a 30 percent withholding tax on ''dividend equivalent'' payments that are made or deemed to be made to non-U.S. persons with respect to certain derivative Securities that reference equity (''Equity Derivative'') of a U.S. issuer. In enacting Section 871(m),

[7] 26 U.S.C. 871(m).

[8] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/fee-guides/dtcfeeguide.pdf?la=en.*

[9] Distribution Events covered by Announcements include cash dividends, interest, principal, capital gains, sale of rights on American depositary receipts, return of capital, dividend with option, stock splits, stock dividends, automatic dividend reinvestments, spinoffs, rights distributions, pay in kind, and liquidation. *See* Distributions Guide, *supra* note 5, at 12.

[10] *See* Distributions Guide, *supra* note 5, at 9.

[11] The Record Date is the date set by an issuer of a security by which an investor must own the security in order to be eligible to receive an upcoming distribution. *See* DTC Operational Arrangements Necessary for Securities to Become and Remain Eligible for DTC Services, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/issue-eligibility/eligibility/operational-arrangements.pdf,* at 20.

[12] *See* Distributions Guide, *supra* note 5, at 11–13.

[13] *See* Distributions Guide, *supra* note 5, at 11.

[14] *See* Securities Exchange Act Release No. 81871 (October 13, 2017), 82 FR 48734 (October 19, 2017) (SR–DTC–2017–018) (''Tax Event Rule Filing'').

[15] 26 U.S.C. 305(c).

[16] Under Section 305(c), a change in the conversion ratio or conversion price or a similar transaction is treated ''as a distribution [by the issuer] with respect to any shareholder whose proportionate interest in the earnings and profits or assets of the corporation is increased by such change.'' *Id.*

[17] In connection with their use of DTC's services, Participants must comply with all applicable laws, including, but not limited to, all applicable laws relating to taxation. *See* DTC Rule 2, Section 8, *supra* note 5.

[18] *See* Tax Event Rule Filing, *supra* note 14.

[19] *Supra* note 8.

[20] *See* Tax Event Rule Filing, *supra* note 14.

[21] *Id.*

[22] *See* Fee Guide, *supra* note 8, at 15–16.

Congress was attempting to address the ability of foreign persons to obtain the economics of owning dividend-paying stock through an Equity Derivative while avoiding the withholding tax that would apply to dividends paid on the stock if the foreign person owned the stock directly.[23]

In September 2015, the U.S. Treasury Department adopted final regulations (the ''Final Section 871(m) Regulations'')[24] based on a proposal issued in December 2013 that implemented and enforced Section 871(m) with an effective date of January 1, 2017. The Final Section 871(m) Regulations introduced various new tax-related obligations for Participants and DTC.

Under the Final Section 871(m) Regulations, an Equity Derivative held by a non-U.S. person may be considered a ''Section 871(m) Transaction'' and can potentially give rise to a dividend equivalent subject to withholding tax.[25] A complex set of rules and exceptions in the Final Section 871(m) Regulations must be followed in order for the withholding agent to determine if the withholding tax in fact applies, and, if so, the amount of the dividend equivalent subject to withholding tax.[26]

Proposed Rule Change

Distributions Guide

Distributions that occur with respect to Securities subject to the provisions of Section 871(m) are Tax Events as defined in the Distributions Guide.[27] Therefore, pursuant to the proposed rule change, DTC would provide announcements relating to these Securities to Participants in accordance with the provisions of the Distributions Guide relating to Tax Events, as discussed above. As a result, Participants would receive Tax Event announcements relating to Securities subject Section 871(m), as they do to with respect to Securities subject to Section 305(c), and they would be able to use the data provided via the announcements to help them meet their tax withholding and reporting obligations.

In addition, DTC proposes to update the Distributions Guide to update the Payable Date Field to provide for an enhanced description for Payable Date information to be provided by DTC for Section 305(c) announcements versus Section 871(m) announcements. In this regard, the existing Payable Date Field description would be updated from stating it is the ''field used for the date of the deemed distribution'' to instead state it is a ''field used for the date of deemed distributions for sub event types of 305(c) Deemed Dividends'' or a ''field used to provide the payable date of the underlying security for sub event type of 871(m) Dividend Equivalent Amount.''

Pursuant to the proposed rule change DTC would also add a new Field titled ''Timing of the Dividend Equivalent Amount'' with a description that it is a ''field used for the timing of dividend equivalents under 1.871–15 of Treasury regulations.''

The proposed rule change would also make a technical change for enhanced readability and clarity by changing the opening text of the subsection titled ''The Tax Event Announcement Feature'' from stating ''The Tax Event announcement feature leverages the following data fields from other event types to provide relevant information to participants:'' to instead state ''The Tax Event announcement feature uses the following data fields to provide relevant information to participants:''.

Fee Guide

Pursuant to the proposed rule change, because all Tax Events would be announced pursuant to the same Procedures and processes, including using similar Fields, as described above, DTC would charge the same Tax Event Fee amount to Participants for all Tax Event Announcements, regardless of whether they relate to Securities subject to Section 305(c) or Section 871(m). In this regard, DTC would change the name for the Tax Event Fee in the Fee Guide from ''Tax Event Announcement—305c'' to ''Tax Event Announcement,'' so there would be one fee item in the Fee Guide applicable to Tax Events.

DTC believes that the proposed rule change, as described above, would significantly increase the volume of Tax Event announcements processed by DTC and therefore increase the volume of Tax Event Fees charged to Participants. After reviewing the costs of providing Tax Event announcements, and the revenue necessary for DTC to recover development costs and operating expenses relating to providing Tax Event announcements as proposed above, DTC has determined that due to anticipated increasing economies of scale, the increased volumes in Tax Event announcements at the current amount of the Tax Event Fee would result in the collection of a total amount of Tax Events Fees that is significantly more than would be necessary to offset DTC's costs relating to retrieval of Tax Event information from issuers and announcing that information to Participants. In this regard, DTC has determined that it should reduce the Tax Event Fee from $40 per announcement to $12 per announcement for consistency with its cost-based plus markup[28] fee model. Therefore, DTC proposes to amend the Fee Guide to reduce the Tax Event Fee from $40 per announcement to $12 per announcement.

Implementation Timeframe

The proposed rule change would be implemented on December 6, 2019.

2. Statutory Basis

DTC believes that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder applicable to DTC, in particular Sections 17A(b)(3)(D)[29] and 17A(b)(3)(F)[30] of the Act.

Section 17A(b)(3)(D) of the Act[31] requires that the rules of the clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. DTC believes that the proposed Tax Event Fee, as described above, would be equitably allocated among Participants because each Participant holding Securities subject to Tax Events would be charged the same Tax Event Fee amount per Announcement. DTC believes that the proposed Tax Event Fee amount would be reasonable because it would allow DTC to recover

[23] *See* 26 U.S.C. 871(a)(1)(A) (30 percent tax on dividends paid to non-resident aliens).

[24] *See* T.D. 9734, 80 FR 56866 (Sept. 18, 2015).

[25] *See* 26 CFR 1.871–15(g)(1).

[26] *See id.*

[27] Pursuant to the Distributions Guide, Tax Events announcements are information only announcements regarding taxable events that may give rise to information and/or withholding obligations which occur even in the absence of an actual distribution of dividend and interest payments. *See* Distributions Guide, *supra* note 5, at 9. Announcements of Distribution Events for Securities subject to Section 871(m) meet the definition of Tax Event as defined in the Distributions Guide because under the Final Section 871(m) Regulations, an Equity Derivative held by a non-U.S. person may be considered a ''Section 871(m) Transaction'' and can potentially give rise to a dividend equivalent subject to withholding tax even in the absence of an actual distribution payment. *See supra* note 25.

[28] DTC has in place procedures to control costs and to regularly review pricing levels against costs of operation. DTC's fees are cost-based plus a markup as approved by its Board of Directors. This markup is applied to recover development costs and operating expenses, and to accumulate capital enough to meet regulatory and economic requirements. *See* DTC Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/policy-and-compliance/DTC_Disclosure_Framework.pdf,* at 124.

[29] 15 U.S.C. 78q–1(b)(3)(D).

[30] 15 U.S.C. 78q–1(b)(3)(F).

[31] 15 U.S.C. 78q–1(b)(3)(D).

its costs of retrieval of Tax Event information from issuers and announcing that information to Participants holding the applicable Securities, which information is needed by the Participants to facilitate their compliance with applicable tax withholding obligations, as described above. Therefore, DTC believes that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act, cited above.

Section 17A(b)(3)(F) of the Act [32] requires, *inter alia,* that the rules of the clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions. As described above, the proposed rule change would enhance the Distributions Service to include the distribution of announcements for Tax Events for Securities subject to Section 871(m) to Participants. As described above, by providing for the distribution of Tax Event information to Participants, the proposed rule change would facilitate Participants' ability to comply with their federal tax withholding obligations. This would further facilitate Participants' ability to continue to maintain Eligible Securities subject to Tax Events on Deposit at DTC and make use of DTC's book-entry transfer and settlement services with respect to those Securities, in accordance with DTC Rules requirements relating to the use of DTC services by Participants.[33] Therefore, by facilitating Participant's ability to continue to use DTC's book-entry transfer and settlement services at DTC with respect to Eligible Securities that are subject to Tax Events, the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, consistent with the requirements of the Act, in particular Section 17A(b)(3)(F) of the Act, cited above.

(B) Clearing Agency's Statement on Burden on Competition

DTC believes that the proposed rule change to amend the Distributions Guide to update Fields used by DTC to report Tax Events and make other technical and clarifying changes, as described above, could impose a burden on competition, because by designating Section 871(m) announcements as Tax Events, and causing Participants that hold Securities subject Section 871(m) to be subject to the Tax Event Fee, it would subject Participants to a mandatory DTC Tax Event Fee that they would not incur today.

To the extent the proposed rule change may impose a burden on competition, DTC believes it would be necessary and appropriate in furtherance of the purposes of the Act,[34] because the proposed rule change would provide for Participants to obtain the Tax Event announcement information needed to facilitate their compliance with tax withholding obligations and DTC's Rules relating to Participants' compliance with applicable law, as described above. DTC has discussed the proposal with Participants that hold Securities subject to Section 871(m), and issuers of those Securities, and DTC is not aware of either (i) an alternative method available to Participants to obtain Section 871(m) announcement information in a centralized format or (ii) established or planned arrangements by issuers to provide tax-related information for Section 871(m) Securities directly to DTC Participants and/or investors.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not solicited and does not intend to solicit written comments regarding the proposed rule change. DTC has not received any unsolicited written comments from interested parties. To the extent DTC receives written comments on the proposed rule change, DTC will forward such comments to the Commission.

Participants most likely to be affected by the proposed rule change have indicated in discussions with DTC that receiving Section 871(m) announcements through DTC would facilitate their ability to comply with their tax withholding obligations.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [35] and paragraph (f) of Rule 19b–4 thereunder.[36] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2019–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2019–011. 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 DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2019–011 and should be submitted on or before January 8, 2020.

[32] 15 U.S.C. 78q–1(b)(3)(F).

[33] *See supra* note 17.

[34] 15 U.S.C. 78q–1(b)(3)(I).

[35] 15 U.S.C. 78s(b)(3)(A).

[36] 17 CFR 240.19b–4(f).

[37] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–27206 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87727; File No. SR–CBOE–2019–111)]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Fees Schedule in Connection With Migration

December 12, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2019, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule in connection with migration. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2016, the Exchange's parent company, Cboe Global Markets, Inc. (formerly named CBOE Holdings, Inc.) (''Cboe Global''), which is also the parent company of Cboe C2 Exchange, Inc. (''C2''), acquired Cboe EDGA Exchange, Inc. (''EDGA''), Cboe EDGX Exchange, Inc. (''EDGX'' or ''EDGX Options''), Cboe BZX Exchange, Inc. (''BZX'' or ''BZX Options''), and Cboe BYX Exchange, Inc. (''BYX'' and, together with Cboe Options, C2, EDGX, EDGA, and BZX, the ''Affiliated Exchanges''). The Cboe Affiliated Exchanges recently aligned certain system functionality, including with respect to connectivity, retaining only intended differences between the Affiliated Exchanges, in the context of a technology migration. The Exchange migrated its trading platform to the same system used by the Affiliated Exchanges, which the Exchange completed on October 7, 2019 (the ''migration''). As a result of this migration, the Exchange's pre-migration connectivity architecture was rendered obsolete, and as such, the Exchange now offers new functionality, including new logical connectivity, and therefore proposes to adopt corresponding fees.[3] In determining the proposed fee changes, the Exchange assessed the impact on market participants to ensure that the proposed fees would not create an undue financial burden on any market participants, including smaller market participants. While the Exchange has no way of predicting with certainty the impact of the proposed changes, the Exchange had anticipated its post-migration connectivity revenue[4] to be approximately 1.75% lower than connectivity revenue pre-migration.[5] In addition to providing a consistent technology offering across the Cboe Affiliated Exchanges, the migration also provided market participants a latency equalized infrastructure, improved system performance, and increased sustained order and quote per second capacity, as discussed more fully below. Accordingly, in connection with the migration and in order to more closely align the Exchange's fee structure with that of its Affiliated Exchanges, the Exchange intends to update and simplify its fee structure with respect to access and connectivity and adopt new access and connectivity fees.[6]

Physical Connectivity

A physical port is utilized by a Trading Permit Holder (''TPH'') or non-TPH to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses fees for Network Access Ports for these physical connections to the Exchange. Specifically, TPHs and non-TPHs can elect to connect to Cboe Options' trading system via either a 1 gigabit per second (''Gb'') Network Access Port or a 10 Gb Network Access Port. Pre-migration the Exchange assessed a monthly fee of $1,500 per port for 1 Gb Network Access Ports and a monthly fee of $5,000 per port for 10 Gb Network Access Ports for access to Cboe Options primary system. Through January 31, 2020, Cboe Options market participants will continue to have the ability to connect to Cboe Options' trading system via the current Network Access Ports. As of October 7, 2019, in connection with the migration, TPHs and non-TPHs may alternatively elect to connect to Cboe Options via new latency equalized Physical Ports.[7] The new Physical Ports similarly allow TPHs and non-TPHs the ability to connect to the Exchange at the data center where the Exchange's servers are located and TPHs and non-TPHs have the option to connect via 1 Gb or 10 Gb Physical Ports. As noted above, both the new 1 Gb and 10 Gb Physical Ports provide latency

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As of October 7, 2019, market participants no longer have the ability to connect to the old Exchange architecture.

[4] Connectivity revenue post-migration includes revenue from physical port fees (other than for disaster recovery), Cboe Data Services Port Fee, logical port fees, Trading Permit Fees, Market-Maker EAP Appointment Unit fees, Tier Appointment Surcharges and Floor Broker Trading Surcharges, less the Floor Broker ADV discounts and discounts on BOE Bulk Ports via the Affiliate Volume Plan and the Market-Maker Access Credit program.

[5] The Exchange does not anticipate realizing the projected revenue reduction prior to February 2020, as the Exchange's legacy physical ports will not be decommissioned until January 31, 2020 and firms may still be in the process of transitioning their connectivity. As such, the Exchange believes any changes in revenue until such time are not reflective of the predicted and modeled impact.

[6] The Exchange initially filed the proposed fee changes on October 1, 2019 (SR–CBOE–2019–077). On business date October 2, 2019, the Exchange withdrew that filing and submitted SR–CBOE–2019–082, *See* Securities Exchange Act Release No. 87304 (October 15, 2019), 84 FR 56240, (October 21, 2019). On business date November 29, 2019, the Exchange withdrew that filing and submitted this filing.

[7] As previously noted, market participants will continue to have the option of connecting to Cboe Options via a 1 Gbps or 10 Gbps Network Access Port at the same rates as proposed, respectively.

equalization, meaning that each market participant will be afforded the same latency for 1 Gb or 10 Gb Physical Ports in the primary data center to the Exchange's customer-facing switches regardless of location of the market participant's cage [8] in the primary data center relative to the Exchange's servers. Conversely, the legacy Network Access Ports are not latency equalized, meaning the location of a market participant's cage within the data center may affect latency. For example, in the legacy system, a cage located further from the Exchange's servers may experience higher latency than those located closer to the Exchange's servers.[9] As such, the proposed Physical Ports ensure all market participants connected to the Exchange via the new Physical Ports will receive the same respective latency for each port size and ensure that no market participant has a latency advantage over another market participant within the primary data center.[10] Additionally, the new infrastructure utilizes new and faster switches resulting in lower overall latency.

The Exchange proposes to assess the following fees for any physical port, regardless of whether the TPH or non-TPH connects via the current Network Access Ports or the new Physical Ports. Specifically, the Exchange proposes to continue to assess a monthly fee of $1,500 per port for 1 Gb Network Access Ports and new Physical Ports and increase the monthly fee for 10 Gb Network Access Ports and new Physical Ports to $7,000 per port. Physical port fees will be prorated based on the remaining trading days in the calendar month. The proposed fee for 10 Gb Physical Ports is in line with the amounts assessed by other exchanges for similar connections by its Affiliated Exchanges and other Exchanges that utilize the same connectivity infrastructure.[11]

In addition to the benefits resulting from the new Physical Ports providing latency equalization and new switches (*i.e.,* improved latency), TPHs and non-TPHs may be able to reduce their overall physical connectivity fees. Particularly, Network Access Port fees are assessed for unicast (orders, quotes) and multicast (market data) connectivity separately. More specifically, Network Access Ports may only receive one type of connectivity each (thus requiring a market participant to maintain two ports if that market participant desires both types of connectivity). The new Physical Ports however, allow access to both unicast and multicast connectivity with a single physical connection to the Exchange. Therefore, TPHs and non-TPHs that currently purchase two legacy Network Access Ports for the purpose of receiving each type of connectivity now have the option to purchase only one new Physical Port to accommodate their connectivity needs, which may result in reduced costs for physical connectivity.[12]

Cboe Data Services—Port Fees

The Exchange proposes to amend the ''Port Fee'' under the Cboe Data Services (''CDS'') Fees Schedule. Currently, the Port Fee is payable by any Customer [13] that receives data through two types of sources; a direct connection to CDS (''direct connection'') or through a connection to CDS provided by an extranet service provider (''extranet connection''). The Port Fee applies to receipt of any Cboe Options data feed but is only assessed once per data port. The Exchange proposes to amend the monthly CDS Port Fee to provide that it is payable ''per source'' used to receive data, instead of ''per data port''. The Exchange also proposes to increase the fee from $500 per data port/month to $1,000 per data source/month.[14] The Exchange notes the proposed change in assessing the fee (*i.e.,* per source vs per port) and the proposed fee amount are the same as the corresponding fee on its affiliate C2.[15]

In connection with the proposed change, the Exchange also proposes to rename the ''Port Fee'' to ''Direct Data Access Fee''. As the fee will be payable ''per data source'' used to receive data, instead of ''per data port'', the Exchange believes the proposed name is more appropriate and that eliminating the term ''port'' from the fee will eliminate confusion as to how the fee is assessed.

Logical Connectivity

Next, the Exchange proposes to amend its login fees. By way of background, Cboe Options market participants were able to access Cboe Command via either a CMI or a FIX Port, depending on how their systems are configured. Effective October 7, 2019, market participants are no longer able to use CMI and FIX Login IDs. Rather, the Exchange utilizes a variety of logical connectivity ports as further described below. Both a legacy CMI/FIX Login ID and logical port represent a technical port established by the Exchange within the Exchange's trading system for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts,

[8] A market participant's ''cage'' is the cage within the data center that contains a market participant's servers, switches and cabling.

[9] The Exchange equalizes physical connectivity in the data center for its primary system by taking the farthest possible distance that a Cboe market participant cage may exist from the Exchange's customer-facing switches and using that distance as the cable length for any cross-connect.

[10] The Exchange notes that 10 Gb Physical Ports have an 11 microsecond latency advantage over 1 Gb Physical Ports. Other than this difference, there are no other means to receive a latency advantage as compared to another market participant in the new connectivity structure.

[11] *See* Cboe EDGA U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe EDGX U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe BZX U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe BYX U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe EDGX Options Exchange Fee Schedule, Physical Connectivity Fees; and Cboe BZX Options Exchange Fee Schedule, Physical Connectivity Fees (collectively, ''Affiliated Exchange Fee Schedules''). *See e.g.,* Nasdaq PHLX and ISE Rules, General Equity and Options Rules, General 8. Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection. *See also* Nasdaq Price List—Trading Connectivity. Nasdaq charges a monthly fee of $7,500 for each 10Gb direct connection to Nasdaq and $2,500 for each direct connection that supports up to 1Gb. *See also* NYSE American Fee Schedule, Section V.B, and Arca Fees and Charges, Co-Location Fees. NYSE American and Arca each charge a monthly fee of $5,000 for each 1Gb circuit, $14,000 for each 10Gb circuit and $22,000 for each 10Gb LX circuit.

[12] The Exchange proposes to eliminate the current Cboe Command Connectivity Charges table in its entirety and create and relocate such fees in a new table in the Fees Schedule that addresses fees for physical connectivity, including fees for the current Network Access Ports, the new Physical Ports and Disaster Recovery (''DR'') Ports. The Exchange notes that it is not proposing any changes with respect to DR Ports other than renaming the DR ports from ''Network Access Ports'' to ''Physical Ports'' to conform to the new Physical Port terminology. The Exchange also notes that subsequent to the initial filings that proposed these fee changes on October 1 and 2, 2019 (SR–CBOE–2019–077 and SR–CBOE–2019–082), the Exchange amended the proposed port fees to waive fees for ports used for PULSe in filing No. SR–CBOE–2019–105. The additions proposed by filing SR–CBOE–2019–105 are double underlined in Exhibit 5A and the deletions are doubled bracketed in Exhibit 5A.

[13] A Customer is any person, company or other entity that, pursuant to a market data agreement with CDS, is entitled to receive data, either directly from CDS or through an authorized redistributor (*i.e.,* a Customer or extranet service provider), whether that data is distributed externally or used internally.

[14] For example, under the pre-migration ''per port'' methodology, if a TPH maintained 4 ports that receive market data, that TPH would be assessed $2,000 per month (*i.e.,* $500 × 4 ports), regardless of how many sources it used to receive data. Under the proposed ''per source'' methodology, if a TPH maintains 4 ports that receive market data, but receives data through only one source (*e.g.,* a direct connection) that TPH would be assessed $1,000 per month (*i.e.,* $1,000 × 1 source). If that TPH maintains 4 ports but receives data from both a direct connection and an extranet connection, that TPH would be assessed $2,000 per month (*i.e.,* $1,000 × 2 sources). Similarly, if that TPH maintains 4 ports and receives data from two separate extranet providers, that TPH would be assessed $2,000 per month (*i.e.,* $1,000 × 2).

[15] *See* Cboe C2 Options Exchange Fee Schedule, Cboe Data Services, LLC Fees, Section IV, Systems Fees.

cancels, transactions, etc. Market participants that wish to connect directly to the Exchange can request a number of different types of ports, including ports that support order entry, customizable purge functionality, or the receipt of market data. Market participants can also choose to connect indirectly through a number of different third-party providers, such as another broker-dealer or service bureau that the Exchange permits through specialized access to the Exchange's trading system and that may provide additional services or operate at a lower mutualized cost by providing access to multiple members. In light of the discontinuation of CMI and FIX Login IDs, the Exchange proposes to eliminate the fees associated with the CMI and FIX login IDs and adopt the below pricing for logical connectivity in its place.

Service	Cost per month
Logical Ports (BOE, FIX) 1 to 5	$750 per port.
Logical Ports (BOE, FIX) >5	$800 per port.
Logical Ports (Drop)	$750 per port.
BOE Bulk Ports 1 to 5	$1,500 per port.
BOE Bulk Ports 6 to 30	$2,500 per port.
BOE Bulk Ports >30	$3,000 per port.
Purge ports	$850 per port.
GRP Ports	$750/primary (A or C Feed).
Multicast PITCH/Top Spin Server Ports	$750/set of primary (A or C feed).

The Exchange proposes to provide for each of the logical connectivity fees that new requests will be prorated for the first month of service. Cancellation requests are billed in full month increments as firms are required to pay for the service for the remainder of the month, unless the session is terminated within the first month of service. The Exchange notes that the proration policy is the same on its Affiliated Exchanges.[16]

Logical Ports (BOE, FIX, Drop): The new Logical Ports represent ports established by the Exchange within the Exchange's system for trading purposes. Each Logical Port established is specific to a TPH or non-TPH and grants that TPH or non-TPH the ability to operate a specific application, such as order/quote[17] entry (FIX and BOE Logical Ports) or drop copies (Drop Logical Ports). Similar to CMI and FIX Login IDs, each Logical Port will entitle a firm to submit message traffic of up to specified number of orders per second.[18] The Exchange proposes to assess $750 per port per month for all Drop Logical Ports and also assess $750 per port per month (which is the same amount currently assessed per CMI/FIX Login ID per month), for the first 5 FIX/BOE Logical Ports and thereafter assess $800 per port, per month for each additional FIX/BOE Logical Port. While the proposed ports will be assessed the same monthly fees as current CMI/FIX Login IDs (for the first five logical ports), the proposed logical ports provide for significantly more message traffic as shown below:

	CMI/FIX login Ids		BOE/FIX logical ports
	Quotes	Orders	Quotes/orders
Bandwidth Limit per login	5,000 quotes/3 sec[19]	30 orders/sec	15,000 quotes/orders/3 sec.
Cost	$750 each	$750 each	$750/$800 each.
Cost per Quote/Order Sent @Limit	$0.15 per quote/3 sec	$25.00 per order/sec	$0.05/$0.053 per quote/order/3 sec.

Logical Port fees will be limited to Logical Ports in the Exchange's primary data center and no Logical Port fees will be assessed for redundant secondary data center ports. Each BOE or FIX Logical Port will incur the logical port fee indicated in the table above when used to enter up to 70,000 orders per trading day per logical port as measured on average in a single month. Each incremental usage of up to 70,000 per day per logical port will incur an additional logical port fee of $800 per month. Incremental usage will be determined on a monthly basis based on the average orders per day entered in a single month across all of a market participant's subscribed BOE and FIX Logical Ports. The Exchange believes that the pricing implications of going beyond 70,000 orders per trading day per Logical Port encourage users to mitigate message traffic as necessary. The Exchange notes that the proposed fee of $750 per port is the same amount assessed not only for current CMI and FIX Login Ids, but also similar ports available on an affiliate exchange.[20]

The Exchange also proposes to provide that the fee for one FIX Logical Port connection to PULSe and one FIX Logical Port connection to Cboe Silexx (for FLEX trading purposes) will be waived per TPH. The Exchange notes that only one FIX Logical Port connection is required to support a firm's access through each of PULSe and Cboe Silexx FLEX.

BOE Bulk Logical Ports: The Exchange also offers BOE Bulk Logical Ports, which provide users with the ability to submit single and bulk order messages

[16] *See* Affiliated Exchange Fee Schedules, Logical Port Fees.

[17] As of October 7, 2019, the definition of quote in Cboe Options Rule 1.1 means a firm bid or offer a Market-Maker (a) submits electronically as an order or bulk message (including to update any bid or offer submitted in a previous order or bulk message) or (b) represents in open outcry on the trading floor.

[18] Login Ids restrict the maximum number of orders and quotes per second in the same way logical ports do, and Users may similarly have multiple logical ports as they may have Trading Permits and/or bandwidth packets to accommodate their order and quote entry needs.

[19] Each Login ID has a bandwidth limit of 80,000 quotes per 3 seconds. However, in order to place such bandwidth onto a single Login ID, a TPH or non-TPH would need to purchase a minimum of 15 Market-Maker Permits or Bandwidth Packets (each Market-Maker Permit and Bandwidth Packet provides 5,000 quotes/3 sec). For purposes of comparing ''quote'' bandwidth, the provided example assumes only 1 Market-Maker Permit or Bandwidth Packet has been purchased.

[20] *See* Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

to enter, modify, or cancel orders designated as Post Only Orders with a Time-in-Force of Day or GTD with an expiration time on that trading day. While BOE Bulk Ports will be available to all market participants, the Exchange anticipates they will be used primarily by Market-Makers or firms that conduct similar business activity, as the primary purpose of the proposed bulk message functionality is to encourage market-maker quoting on exchanges. As indicated above, BOE Bulk Logical Ports are assessed $1,500 per port, per month for the first 5 BOE Bulk Logical Ports, assessed $2,500 per port, per month thereafter up to 30 ports and thereafter assessed $3,000 per port, per month for each additional BOE Bulk Logical Port. Like CMI and FIX Login IDs, and FIX/BOX Logical Ports, BOE Bulk Ports will also entitle a firm to submit message traffic of up to specified number of quotes/orders per second.[21] The proposed BOE Bulk ports also provide for significantly more message traffic as compared to current CMI/FIX Login IDs, as shown below:

	CMI/FIX login Ids	BOE bulk ports
	Quotes	Quotes [22]
Bandwidth Limit	5,000 quotes/3 sec [23]	225,000 quotes 3 sec.
Cost	$750 each	$1,500/$2,500/$3,000 each.
Cost per Quote/Order Sent @Limit	$0.15 per quote/3 sec	$0.006/$0.011/$0.013 per quote/3 sec.

Each BOE Bulk Logical Port will incur the logical port fee indicated in the table above when used to enter up to 30,000,000 orders per trading day per logical port as measured on average in a single month. Each incremental usage of up to 30,000,000 orders per day per BOE Bulk Logical Port will incur an additional logical port fee of $3,000 per month. Incremental usage will be determined on a monthly basis based on the average orders per day entered in a single month across all of a market participant's subscribed BOE Bulk Logical Ports. The Exchange believes that the pricing implications of going beyond 30,000,000 orders per trading day per BOE Bulk Logical Port encourage users to mitigate message traffic as necessary. The Exchange notes that the proposed BOE Bulk Logical Port fees are similar to the fees assessed for these ports by BZX Options.[24]

Purge Ports: As part of the migration, the Exchange introduced Purge Ports to provide TPHs additional risk management and open order control functionality. Purge ports were designed to assist TPHs, in the management of, and risk control over, their quotes, particularly if the TPH is dealing with a large number of options. Particularly, Purge Ports allow TPHs to submit a cancelation for all open orders, or a subset thereof, across multiple sessions under the same Executing Firm ID (''EFID''). This would allow TPHs to seamlessly avoid unintended executions, while continuing to evaluate the direction of the market. While Purge Ports are available to all market participants, the Exchange anticipates they will be used primarily by Market-Makers or firms that conduct similar business activity and are therefore exposed to a large amount of risk across a number securities. The Exchange notes that market participants are also able to cancel orders through FIX/BOE Logical Ports and as such a dedicated Purge Port is not required nor necessary. Rather, Purge Ports were specially developed as an optional service to further assist firms in effectively managing risk. As indicated in the table above, the Exchange proposes to assess a monthly charge of $850 per Purge Port. The Exchange notes that the proposed fee is in line with the fee assessed by other exchanges, including its Affiliated Exchanges, for Purge Ports.[25]

Multicast PITCH/Top Spin Server and GRP Ports: In connection with the migration, the Exchange also offers optional Multicast PITCH/Top Spin Server (''Spin'') and GRP ports and proposes to assess $750 per month, per port. Spin Ports and GRP Ports are used to request and receive a retransmission of data from the Exchange's Multicast PITCH/Top data feeds. The Exchange's Multicast PITCH/Top data feeds are available from two primary feeds, identified as the ''A feed'' and the ''C feed'', which contain the same information but differ only in the way such feeds are received. The Exchange also offers two redundant feeds, identified as the ''B feed'' and the ''D feed.'' All secondary feed Spin and GRP Ports will be provided for redundancy at no additional cost. The Exchange notes a dedicated Spin and GRP Port is not required nor necessary. Rather, Spin ports enable a market participant to receive a snapshot of the current book quickly in the middle of the trading session without worry of gap request limits and GRP Ports were specially developed to request and receive retransmission of data in the event of missed or dropped message. The Exchange notes that the proposed fee is in line with the fee assessed for the same ports on BZX Options.[26]

Access Credits

The Exchange next proposes to amend its Affiliate Volume Plan (''AVP'') to provide Market-Makers an opportunity to obtain credits on their monthly BOE Bulk Port Fees.[27] By way of background, under AVP, if a TPH Affiliate [28] or Appointed OFP [29] (collectively, an

[21] The Exchange notes that while technically there is no bandwidth limit per BOE Bulk Port, there may be possible performance degradation at 15,000 messages per second (which is the equivalent of 225,000 quotes/orders per 3 seconds). As such, the Exchange uses the number at which performance may be degraded for purposes of comparison.

[22] *See* Cboe Options Rule 1.1.

[23] Each Login ID has a bandwidth limit of 80,000 quotes per 3 seconds. However, in order to place such bandwidth onto a single Login ID, a TPH or non-TPH would need to purchase a minimum of 15 Market-Maker Permits or Bandwidth Packets (each Market-Maker Permit and Bandwidth Packet provides 5,000 quotes/3 sec). For purposes of comparing ''quote'' bandwidth, the provided example assumes only 1 Market-Maker Permit or Bandwidth Packet has been purchased.

[24] *See* Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

[25] *See e.g.,* Nasdaq ISE Options Pricing Schedule, Section 7(C), Ports and Other Services. *See also* Cboe EDGX Options Exchange Fee Schedule, Options Logical Port Fees; Cboe C2 Options Exchange Fee Schedule, Options Logical Port Fees and Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

[26] *See* Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

[27] As noted above, while BOE Bulk Ports will be available to all market participants, the Exchange anticipates they will be used primarily by Market Makers or firms that conduct similar business activity.

[28] For purposes of AVP, ''Affiliate'' is defined as having at least 75% common ownership between the two entities as reflected on each entity's Form BD, Schedule A.

[29] *See* Cboe Options Fees Schedule Footnote 23. Particularly, a Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of qualifying for credits under AVP.

''affiliate'') of a Market-Maker qualifies under the Volume Incentive Program (''VIP'') (*i.e.,* achieves VIP Tiers 2–5), that Market-Maker will also qualify for a discount on that Market-Maker's Liquidity Provider (''LP'') Sliding Scale transaction fees and Trading Permit fees. The Exchange proposes to amend AVP to provide that qualifying Market-Makers will receive a discount on Bulk Port fees (instead of Trading Permits) where an affiliate achieves VIP Tiers 4 or 5. As discussed more fully below, the Exchange is amending its Trading Permit structure, such that off-floor Market-Makers no longer need to hold more than one Market-Maker Trading Permit. As such, in place of credits for Trading Permits, the Exchange will provide credits for BOE Bulk Ports.[30] The proposed credits are as follows:

Market maker affiliate access credit	VIP tier	% Credit on monthly BOE bulk port fees
Credit Tier	1	0
	2	0
	3	0
	4	15
	5	25

The Exchange believes the proposed change to AVP continues to allow the Exchange to provide TPHs that have both Market-Maker and agency operations reduced Market-Maker costs via the credits, albeit credits on BOE Bulk Port fees instead of Trading Permit fees. AVP also continues to provide incremental incentives for TPHs to strive for the higher tier levels, which provide increasingly higher benefits for satisfying increasingly more stringent criteria.

In addition to the opportunity to receive credits via AVP, the Exchange proposes to provide an additional opportunity for Market-Makers to obtain credits on their monthly BOE Bulk Port fees based on the previous month's make rate percentage. By way of background, the Liquidity Provider Sliding Scale Adjustment Table provides that Taker fees be applied to electronic ''Taker'' volume and a Maker rebate be applied to electronic ''Maker'' volume, in addition to the transaction fees assessed under the Liquidity Provider Sliding Scale.[31] The amount of the Taker fee (or Maker rebate) is determined by the Liquidity Provider's percentage of volume from the previous month that was Maker (''Make Rate'').[32] Market-Makers are given a Performance Tier based on their Make Rate percentage which currently provides adjustments to transaction fees. Thus, the program is designed to attract liquidity from traditional Market-Makers. The Exchange proposes to now also provide BOE Bulk Port fee credits if Market-Makers satisfy the thresholds of certain Performance Tiers. Particularly, the Performance Tier earned will also determine the percentage credit applied to a Market-Maker's monthly BOE Bulk Port fees, as shown below:

Market maker access credit	Liquidity provider sliding scale adjustment performance tier	Make rate (% based on prior month)	% Credit on monthly BOE bulk port fees
Credit Tier	1	0–50	0
	2	Above 50–60	0
	3	Above 60–75	0
	4	Above 75–90	40
	5	Above 90	40

The Exchange believes the proposal mitigates costs incurred by traditional Market-Makers that focus on adding liquidity to the Exchange (as opposed to those that provide and take, or just take). The Exchange lastly notes that both the Market-Maker Affiliate Access Credit under AVP and the Market-Maker Access Credit tied to Performance Tiers can both be earned by a TPH, and these credits will each apply to the total monthly BOE Bulk Port Fees including any incremental BOE Bulk Port fees incurred, before any credits/adjustments have been applied (*i.e.,* an electronic MM can earn a credit from 15% to 65%).

Bandwidth Packets

As described above, post-migration, the Exchange utilizes a variety of logical ports. Part of this functionality is similar to bandwidth packets that were previously available on the Exchange. Bandwidth packets restricted the maximum number of orders and quotes

[30] The Exchange notes that Trading Permits currently each include a set bandwidth allowance and 3 logins. Current logins and bandwidth are akin to the proposed logical ports, including BOE Bulk Ports which will primarily be used by Market-Makers.

[31] *See* Cboe Options Exchange Fees Schedule, Liquidity Provider Sliding Scale Adjustment Table.

[32] More specifically, the Make Rate is derived from a Liquidity Provider's electronic volume the previous month in all symbols excluding Underlying Symbol List A using the following formula: (i) The Liquidity Provider's total electronic automatic execution (''auto-ex'') volume (*i.e.,* volume resulting from that Liquidity Provider's resting quotes or single sided quotes/orders that were executed by an incoming order or quote), divided by (ii) the Liquidity Provider's total auto-ex volume (*i.e.,* volume that resulted from the Liquidity Provider's resting quotes/orders and volume that resulted from that LP's quotes/orders that removed liquidity). For example, a TPH's electronic Make volume in September 2019 is 2,500,000 contracts and its total electronic auto-ex volume is 3,000,000 contracts, resulting in a Make Rate of 83% (Performance Tier 4). As such, the TPH would receive a 40% credit on its monthly Bulk Port fees for the month of October 2019. For the month of October 2019, the Exchange will be billing certain incentive programs separately, including the Liquidity Provider Sliding Scale Adjustment Table, for the periods of October 1–October 4 and October 7–October 31 in light of the migration of its billing system. As such, a Market-Maker's Performance Tier for November 2019 will be determined by the Market-Maker's percentage of volume that was Maker from the period of October 7–October 31, 2019.

per second. Post-migration, market participants may similarly have multiple Logical Ports and/or BOE Bulk Ports as they may have had bandwidth packets to accommodate their order and quote entry needs. As such, the Exchange proposes to eliminate all of the current Bandwidth Packet fees.[33] The Exchange believes that the proposed pricing implications of going beyond specified bandwidth described above in the logical connectivity fees section will be able to otherwise mitigate message traffic as necessary.

CAS Servers

By way of background, in order to connect to the legacy Cboe Command, which allowed a TPH to trade on the Cboe Options System, a TPH had to connect via either a CMI or FIX interface (depending on the configuration of the TPH's own systems). For TPHs that connected via a CMI interface, they had to use CMI CAS Servers. In order to ensure that a CAS Server was not overburdened by quoting activity for Market-Makers, the Exchange allotted each Market-Maker a certain number of CASs (in addition to the shared backups) based on the amount of quoting bandwidth that they had. The Exchange no longer uses CAS Servers, post-migration. In light of the elimination of CAS Servers, the Exchange proposes to eliminate the CAS Server allotment table and extra CAS Server fee.

Trading Permit Fees

By way of background, the Exchange may issue different types of Trading Permits and determine the fees for those Trading Permits.[34] Pre-migration, the Exchange issued the following three types of Trading Permits: (1) Market-Maker Trading Permits, which were assessed a monthly fee of $5,000 per permit; (2) Floor Broker Trading Permits, which were assessed a monthly fee of $9,000 per permit; and (3) Electronic Access Permits (''EAPs''), which were assessed a monthly fee of $1,600 per. The Exchange also offered separate Market-Maker and Electronic Access Permits for the Global Trading Hours (''GTH'') session, which were assessed a monthly fee of $1,000 per permit and $500 per permit respectively.[35] For further color, a Market-Maker Trading Permit entitled the holder to act as a Market-Maker, including a Market-Maker trading remotely, DPM, eDPM, or LMM, and also provided an appointment credit of 1.0, a quoting and order entry bandwidth allowance, up to three logins, trading floor access and TPH status.[36] A Floor Broker Trading Permit entitled the holder to act as a Floor Broker, provided an order entry bandwidth allowance, up to 3 logins, trading floor access and TPH status.[37] Lastly, an EAP entitled the holder to electronic access to the Exchange. Holders of EAPs must have been broker-dealers registered with the Exchange in one or more of the following capacities: (a) Clearing TPH, (b) TPH organization approved to transact business with the public, (c) Proprietary TPHs and (d) order service firms. The permit did not provide access to the trading floor. An EAP also provided an order entry bandwidth allowance, up to 3 logins and TPH status.[38] The Exchange also provided an opportunity for TPHs to pay reduced rates for Trading Permits via the Market Maker and Floor Broker Trading Permit Sliding Scale Programs (''TP Sliding Scales''). Particularly, the TP Sliding Scales allowed Market-Makers and Floor Brokers to pay reduced rates for their Trading Permits if they committed in advance to a specific tier that includes a minimum number of eligible Market-Maker and Floor Broker Trading Permits, respectively, for each calendar year.[39]

As noted above, Trading Permits were tied to bandwidth allocation, logins and appointment costs, and as such, TPH organizations may hold multiple Trading Permits of the same type in order to meet their connectivity and appointment cost needs. Post-Migration, bandwidth allocation, logins and appointment costs are no longer tied to a Trading Permit, and as such, the Exchange proposes to modify its Trading Permit structure. Particularly, in connection with the migration, the Exchange adopted separate on-floor and off-floor Trading Permits for Market-Makers and Floor Brokers, adopted a new Clearing TPH Permit, and proposes to modify the corresponding fees and discounts. As was the case pre-migration, the proposed access fees discussed below will continue to be non-refundable and will be assessed through the integrated billing system during the first week of the following month. If a Trading Permit is issued during a calendar month after the first trading day of the month, the access fee for the Trading Permit for that calendar month is prorated based on the remaining trading days in the calendar month. Trading Permits will be renewed automatically for the next month unless the Trading Permit Holder submits written notification to the Membership Services Department by 4 p.m. CT on the second-to-last business day of the prior month to cancel the Trading Permit effective at or prior to the end of the applicable month. Trading Permit Holders will only be assessed a single monthly fee for each type of electronic Trading Permit it holds.

First, TPHs no longer need to hold multiple permits for each type of electronic Trading Permit (*i.e.,* electronic Market-Maker Trading Permits and/or and Electronic Access Permits). Rather, for electronic access to the Exchange, a TPH need only purchase one of the following permit types for each trading function the TPH intends to perform: Market-Maker Electronic Access Permit (''MM EAP'') in order to act as an off-floor Market-Maker and which will continue to be assessed a monthly fee of $5,000, Electronic Access Permit (''EAP'') in order to submit orders electronically to the Exchange[40] and which will be assessed a monthly fee of $3,000, and a Clearing TPH Permit, for TPHs acting solely as a Clearing TPH, which will be assessed a monthly fee of $2,000 (and is more fully described below). For example, a TPH organization that wishes to act as a Market-Maker and also submit orders electronically in a non-Market Maker capacity would have to purchase one MM EAP and one EAP. TPHs will be assessed the monthly fee for each type of Permit once per electronic access capacity.

[33] *See* Cboe Options Fees Schedule, Bandwidth Packet Fees.

[34] *See* Cboe Options Rules 3.1(a)(iv)–(v).

[35] The fees were waived through September 2019 for the first Market-Maker and Electronic Access GTH Trading Permits.

[36] *See* Cboe Options Fees Schedule.

[37] Id.

[38] Id.

[39] Due to the October 7 migration, the Exchange had amended the TP Sliding Scale Programs to provide that any commitment to Trading Permits under the TP Sliding Scales shall be in place through September 2019, instead of the calendar year. *See* Cboe Options Fees Schedule, Footnotes 24 and 25.

[40] EAPs may be purchased by TPHs that both clear transactions for other TPHs (*i.e.,* a ''Clearing TPH'') and submit orders electronically.

Next, the Exchange proposes to adopt a new Trading Permit, exclusively for Clearing TPHs that are approved to act solely as a Clearing TPH (as opposed to those that are also approved in a capacity that allows them to submit orders electronically). Currently any TPH that is registered to act as a Clearing TPH must purchase an EAP, whether or not that Clearing TPH acts solely as a Clearing TPH or acts as a Clearing TPH and submits orders electronically. The Exchange proposes to adopt a new Trading Permit, for any TPH that is registered to act solely as Clearing TPH at a discounted rate of $2,000 per month.[41]

Additionally, the Exchange proposes to eliminate its fees for Global Trading Hours Trading Permits. Particularly, the Exchange proposes to provide that any Market-Maker EAP, EAP and Clearing TPH Permit provides access (at no additional cost) to the GTH session.[42] Additionally, the Exchange proposes to amend Footnote 37 of the Fees Schedule regarding GTH in connection with the migration. Currently Footnote 37 provides that separate access permits and connectivity is needed for the GTH session. The Exchange proposes to eliminate this language as that is no longer the case post-migration (*i.e.,* an electronic Trading Permits will grant access to both sessions and physical and logical ports may be used in both sessions, eliminating the need to purchase separate connectivity). The Exchange also notes that in connection with migration, the Book used during Regular Trading Hours (''RTH'') will be the same Book used during GTH (as compared to pre-migration where the Exchange maintained separate Books for each session). The Exchange therefore also proposes to eliminate language in Footnote 37 stating that GTH is a segregated trading session and that there is no market interaction between the two sessions.

The Exchange next proposes to adopt MM EAP Appointment fees. By way of background, a registered Market-Maker may currently create a Virtual Trading Crowd (''VTC'') Appointment, which confers the right to quote electronically in an appropriate number of classes selected from ''tiers'' that have been structured according to trading volume statistics, except for the AA tier.[43] Each Trading Permit historically held by a Market-Maker had an appointment credit of 1.0. A Market-Maker could select for each Trading Permit the Market-Maker held any combination of classes whose aggregate appointment cost did not exceed 1.0. A Market-Maker could not hold a combination of appointments whose aggregate appointment cost was greater than the number of Trading Permits that Market-Maker held.[44]

As discussed, post-migration, bandwidth allocation, logins and appointment costs are no longer tied to a single Trading Permit and therefore TPHs no longer need to have multiple permits for each type of electronic Trading Permit. Market-Makers must still select class appointments in the classes they seek to make markets electronically.[45] Particularly, a Market-Maker firm will only be required to have one permit and will thereafter be charged for one or more ''Appointment Units'' (which will scale from 1 ''unit'' to more than 5 ''units''), depending on which classes they elect appointments in. Appointment Units will replace the standard 1.0 appointment cost, but function in the same manner. Appointment weights (formerly known as ''appointment costs'') for each appointed class will be set forth in Cboe Options Rule 5.50(g) and will be summed for each Market-Maker in order to determine the total appointment units, to which fees will be assessed. This was the manner in which the tier costs per class appointment were summed to meet the 1.0 appointment cost, the only difference being that if a Market-Maker exceeds this ''unit'', then their fees will be assessed under the ''unit'' that corresponds to the total of their appointment weights, as opposed to holding another Trading Permit because it exceeded the 1.0 ''unit''. Particularly, the Exchange proposes to adopt a new MM EAP Appointment Sliding Scale. Appointment Units for each assigned class will be aggregated for each Market-Maker and Market-Maker affiliate. If the sum of appointments is a fractional amount, the total will be rounded up to the next highest whole Appointment Unit. The following lists the progressive monthly fees for Appointment Units:[46]

Market-maker EAP appointments	Quantity	Monthly fees (per unit)
Appointment Units	1	$0
	2	6,000
	3 to 5	4,000
	>5	3,100

As noted above, upon migration the Exchange required separate Trading Permits for on-floor and off-floor activity. As such, the Exchange proposes to maintain a Floor Broker Trading Permit and adopt a new Market-Maker Floor Permit for on-floor Market-Makers. In addition, RUT, SPX, and VIX Tier Appointment fees will be charged separately for Permit, as discussed more fully below.

As briefly described above, the Exchange currently maintains TP Sliding Scales, which allow Market-Makers and Floor Brokers to pay reduced rates for their Trading Permits if they commit in advance to a specific tier that includes a minimum number of eligible Market-Maker and Floor Broker Trading Permits, respectively, for each calendar year. The Exchange proposes to eliminate the current TP Sliding Scales, including the requirement to commit to a specific tier, and replace it

[41] Cboe Option Rules provides the Exchange authority to issue different types of Trading Permits which allows holders, among other things, to act in one or more trading functions authorized by the Rules. *See* Cboe Options Rule 3.1(a)(iv). The Exchange notes that currently 17 out of 38 Clearing TPHs are acting solely as a Clearing TPH on the Exchange.

[42] The Exchange notes that Clearing TPHs must be properly authorized by the Options Clearing Corporation (''OCC'') to operate during the Global Trading Hours session and all TPHs must have a Letter of Guarantee to participate in the GTH session (as is the case today).

[43] *See* Cboe Options Rule 5.50 (Appointment of Market-Makers).

[44] For example, if a Market-Maker selected a combination of appointments that has an aggregate appointment cost of 2.5, that Market-Maker must hold at least 3 Market-Maker Trading Permits.

[45] *See* Cboe Options Rule 5.50(a).

[46] For example, if a Market-Maker's total appointment costs amount to 3.5 unites, the Market-Maker will be assessed a total monthly fee of $14,000 (1 appointment unit at $0, 1 appointment unit at $6,000 and 2 appointment units at $4,000) as and for appointment fees and $5,000 for a Market-Maker Trading Permit, for a total monthly sum of $19,000, where a Market-Maker currently (*i.e.,* prior to migration) with a total appointment cost of 3.5 would need to hold 4 Trading Permits and would therefore be assessed a monthly fee of $20,000.

with new TP Sliding Scales as follows:[47]

Floor TPH permits	Current permit qty	Current monthly fee (per permit)	Proposed permit qty	Proposed monthly fee (per permit)
Market-Maker Floor Permit	1–10	$5,000	1	$6,000
	11–20	3,700	2 to 5	4,500
	21 or more	1,800	6 to 10	3,500
			>10	2,000
Floor Broker Permit	1	9,000	1	7,500
	2–5	5,000	2 to 3	5,700
	6 or more	3,000	4 to 5	4,500
			>5	3,200

Floor Broker ADV Discount

Footnote 25, which governs rebates on Floor Broker Trading Permits, currently provides that any Floor Broker that executes a certain average of customer or professional customer/voluntary customer (collectively ''customer'') open-outcry contracts per day over the course of a calendar month in all underlying symbols excluding Underlying Symbol List A (except RLG, RLV, RUI, and UKXM), DJX, XSP, and subcabinet trades (''Qualifying Symbols''), will receive a rebate on that TPH's Floor Broker Trading Permit Fees. Specifically, any Floor Broker Trading Permit Holder that executes an average of 15,000 customer (''C'' origin code) and/or professional customer and voluntary customer (''W'' origin code) open-outcry contracts per day over the course of a calendar month in Qualifying Symbols will receive a rebate of $9,000 on that TPH's Floor Broker Trading Permit fees. Additionally, any Floor Broker that executes an average of 25,000 customer open-outcry contracts per day over the course of a calendar month in Qualifying Symbols will receive a rebate of $14,000 on that TPH's Floor Broker Trading Permit fees. The Exchange proposes to maintain, but modify, its discount for Floor Broker Trading Permit fees. First, the measurement criteria to qualify for a rebate will be modified to only include customer (''C'' origin code) open-outcry contracts executed per day over the course of a calendar month in all underlying symbols, while the rebate amount will be modified to be a percentage of the TPH's Floor Broker Permit total costs, instead of a straight rebate.[48] The criteria and corresponding percentage rebates are noted below.[49]

Floor broker ADV discount tier	ADV	Floor broker permit rebate (percent)
1	0 to 99,999	0
2	100,000 to 174,999	15
3	>174,999	25

Next, the Exchange proposes to modify its SPX, VIX and RUT Tier Appointment Fees. Currently, these fees are assessed to any Market-Maker TPH that either (i) has the respective SPX, VIX or RUT appointment at any time during a calendar month and trades a specified number of contracts or (ii) trades a specified number of contracts in open outcry during a calendar month. More specifically, the Fees Schedule provides that the $3,000 per month SPX Tier Appointment is assessed to any Market-Maker Trading Permit Holder that either (i) has an SPX Tier Appointment at any time during a calendar month and trades at least 100 SPX contracts while that appointment is active or (ii) conducts any open outcry transaction in SPX or SPX Weeklys at any time during the month. The $2,000 per month VIX Tier Appointment is assessed to any Market-Maker Trading Permit Holder that either (i) has an SPX Tier Appointment at any time during a calendar month and trades at least 100 VIX contracts while that appointment is active or (ii) conducts at least 1,000 open outcry transaction in VIX at any time during the month. Lastly, the $1,000 RUT Tier Appointment is assessed to any Market-Maker Trading Permit Holder that either (i) has an RUT Tier Appointment at any time during a calendar month and trades at least 100 RUT contracts while that appointment is active or (ii) conducts at least 1,000 open outcry transaction in RUT at any time during the month.

Because the Exchange is separating Market-Maker Trading Permits for electronic and open-outcry market-making, the Exchange will be assessing separate Tier Appointment Fees for each type of Market-Maker Trading Permit. The Exchange proposes that a MM EAP will be assessed the Tier Appointment Fee whenever the Market-Maker executes the corresponding specified number of contracts, if any. The Exchange also proposes to modify the threshold number of contracts a Market-Maker must execute in a month to trigger the fee for SPX, VIX and RUT. Particularly, for SPX, the Exchange proposes to eliminate the 100 contract threshold for electronic SPX executions. The Exchange notes that historically, all TPHs that trade SPX electronically executed more than 100 contracts electronically each month (*i.e.,* no TPH electronically traded between 1 and 100 contracts of SPX). As no TPH would currently be negatively impacted by this change, the Exchange proposes to eliminate the threshold for SPX and align the electronic SPX Tier Appointment Fee with that of the floor SPX Tier Appointment Fee, which is

[47] In light of the proposed change to eliminate the TP Sliding Scale, the Exchange proposes to eliminate Footnote 24 in its entirety.

[48] As is the case today, the Floor Broker ADV Discount will be available for all Floor Broker Trading Permits held by affiliated Trading Permit Holders and TPH organizations.

[49] In light of the proposal to eliminate the TP Sliding Scales and the Floor Broker rebates currently set forth under Footnote 25, the Exchange proposes to eliminate Footnote 25 in its entirety.

not subject to any executed volume threshold. For the VIX and RUT Tier appointments, the Exchange proposes to increase the threshold from 100 contracts a month to 1,000 contracts a month. The Exchange notes the Tier Appointment Fee amounts are not changing.[50] In connection with the proposed changes, the Exchange proposes to relocate the Tier Appointment Fees to a new table and eliminate the language in the current respective notes sections of each Tier Appointment Fee as it is no longer necessary.

Trading Permit Holder Regulatory Fee

The Fees Schedule provides for a Trading Permit Holder Regulatory Fee of $90 per month, per RTH Trading Permit, applicable to all TPHs, which fee helps more closely cover the costs of regulating all TPHs and performing regulatory responsibilities. In light of the changes to the Exchange's Trading Permit structure, the Exchange proposes to eliminate the TPH Regulatory Fee. The Exchange notes that there is no regulatory requirement to maintain this fee.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[51] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[52] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[53] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[54] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange first notes that the proposed changes were not designed with the objective to generate an overall increase in access fee revenue, as demonstrated by the anticipated loss of revenue discussed above. Rather, the proposed changes were prompted by the Exchange's technology migration and the adoption of a new (and improved) connectivity infrastructure, rendering the pre-migration structure obsolete. Such changes accordingly necessitated an overhaul of the Exchange's previous access fee structure and corresponding fees. Moreover, the proposed changes more closely aligns the Exchange's access fees to those of its Affiliated Exchanges, and reasonably so, as the Affiliated Exchanges offer substantially similar connectivity and functionality and are on the same platform that the Exchange has now migrated to.

The Exchange also notes that it operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. There is also no regulatory requirement that any market participant connect to any one options exchange, or that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. Even the number of members between the Exchange and its 3 other options exchange affiliates vary. Indeed, a number of firms currently do not participate on the Exchange, or participate on the Exchange through sponsored access arrangements rather than by becoming a member. Particularly, the Exchange notes that as of August 2019, the Exchange had 97 members (TPH organizations), of which only 45 directly connected to the Exchange. The Exchange notes that in November 2019, the Exchange had 96 members (TPH organizations), of which only 43 directly connected to the Exchange. The Exchange notes the 43 TPH organizations connecting directly to the Exchange in November accounts for approximately 75% of the Exchange's volume in November. The remaining 55 members connect indirectly to the Exchange and account for approximately 25% of the Exchange's volume in November. The Exchange notes that multiple types of members connect indirectly to the Exchange including Clearing firms, Floor Brokers, order flow provides, and on-floor and off-floor Market-Makers. In addition, of those market participants that do connect to the Exchange, it is the individual needs of each market participant that determine the amount and type of Trading Permits and physical and logical connections to the Exchange.[55]

Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [56] The number of available exchanges to connect to ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees for access to its market. Additionally, the Exchange notes that non-TPHs such as Service Bureaus and Extranets resell Cboe Options connectivity.[57] This indirect connectivity is another viable alternative that is already being used by non-TPHs, further constraining the price that the Exchange is able to charge for connectivity to its Exchange. Accordingly, in the event that a market participant views one exchange's direct connectivity and access fees as more or

[50] Floor Broker Trading Surcharges for SPX/SPXW and VIX are also not changing. The Exchange however, is creating a new table for Floor Broker Trading Surcharges and relocating such fees in the Fees Schedule in connection with the proposal to eliminate fees currently set forth in the ''Trading Permit and Tier Appointment Fees'' Table.

[51] 15 U.S.C. 78f(b).

[52] 15 U.S.C. 78f(b)(5).

[53] 15 U.S.C. 78f(b)(4).

[54] 15 U.S.C. 78f(b)(5).

[55] To assist market participants that are connected or considering connecting to the Exchange, the Exchange provides detailed information and specifications about its available connectivity alternatives in the Cboe C1 Options Exchange Connectivity Manual, as well as the various technical specifications. *See http://markets.cboe.com/us/options/support/technical/*.

[56] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[57] Prior to migration, there were 13 firms that resold Cboe Options connectivity. Post-migration, the Exchange anticipated that there would be 19 firms that resell Cboe Options connectivity (both physical and logical) and currently there are in fact 17 firms that resell Cboe Options connectivity. The Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

less attractive than the competition they can choose to connect to that exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 options markets. For example, two TPHs that connected directly to the Exchange pre-migration, now connect indirectly via an extranet provider. The Exchange notes that it has not received any comments or evidence to suggest the two TPHs that transitioned from direct connections to an indirect connections post-migration were the result of an undue financial burden resulting from the proposed fee changes. Rather, the Exchange believes the transitions demonstrate that indirect connectivity is in fact a viable option for market participants, therefore reflecting a competitive environment.

Moreover, the Commission itself has recognized that while some exchanges may have a unique business model that is not currently offered by competitors, it believes a competitor could create similar business models if demand were adequate, and if they did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[58] Similarly, while some exchanges may have exclusively-listed proprietary products, such Exchanges are still subject to competitive constraints as such products may compete with other multi-listed products or alternative proprietary products on other exchanges, as well as alternative Over-the-Counter (OTC) products. For example, singly-listed XSP options may compete with the multiply-listed SPY options. Additionally, market participants may still trade an Exchange's proprietary products through a third-party without directly or indirectly connecting to the Exchange. The proposed fees therefore reflect a competitive environment, as the Exchange seeks to amend its access fees in connection with the migration of its technology platform, while still attracting market participants to continue to be, or become, connected to the Exchange.

In determining the proposed fee changes discussed above, the Exchange reviewed the current competitive landscape, considered the fees historically paid by market participants for connectivity to the pre-migration system, and also assessed the impact on market participants to ensure that the proposed fees would not create an undue financial burden on any market participants, including smaller market participants. Indeed, the Exchange received no comments from any TPH suggesting they were unduly burdened by the proposed changes described herein, which were first announced via Exchange Notice nearly two months in advance of the migration, nor were any timely comment letters received by the Commission by the comment period submission deadline of November 12, 2019.[59]

The proposed connectivity structure and corresponding fees, like the pre-migration connectivity structure and fees, provide market participants flexibility with respect to how to connect to the Exchange based on each market participants' respective business needs. For example, the amount and type of physical and logical ports are determined by factors relevant and specific to each market participant, including its business model, costs of connectivity, how its business is segmented and allocated and volume of messages sent to the Exchange. Moreover, the proposed connectivity structure is designed to encourage market participants to be efficient with their physical and logical port usage. While the Exchange has no way of predicting with certainty the amount or type of connections market participants will in fact purchase, if any, the Exchange anticipates that like today, some market participants will continue to decline to connect and participate on the Exchange, some will participate on the Exchange via indirect connectivity, some will only purchase one physical connection and/or logical port connection, and others will purchase multiple connections.

Physical Ports

The Exchange believes increasing the fee for the new 10 Gb Physical Port is reasonable because unlike, the current 10 Gb Network Access Ports, the new Physical Ports provides a connection through a latency equalized infrastructure with faster switches and also allows access to both unicast order entry and multicast market data with a single physical connection. As discussed above, legacy Network Access Ports do not permit market participants to receive unicast and multicast connectivity. As such, in order to receive both connectivity types pre-migration, a market participant needed to purchase and maintain at least two 10 Gb Network Access Ports. The proposed Physical Ports not only provide latency equalization (*i.e.,* eliminate latency advantages between market participants based on location) as compared to the legacy ports, but also alleviate the need to pay for two physical ports as a result of needing unicast and multicast connectivity. Accordingly, market participants who historically had to purchase two separate ports for each of multicast and unicast activity, will be able to purchase only one port, and consequently pay lower fees overall. For example, pre-migration if a TPH had two 10 Gb legacy Network Access Ports, one of which received unicast traffic and the other of which received multicast traffic, that TPH would have been assessed $10,000 per month ($5,000 per port). Under the proposed rule change, using the new Physical Ports, that TPH has the option of utilizing one single port, instead of two ports, to receive both unicast and multicast traffic, therefore paying only $7,000 per month for a port that provides both connectivity types. The Exchange notes that pre-migration, approximately 50% of TPHs maintained two or more 10 Gb Network Access Ports. While the Exchange has no way of predicting with certainty the amount or type of connections market participants will in fact purchase post-migration, the Exchange anticipated approximately 50% of the TPHs with two or more 10 Gb Network Access Ports to reduce the number of 10 Gb Physical Ports that they purchase and expected the remaining 50% of TPHs to maintain their current 10 Gb Physical Ports, but reduce the number of 1 Gb Physical Ports. Particularly, pre-migration, a number of TPHs maintained two 10 Gb Network Access Ports to receive multicast data and two 1 Gb Network Access Ports for order entry (unicast connectivity). As the new 10 Gb Physical Ports are able to accommodate unicast connectivity (order entry), TPHs may choose to eliminate their 1 Gb Network Access Ports and utilize the new 10 Gb Physical Ports for both multicast and unicast connectivity. The Exchange notes that many market participants are still transitioning to the new connectivity structure and as such, the Exchange does not expect its projections regarding port purchases to be realized prior to February 2020.

As discussed above, if a TPH deems a particular exchange as charging excessive fees for connectivity, such market participants may opt to terminate their connectivity arrangements with that exchange, and

[58] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[59] *See* Exchange Notice ''Cboe Options Exchange Access and Capacity Fee Schedule Changes Effective October 1, 2019 and November 1, 2019'' Reference ID C2019081900.

adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for physical connectivity. The Exchange also notes that the proposal represents an equitable allocation of reasonable dues, fees and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives, as discussed above. The proposed amounts are in line with, and in some cases lower than, the costs of physical connectivity at other Exchanges,[60] including the Cboe Affiliated Exchanges which have the same connectivity infrastructure the Exchange has migrated to.[61] The Exchange does not believe it is unreasonable to assess fees that are in line with fees that have already been established for the same physical ports used to connect to the same connectivity infrastructure and common platform. The Exchange believes the proposed Physical Port fees are equitable and not unreasonably discriminatory as the connectivity pricing is associated with relative usage of the various market participants and the Exchange has not been presented with any evidence to suggest its proposed fee changes would impose a barrier to entry for participants, including smaller participants. In fact, as noted above, the Exchange is unaware of any market participant that has terminated direct connectivity solely as a result of the proposed fee changes. The Exchange also believes increasing the fee for 10 Gb Physical Ports and charging a higher fee as compared to the 1 Gb Physical Port is equitable as the 1 Gb Physical Port is 1/10th the size of the 10 Gb Physical Port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb Physical Ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fees for the 1 and 10 Gb Physical Ports, respectively are reasonably and appropriately allocated.

Data Port Fees

The Exchange believes assessing the data port fee per data source, instead of per port, is reasonable because it may allow for market participants to maintain more ports at a lower cost and applies uniformly to all market participants. The Exchange believes the proposed increase is reasonable because, as noted above, market participants may pay lower fees as a result of charging per data source and not per data port. Indeed, while the Exchange has no way of predicting with certainty the impact of the proposed changes, the Exchange had anticipated approximately 76% of the 51 market participants who pay data port fees to pay the same or lower fees upon implementation of the proposed change. Currently, 46 market participants[62] pay the proposed data port fees, of which approximately 78% market participants are paying the same or lower fees in connection with the proposed change. Monthly savings for firms paying lower fees range from $500 to $6,000 per month. The Exchange also anticipated that 19% of TPHs who pay data port fees would pay a modest increase of only $500 per month. To date, approximately 22% market participants pay higher fees, with the majority of those market participants paying a modest monthly increase of $500 and only 3 firms paying either $1,000 or $1,500 more per month. Additionally as discussed above, the Exchange's affiliate C2 has the same fee which is also assessed at the proposed rate and assessed by data source instead of per port. The proposed name change is also appropriate in light of the Exchange's proposed changes and may alleviate potential confusion.

Logical Connectivity

Port Fees

The Exchange believes it's reasonable to eliminate certain fees associated with legacy options for connecting to the Exchange and to replace them with fees associated with new options for connecting to the Exchange that are similar to those offered at its Affiliated Exchanges. In particular, the Exchange believes it's reasonable to no longer assess fees for CMI and FIX Login IDs because the Login IDs were retired and rendered obsolete upon migration and because the Exchange is proposing to replace them with fees associated with the new logical connectivity options. The Exchange believes that it is reasonable to harmonize the Exchange's logical connectivity options and corresponding connectivity fees now that the Exchange is on a common platform as its Affiliated Exchanges. Additionally, the Exchange notes the proposed fees are the same as, or in line with, the fees assessed on its Affiliated Exchanges for similar connectivity.[63] The proposed logical connectivity fees are also equitable and not unfairly discriminatory because the Exchange will apply the same fees to all market participants that use the same respective connectivity options.

The Exchange believes the proposed Logical Port fees are reasonable as it is the same fee for Drop Ports and the first five BOE/FIX Ports that is assessed for CMI and FIX Logins, which the Exchange is eliminating in lieu of logical ports. Additionally, while the proposed ports will be assessed the same monthly fees as current CMI/FIX Login IDs, the proposed logical ports provide for significantly more message traffic. Specifically, the proposed BOE/FIX Logical Ports will provide for 3 times the amount of quoting[64] capacity and approximately 165 times order entry capacity. Similarly, the Exchange believes the proposed BOE Bulk Port fees are reasonable because while the fees are higher than the CMI and FIX Login Id fees and the proposed Logical Port fees, BOE Bulk Ports offer significantly more bandwidth capacity than both CMI and FIX Login Ids and Logical Ports. Particularly, a single BOE Bulk Port offers 45 times the amount of quoting bandwidth than CMI/FIX Login

[60] *See e.g.,* Nasdaq PHLX and ISE Rules, General Equity and Options Rules, General 8. Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection. *See also* Nasdaq Price List—Trading Connectivity. Nasdaq charges a monthly fee of $7,500 for each 10Gb direct connection to Nasdaq and $2,500 for each direct connection that supports up to 1Gb. *See also* NYSE American Fee Schedule, Section V.B, and Arca Fees and Charges, Co-Location Fees. NYSE American and Arca each charge a monthly fee of $5,000 for each 1Gb circuit, $14,000 for each 10Gb circuit and $22,000 for each 10Gb LX circuit.

[61] *See e.g.,* Affiliated Exchange Fee Schedules, Physical Connectivity Fees. For example, Cboe BZX, Cboe EDGX and C2 each charge a monthly fee of $2,500 for each 1Gb connection and $7,500 for each 10Gb connection.

[62] The Exchange notes the reduction in market participants that pay the data port fee is due to firm consolidations and acquisitions.

[63] *See* Affiliated Exchange Fee Schedules, Logical Port Fees.

[64] Based on the purchase of a single Market-Maker Trading Permit or Bandwidth Packet.

Ids[65] and 5 times the amount of quoting bandwidth than Logical Ports will offer. Additionally, the Exchange believes that its fees for logical connectivity are reasonable, equitable, and not unfairly discriminatory as they are designed to ensure that firms that use the most capacity pay for that capacity, rather than placing that burden on market participants that have more modest needs. Although the Exchange charges a ''per port'' fee for logical connectivity, it notes that this fee is in effect a capacity fee as each FIX, BOE or BOE Bulk port used for order/quote entry supports a specified capacity (*i.e.,* messages per second) in the matching engine, and firms purchase additional logical ports when they require more capacity due to their business needs.

An obvious driver for a market participant's decision to purchase multiple ports will be their desire to send or receive additional levels of message traffic in some manner, either by increasing their total amount of message capacity available, or by segregating order flow for different trading desks and clients to avoid latency sensitive applications from competing for a single thread of resources. For example, a TPH may purchase one or more ports for its market making business based on the amount of message traffic needed to support that business, and then purchase separate ports for proprietary trading or customer facing businesses so that those businesses have their own distinct connection, allowing the firm to send multiple messages into the Exchange's trading system in parallel rather than sequentially. Some TPHs that provide direct market access to their customers may also choose to purchase separate ports for different clients as a service for latency sensitive customers that desire the lowest possible latency to improve trading performance. Thus, while a smaller TPH that demands more limited message traffic may connect through a service bureau or other service provider, or may choose to purchase one or two logical ports that are billed at a rate of $750 per month each, a larger market participant with a substantial and diversified U.S. options business may opt to purchase additional ports to support both the volume and types of activity that they conduct on the Exchange. While the Exchange has no way of predicting with certainty the amount or type of logical ports market participants will in fact purchase post-migration, the Exchange anticipated approximately 16% of TPHs to purchase one to two logical ports, and approximately 22% of TPHs to not purchase any logical ports. To date, 13% of TPHs purchased one to two logical ports and 27% have not purchased any logical ports. At the same time, market participants that desire more total capacity due to their business needs, or that wish to segregate order flow by purchasing separate capacity allocations to reduce latency or for other operational reasons, would be permitted to choose to purchase such additional capacity at the same marginal cost. The Exchange believes the proposal to assess an additional Logical and BOE Bulk port fee for incremental usage per logical port is reasonable because the proposed fees are modestly higher than the proposed Logical Port and BOE Bulk fees and encourage users to mitigate message traffic as necessary. The Exchange notes one of its Affiliated Exchanges has similar implied port fees.[66]

In sum, the Exchange believes that the proposed BOE/FIX Logical Port and BOE Bulk Port fees are appropriate as these fees would ensure that market participants continue to pay for the amount of capacity that they request, and the market participants that pay the most are the ones that demand the most resources from the Exchange. The Exchange also believes that its logical connectivity fees are aligned with the goals of the Commission in facilitating a competitive market for all firms that trade on the Exchange and of ensuring that critical market infrastructure has ''levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.''[67]

The Exchange believes waiving the FIX/BOE Logical Port fee for one FIX Logical Port used to access PULSe and Silexx (for FLEX Trading) is reasonable because it will allow all TPHs using PULSe and Silexx to avoid having to pay a fee that they would otherwise have to pay. The waiver is equitable and not unfairly discriminatory because TPHs using PULSe are already subject to a monthly fee for the PULSe Workstation, which the Exchange views as inclusive of fees to access the Exchange. Moreover, while PULSe users today do not require a FIX/CMI Login Id, post-migration, due to changes to the connectivity infrastructure, PULSe users will be required to maintain a FIX Logical Port and as such incur a fee they previously would not have been subject to. Similarly, the Exchange believes that the waiver for Silexx (for FLEX trading) will encourage TPHs to transact business using FLEX Options using the new Silexx System and encourage trading of FLEX Options. Additionally, the Exchange notes that it currently waives the Login Id fees for Login IDs used to access the CFLEX system.

The Exchange believes its proposed fee for Purge Ports is reasonable as it is also in line with the amount assessed for purge ports offered by its Affiliated Exchanges, as well as other exchanges.[68] Moreover, the Exchange believes that offering purge port functionality at the Exchange level promotes robust risk management across the industry, and thereby facilitates investor protection. Some market participants, and, in particular, larger firms, could build similar risk functionality on their trading systems that permit the flexible cancellation of orders entered on the Exchange. Offering Exchange level protections however, ensures that such functionality is widely available to all firms, including smaller firms that may otherwise not be willing to incur the costs and development work necessary to support their own customized mass cancel functionality. The Exchange operates in a highly competitive market in which exchanges offer connectivity and related services as a means to facilitate the trading activities of TPHs and other participants. As the proposed Purge Ports provide voluntary risk management functionality, excessive fees would simply serve to reduce demand for this optional product. The Exchange also believes that the proposed Purge Port fees are not unfairly discriminatory because they will apply uniformly to all TPHs that choose to use dedicated Purge Ports. The proposed Purge Ports are completely voluntary and, as they relate solely to optional risk management functionality, no TPH is required or under any regulatory obligation to utilize them. The Exchange believes that adopting separate fees for these ports ensures that the associated costs are borne exclusively by TPHs that determine to use them based on their business needs, including Market-Makers or similarly situated market participants. Similar to Purge Ports, Spin and GRP Ports are optional products that provide an alternative means for market participants to receive

[65] Based on the purchase of a single Market-Maker Trading Permit or Bandwidth Packet.

[66] *See e.g.,* Cboe C2 Options Exchange Fees Schedule, Logical Connectivity Fees.

[67] *See* Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (File No. S7–01–13) (Regulation SCI Adopting Release).

[68] *See* Affiliated Exchange Fee Schedules, Logical Port Fees. *See also;* Nasdaq ISE Pricing Schedule, Section 7(C). ISE charges a fee of $1,100 per month for SQF Purge Ports.

multicast data and request and receive a retransmission of such data. As such excessive fees would simply serve to reduce demand for these products, which TPHs are under no regulatory obligation to utilize. All TPHs that voluntarily select these service options (*i.e.,* Purge Ports, Spin Ports or GRP Ports) will be charged the same amount for the same respective services. All TPHs have the option to select any connectivity option, and there is no differentiation among TPHs with regard to the fees charged for the services offered by the Exchange.

Access Credits

The Exchange believes the proposal to adopt credits for BOE Bulk Ports is reasonable, equitable and not unfairly discriminatory because it provides an opportunity for TPHs to pay lower fees for logical connectivity. The Exchange notes that the proposed credits are in lieu of the current credits that Market-Makers are eligible to receive today for Trading Permits fees. Although only Market-Makers may receive the proposed BOE Bulk Port credits, Market-Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. For example, Market-Makers have a number of obligations, including quoting obligations and fees associated with appointments that other market participants do not have. The Exchange also believes that the proposals provide incremental incentives for TPHs to strive for the higher tier levels, which provide increasingly higher benefits for satisfying increasingly more stringent criteria, including criteria to provide more liquidity to the Exchange. The Exchange believes the value of the proposed credits is commensurate with the difficulty to achieve the corresponding tier thresholds of each program.

First, the Exchange believes the proposed BOE Bulk Port fee credits provided under AVP will incentivize the routing of orders to the Exchange by TPHs that have both Market-Maker and agency operations, as well as incent Market-Makers to continue to provide critical liquidity notwithstanding the costs incurred with being a Market-Maker. More specifically, in the options industry, many options orders are routed by consolidators, which are firms that have both order router and Market-Maker operations. The Exchange is aware not only of the importance of providing credits on the order routing side in order to encourage the submission of orders, but also of the operations costs on the Market-Maker side. The Exchange believes the proposed change to AVP continues to allow the Exchange to provide relief to the Market-Maker side via the credits, albeit credits on BOE Bulk Port fees instead of Trading Permit fees. Additionally, the proposed credits may incentivize and attract more volume and liquidity to the Exchange, which will benefit all Exchange participants through increased opportunities to trade as well as enhancing price discovery. While the Exchange has no way of predicting with certainty how many and which TPHs will satisfy the required criteria to receive the credits, the Exchange had anticipated approximately two TPHs (out of approximately 5 TPHs that are eligible for AVP) to reach VIP Tiers 4 or 5 and consequently earn the BOE Bulk Port fee credits for their respective Market-Maker affiliate. For the month of October 2019, two TPHs received access credits under Tier 5 and no TPHs received credits under Tier 4. The Exchange notes that it believes its reasonable, equitable and not unfairly discriminatory to no longer provider access credits for Market-Makers whose affiliates achieve VIP Tiers 2 or 3 as the Exchange has adopted another opportunity for all Market-Makers, not just Market-Makers that are part of a consolidator, to receive credits on BOE Bulk Port fees (*i.e.,* credits available via the proposed Market-Maker Access Credit Program). More specifically, limiting the credits under AVP to the top two tiers enables the Exchange to provide further credits under the new Market-Maker Access Credit Program. Furthermore, the Exchange notes that it is not required to provide any credits at any tier level.

The Exchange believes the proposed BOE Bulk Port fee credits available for TPHs that reach certain Performance Tiers under the Liquidity Provider Sliding Scale Adjustment Table is reasonable as the credits provide for reduced connectivity costs for those Market-Makers that reach the required thresholds. The Exchange believe it's reasonable, equitable and not unfairly discriminatory to provide credits to those Market-Makers that primarily provide and post liquidity to the Exchange, as the Exchange wants to continue to encourage Market-Makers with significant Make Rates to continue to participate on the Exchange and add liquidity. Greater liquidity benefits all market participants by providing more trading opportunities and tighter spreads.

Moreover, the Exchange notes that Market-Makers with a high Make Rate percentage generally require higher amounts of capacity than other Market-Makers. Particularly, Market-Makers with high Make Rates are generally streaming significantly more quotes than those with lower Make Rates. As such, Market-Makers with high Make Rates may incur more costs than other Market-Makers as they may need to purchase multiple BOE Bulk Ports in order to accommodate their capacity needs. The Exchange believes the proposed credits for BOE Bulk Ports encourages Market-Makers to continue to provide liquidity for the Exchange, notwithstanding the costs incurred by purchasing multiple ports. Particularly, the proposal is intended to mitigate the costs incurred by traditional Market-Makers that focus on adding liquidity to the Exchange (as opposed to those that provide and take, or just take). While the Exchange cannot predict with certainty which Market-Makers will reach Performance Tiers 4 and 5 each month, based on historical performance it anticipated approximately 10 Market-Makers would achieve Tiers 4 or 5. In October 2019, 12 Market-Makers achieved Tiers 4 or 5. Lastly, the Exchange notes that it is common practice among options exchanges to differentiate fees for adding liquidity and fees for removing liquidity.[69]

Bandwidth Packets and CMI CAS Server Fees

The Exchange believes it's reasonable to eliminate Bandwidth Packet fees and the CMI CAS Server fee because TPHs will not pay fees for these connectivity options and because Bandwidth Packets and CAS Servers have been retired and rendered obsolete as part of the migration. The Exchange believes that even though it will be discontinuing Bandwidth Packets, the proposed incremental pricing for Logical Ports and BOE Bulk Ports will continue to encourage users to mitigate message traffic. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs.

Access Fees

The Exchange believes the restructuring of its Trading Permits is reasonable in light of the changes to the Exchange's connectivity infrastructure in connection with the migration and the resulting separation of bandwidth allowance, logins and appointment costs from each Trading Permit. The Exchange also believes that it is reasonable to harmonize the Exchange's Trading Permit structure and corresponding connectivity options to

[69] *See e.g.,* MIAX Options Fees Schedule, Section 1(a), Market Maker Transaction Fees.

more closely align with the structures offered at its Affiliated Exchanges once the Exchange is on a common platform as its Affiliated Exchanges.[70] The proposed Trading Permit structure and corresponding fees are also in line with the structure and fees provided by other exchanges. The proposed Trading Permit fees are also equitable and not unfairly discriminatory because the Exchange will apply the same fees to all market participants that use the same type and number of Trading Permits.

With respect to electronic Trading Permits, the Exchange notes that TPHs previously requested multiple Trading Permits because of bandwidth, login or appointment cost needs. As described above, in connection with migration, bandwidth, logins and appointment costs are no longer tied to Trading Permits or Bandwidth Packets and as such, the need to hold multiple permits and/or Bandwidth Packets is obsolete. As such, the Exchange believes the structure to require only one of each type of applicable electronic Trading Permit is appropriate. Moreover, the Exchange believes offering separate marketing making permits for off-floor and on-floor Market-Makers provides for a cleaner, more streamlined approach to trading permits and corresponding fees. Other exchanges similarly provide separate and distinct fees for Market-Makers that operate on-floor vs off-floor and their corresponding fees are similar to those proposed by the Exchange.[71]

The Exchange believes the proposed fee for its MM EAP Trading Permits is reasonable as it is the same fee it assess today for Market-Maker Trading Permits (*i.e.,* $5,000 per month per permit). Additionally, the proposed fee is in line with, and in some cases even lower than, the amounts assessed for similar access fees at other exchanges, including its affiliate C2.[72] The Exchange believes the proposed EAP fee is also reasonable, and in line with the fees assessed by other Exchanges for non-Market-Maker electronic access.[73] The Exchange notes that while the Trading Permit fee is increasing, TPHs overall cost to access the Exchange may be reduced in light of the fact that a TPH no longer must purchase multiple Trading Permits, Bandwidth Packets and Login Ids in order to receive sufficient bandwidth and logins to meet their respective business needs. To illustrate the value of the new connectivity infrastructure, the Exchange notes that the cost that would be incurred by a TPH today in order to receive the same amount of order capacity that will be provided by a single Logical Port post-migration (*i.e.,* 5,000 orders per second), is approximately 98% higher than the cost for the same capacity post-migration. The following examples further demonstrate potential cost savings/value added for an EAP holder with modest capacity needs and an EAP holder with larger capacity needs:

TPH THAT HOLDS 1 EAP, NO BANDWIDTH PACKETS AND 1 CMI LOGIN

	Current fee structure	Post-migration fee structure
EAP	$1,600	$3,000.
CMI Login/Logical Port	$750	$750.
Bandwidth Packets	0	N/A.
Total Bandwidth Available	30 orders/sec	5,000 orders/sec.
Total Cost	$2,350	$3,750.
Total Cost per message	$78.33/order/sec	$0.75/order/sec.

TPH THAT HOLDS 1 EAP, 4 BANDWIDTH PACKETS AND 15 CMI LOGINS

	Current fee structure	Post-migration fee structure
EAP	$1,600	$3,000.
CMI Login/Logical Port	$11,250 (15@750)	$750.
Bandwidth Packets	$6,400 (4@$1,600)	N/A.
Total Bandwidth Available	150 orders/sec	5,000 orders/sec.
Total Cost	$19,250	$3,750.
Total Cost per message	$128.33/order/sec	$0.75/order/sec.

The Exchange believes the proposal to adopt a new Clearing TPH Permit is reasonable because it offers TPHs that only clear transactions of TPHs a discount. Particularly, Clearing TPHs that also submit orders electronically to the Exchange would purchase the proposed EAP at $3,000 per permit. The Exchange believe it's reasonable to provide a discount to Clearing TPHs that only clear transactions and do not otherwise submit electronic orders to the Exchange. The Exchange notes that another exchange similarly charges a separate fee for clearing firms.[74]

The Exchange believes the proposed fee structure for on-floor Market-Makers is reasonable as the fees are in line with those offered at other Exchanges.[75] The Exchange believes that the proposed fee

[70] For example, the Exchange's affiliate, C2, similarly provides for Trading Permits that are not tied to connectivity, and similar physical and logical port options at similar pricings. *See* Cboe C2 Options Exchange Fees Schedule. Physical connectivity and logical connectivity are also not tied to any type of permits on the Exchange's other options exchange affiliates.

[71] *See e.g.,* PHLX Section 8A, Permit and Registration Fees. *See also,* BOX Options Fee Schedule, Section IX Participant Fees; NYSE American Options Fees Schedule, Section III(A) Monthly ATP Fees and NYSE Arca Options Fees and Charges, OTP Trading Participant Rights. For similar Trading Floor Permits for Floor Market Makers, Nasdaq PHLX charges $6,000; BOX charges up to $5,500 for 3 registered permits in addition to a $1,500 Participant Fee, NYSE Arca charges up to $6,000; and NYSE American charges up to $8,000.

[72] *See e.g.,* Cboe C2 Options Exchange Fees Schedule. *See also,* NYSE Arca Options Fees and Charges, General Options and Trading Permit (OTP) Fees, which assesses up to $6,000 per Market Maker OTP and NYSE American Options Fee Schedule, Section III. Monthly ATP Fees, which assess up to $8,000 per Market Maker ATP. *See also,* PHLX Section 8A, Permit and Registration Fees, which assesses up to $4,000 per Market Maker Permit.

[73] *See e.g.,* PHLX Section 8A, Permit and Registration Fees, which assesses up to $4,000 per Permit for all member and member organizations other than Floor Specialists and Market Makers.

[74] *See e.g.,* NYSE Arca Options Fees and Charges, General Options and Trading Permit (OTP) Fees and NYSE American Options Fee Schedule, Section III. Monthly ATP Fees.

[75] *See e.g.,* PHLX Section 8A, Permit and Registration Fees, which assesses $6,000 per permit for Floor Specialists and Market Makers.

for MM Floor Permits as compared to MM EAPs is reasonable because it is only modestly higher than MM EAPs and Floor MMs don't have other costs that MM EAP holders have, such as MM EAP Appointment fees.

The Exchange believes its proposed fees for Floor Broker Permits are reasonable because the fees are similar to, and in some cases lower than, the fees the Exchange currently assesses for such permits. Specifically, based on the number of Trading Permits TPHs held upon migration, 60% of TPHs that hold Floor Broker Trading Permits will pay lower Trading Permit fees. Particularly, any Floor Broker holding ten or less Floor Broker Trading Permits will pay lower fees under the proposed tiers as compared to what they pay today. While the remaining 40% of TPHs holding Floor Broker Trading Permits (who each hold between 12–21 Floor Broker Trading Permits) will pay higher fees, the Exchange notes the monthly increase is de minimis, ranging from an increase of 0.6%—2.72%.[76]

The Exchange believes the proposed ADV Discount is reasonable because it provides an opportunity for Floor Brokers to pay lower FB Trading Permit fees, similar to the current rebate program offered to Floor Brokers. The Exchange notes that while the new ADV Discount program includes only customer volume (''C'' origin code) as compared to Customer and Professional Customer/Voluntary Professional, the amount of Professional Customer/Voluntary Professional volume was de minimis and the Exchange does not believe the absence of such volume will have a significant impact.[77] Additionally, the Exchange notes that while the ADV requirements under the proposed ADV Discount program are higher than are required under the current rebate program, the proposed ADV Discount counts volume from all products towards the thresholds as compared to the current rebate program which excludes volume from Underlying Symbol List A (except RLG, RLV, RUI, and UKXM), DJX, XSP, and subcabinet trades. Moreover, the ADV Discount is designed to encourage the execution of orders in all classes via open outcry, which may increase volume, which would benefit all market participants (including Floor Brokers who do not hit the ADV thresholds) trading via open outcry (and indeed, this increased volume could make it possible for some Floor Brokers to hit the ADV thresholds). The Exchange believes the proposed discounts are equitable and not unfairly discriminatory because all Floor Brokers are eligible. While the Exchange has no way of predicting with certainty how many and which TPHs will satisfy the various thresholds under the ADV Discount, the Exchange anticipated approximately 3 Floor Brokers to receive a rebate under the program. To date, 2 Floor Brokers have received a rebate under the program.

The Exchange believes its proposed MM EAP Appointment fees are reasonable in light of the Exchange's elimination of appointment costs tied to Trading Permits. Other exchanges also offer a similar structure with respect to fees for appointment classes.[78] Additionally, the proposed MM EAP Appointment fee structure results in approximately 36% electronic MMs paying lower fees for trading permit and appointment costs. For example, in order to have the ability to make electronic markets in every class on the Exchange, a Market-Maker would need 1 Market-Maker Trading Permit and 37 Appointment Units post-migration. Under, the current pricing structure, in order for a Market-Maker to quote the entire universe of available classes, a Market-Maker would need 33 Appointment Credits, thus necessitating 33 Market-Maker Trading Permits. With respect to fees for Trading Permits and Appointment Unit Fees, under the proposed pricing structure, the cost for a TPH wishing to quote the entire universe of available classes is approximately 29% less (if they are not eligible for the MM TP Sliding Scale) or approximately 2% less (if they are eligible for the MM TP Sliding Scale). To further demonstrate the potential cost savings/value added, the Exchange is providing the following examples comparing current Market-Maker connectivity and access fees to projected connectivity and access fees for different scenarios. The Exchange notes that the below examples not only compare Trading Permit and Appointment Unit costs, but also the cost incurred for logical connectivity and bandwidth. Particularly, the first example demonstrates the total minimum cost that would be incurred today in order for a Market-Maker to have the same amount of capacity as a Market-Maker post-migration that would have only 1 MM EAP and 1 Logical Port (*i.e.,* 15,000 quotes/3 sec). The Exchange is also providing examples that demonstrate the costs of (i) a Market-Maker with small capacity needs and appointment unit of 1.0 and (ii) a Market-Maker with large capacity needs and appointment cost/unit of 30.0:

	Current fee structure	Post-migration fee structure
Market-Maker That Needs Capacity of 15,000/Quotes/3 Seconds		
MM Permit/MM EAP	$5,000	$5,000.
Appointment Unit Cost	N/A (1 appointment cost)	$0 (1 appointment unit).
CMI Login/Logical Port	$750[79]	$750.
Bandwidth Packets	$5,500 (2@$2,750)	N/A.
Total Bandwidth Available	15,000 quotes/3 sec	15,000 quotes/3 sec.
Total Cost	$11,250	$5,750.
Total Cost per message allowed	$0.75/quote/3 sec	$0.38/quote/3 sec.
Market Maker That Needs Capacity of No More Than 5,000 Quotes/3 Secs		
MM Permit/MM EAP	$5,000	$5,000.
Appointment Unit Cost	N/A (1 appointment cost)	$0 (1 appointment unit).
CMI Login/Logical Port	$750	$750.
Bandwidth Packets	0	N/A.
Total Bandwidth Available	5,000 quotes/3 sec	15,000 quotes/3 sec.
Total Cost	$5,750	$5,750.

[76] The Floor Brokers whose fees are increasing have each committed to a minimum number of permits and therefore currently receive the rates set forth in the current Floor Broker TP Sliding Scale.

[77] Furthermore, post-migration the Exchange will not have Voluntary Professionals.

[78] *See e.g.,* PHLX Section 8. Membership Fees, B, Streaming Quote Trader (''SQT'') Fees and C. Remote Market Maker Organization (RMO) Fee.

	Current fee structure	Post-migration fee structure
Total Cost per message allowed	$1.15/quote/3 sec	$0.38/quote/3 sec.
Market-Maker That Needs 30 Appointment Units and Capacity of 300,000 Quotes/3 Sec		
MM Permits/MM EAP	$105,000 (30 MM Permits assumes eligible for MM TP Sliding Scale).[80]	$5,000.
Appointment Units Cost	N/A (30 appointment costs)	$95,500 (30 appointment units).
CMI Logins/BOE Bulk Port	$3,000 (4@$750)[81]	$3,000 (2 BOE Bulk@$1,500).
Bandwidth Packets	$82,500 (30@$2750)	N/A.
Total Bandwidth Available	300,000 quotes/3 sec	* 450,000 quotes/3 sec.
Total Cost	$190,500	$103,500.
Total Cost per message allowed	$0.63/quotes/3 sec	$0.23/quote/3 sec.

** Possible performance degradation at 15,000 messages per second.*

The Exchange believes its proposal to provide separate fees for Tier Appointments for MM EAPs and MM Floor Permits as the Exchange will be issuing separate Trading Permits for on-floor and off-floor market making as discussed above. The proposal to eliminate the volume threshold for the electronic SPX Tier Appointment fee is reasonable as no TPHs in the past several months have electronically traded more than 1 SPX contract or less than 100 SPX contracts per month and therefore will not be negatively impacted by the proposed change, and because it aligns the electronic SPX Tier Appointment with the floor SPX Tier Appointment, which has no volume threshold. The Exchange believes the proposal to increase the electronic volume thresholds for VIX and RUT are reasonable as those that do not regularly trade VIX or RUT in open-outcry will continue to not be assessed the fee. In fact, any TPH that executes more than 100 contracts but less than 1,000 in the respective classes will no longer have to pay the proposed Tier Appointment fee. As noted above, the Exchange is not proposing to change the amounts assessed for each Tier Appointment Fee. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs.

Trading Permit Holder Regulatory Fee

The Exchange believes it's reasonable to eliminate the Trading Permit Holder Regulatory fee because TPHs will not pay this fee and because the Exchange is restructuring its Trading Permit structure. The Exchange notes that although it will less closely be covering the costs of regulating all TPHs and performing its regulatory responsibilities, it still has sufficient funds to do so. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs.

The Exchange believes corresponding changes to eliminate obsolete language in connection with the proposed changes described above and to relocate and reorganize its fees in connection with the proposed changes maintain clarity in the Fees Schedule and alleviate potential confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can buy the less expensive 1 Gb Physical Port and utilize only one Logical Port. Moreover, the pricing for 1 Gb Physical Ports and FIX/BOE Logical Ports are no different than are assessed today (*i.e.,* $1,500 and $750 per port, respectively), yet the capacity and access associated with each is greatly increasing. While pricing may be increased for larger capacity physical and logical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed in the Statutory Basis section above, options market participants are not forced to connect to (or purchase market data from) all options exchanges, as shown by the number of TPHs at Cboe and shown by the fact that there are varying number of members across each of Cboe's Affiliated Exchanges. The Exchange operates in a highly competitive environment, and its ability to price access and connectivity is constrained by competition among exchanges and third parties. As discussed, there are other options markets of which market participants may connect to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or taking the exchange's data indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange or reseller to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition

[79] The maximum quoting bandwidth that may be applied to a single Login Id is 80,000 quotes/3 sec.

[80] For simplicity of the comparison, this assumes no appointments in SPX, VIX, RUT, XEO or OEX (which are not included in the TP Sliding Scale).

[81] Given the bandwidth limit per Login Id of 80,000 quotes/3 sec, example assumes Market-Maker purchases minimum amount of Login IDs to accommodate 300,000 quotes/3 sec.

among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [82] and paragraph (f) of Rule 19b–4 [83] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2019–111 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2019–111. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2019–111, and should be submitted on or before January 8,2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[84]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27194 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

[82] 15 U.S.C. 78s(b)(3)(A).

[83] 17 CFR 240.19b–4(f).

[84] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87726; File No. SR–NASDAQ–2019–092]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 5515 Which Governs the Listing of Warrants on the Nasdaq Capital Market To Replace the Current Requirement That a Warrant Have 400 Round-Lot Holders With a Revised Requirement of 100 Holders That Are Both Public Holders and Round-Lot Holders

December 12, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 5, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below,which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 5515 which governs the listing of warrants on the Nasdaq Capital Market. Specifically, Nasdaq proposes to replace the current requirement that a warrant have 400 Round-Lot Holders with a revised requirement of 100 Holders that are both Public Holders and Round-Lot Holders, which is substantially similar to a long-standing requirement for listing warrants on the NYSE American Exchange.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq Exchange Rule 5515 governs the initial listing of warrants on the Nasdaq Capital Market. Among the requirements for listing warrants on the Nasdaq Capital Market is that each warrant to be listed must have 400 Round-Lot Holders.[3] The corresponding

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Specifically, Rule 5515(a) currently provides that for initial listing on the Nasdaq Capital Market, ''rights, warrants and put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of

rule of the NYSE American Market is Section 105 of the NYSE American Company Guide, which requires that each warrant to be listed must have 100 public warrantholders.

Prior to 2010, Nasdaq did not have a holder requirement for listing warrants on the Nasdaq Capital Market. In 2010, Nasdaq adopted a round lot holder requirement for the initial listing of warrants on the Nasdaq Capital Market to help ensure that warrants listed on the Nasdaq Capital Market had adequate distribution and a liquid trading market.[4] At the time, Nasdaq determined to adopt the same 400 round lot holder requirement as applied to list warrants on the Nasdaq Global Market.

In most instances, the requirements for the Nasdaq Capital Market are lower than those of the Nasdaq Global Market. In addition, Nasdaq has positioned the Nasdaq Capital Market tier to compete for companies that otherwise may list on the NYSE American exchange. Accordingly, Nasdaq has determined to modify its minimum holder requirement to list warrants on the Nasdaq Capital Market so that it is lower than the requirement for the Nasdaq Global Market and substantially similar to the requirement for NYSE American.[5] Specifically, Nasdaq proposes to adopt the standard of 100 Holders that are both Public Holders[6] and Round-Lot Holders,[7] which is substantially similar to (but could be more stringent than) the NYSE American 100 public warrantholders requirement.[8] Nasdaq is proposing no changes to Nasdaq's other initial listing requirements for warrants on the Nasdaq Capital Market, nor is Nasdaq proposing changes to Nasdaq's continued listing standards for warrants.[9]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Specifically, Nasdaq believes this proposed rule change removes an impediment to a free and open system by enabling Nasdaq to compete with NYSE American for the listing of a broader scope of warrants and simultaneously by offering issuers of such warrants an additional listing option. Nasdaq further believes that it does so without impacting the protection of investors or the public interest because, in Nasdaq's opinion, the quantitative standards at issue have been applied by NYSE American for many years without harm.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes the proposed rule change is pro-competitive in that it permits competition for more issuers of warrants. Today, there is no such competition because such issuers are not eligible for listing on Nasdaq.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[14] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the Exchange may allow the issuer of a warrant currently affected by the existing rule the opportunity to list on Nasdaq. The Exchange notes that its proposal is based on an existing NYSE American rule and, in its view, the proposal does not raise new issues that are inconsistent with the protection of investors and the public interest.

The Commission believes that waiver of the operative delay is appropriate because the proposed warrant holder

shares of the Company's common stock, at a specified price until a specified period of time) must meet the following requirements: (1) At least 400,000 issued; (2) The underlying security must be listed on Nasdaq or be a Covered Security; (3) At least three registered and active Market Makers; and (4) In the case of warrants, at least 400 Round Lot Holders (except that this requirement will not apply to the listing of rights or warrants in connection with the initial firm commitment underwritten public offering of such warrants).''

[4] Securities Exchange Act Release No. 61594 (February 25, 2010), 75 FR 9982 (March 4, 2010) (SR–NASDAQ–2010–024).

[5] In considering this change, Nasdaq compared the trading quality of warrants listed on Nasdaq with that of warrants listed on NYSE American. The study reviewed trading during 2019 for warrants listed as of January 1, 2019, and included factors such as average daily volume executed, average quoted and effective spreads, and volatility. While it is difficult to draw conclusions given the small universe of data (only six warrants were listed on NYSE American as of January 1, 2019, and warrants on both markets did not trade on a large number of days) and other differences between the exchanges in market structure and listing requirements, based on this review, in Nasdaq's opinion, there was no evidence indicating that trading quality in warrants listed on NYSE American under its current listing standard was worse than those of warrants listed on Nasdaq under its standard. Additionally, Nasdaq is unaware that NYSE American has taken adverse action against a warrant or an issuer of such warrant listed under Section 105 of the NYSE American Company Guide based on the quantitative listing standards in question.

[6] Nasdaq Rule 5005(a)(36) defines Public Holders as ''holders of a security that includes both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an Executive Officer, director, or the beneficial holder of more than 10% of the total shares outstanding.''

[7] Nasdaq Rule 5005(a)(40) defines a Round Lot Holder as ''a holder of a Normal Unit of Trading of Unrestricted Securities. The number of beneficial holders will be considered in addition to holders of record.''

[8] The proposed Nasdaq requirement could be more stringent than the NYSE American requirement because the Nasdaq rule would require that the holders be both Public Holders and Round Lot Holders, and would exclude holders of restricted securities, whereas the NYSE American rule only requires that they be public holders.

[9] Nasdaq notes that Section 105 of the NYSE American Company Guide also provides requirements around warrant exercise provisions when a company has the right to reduce the exercise price of its warrants. Similar to these NYSE American requirements, Nasdaq believes that its rules also require a company with such a right to comply with any applicable tender offer regulatory provisions under the federal securities laws and to publicly disclose material information such as the reduction of the warrant exercise price. Nasdaq intends to file a subsequent rule filing to provide transparency to this.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

requirement is substantially similar to the rules of another national securities exchange.[16] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal as operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2019–092 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2019–092. 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–NASDAQ–2019–092 and should be submitted on or before January 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–27212 Filed 12–17–19; 8:45 am]

BILLING CODE 8011–01–P

[16] *See also supra* note 9.

[17] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 16220 and # 16221; PENNSYLVANIA Disaster Number PA–00103]

Administrative Declaration of a Disaster for the Commonwealth of Pennsylvania

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the Commonwealth of Pennsylvania dated 12/11/2019.

Incident: Severe Storms and High Winds.

Incident Period: 10/31/2019 through 11/01/2019.

DATES: Issued on 12/11/2019.

Physical Loan Application Deadline Date: 02/10/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 09/11/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Erie.

Contiguous Counties:

Pennsylvania: Crawford, Warren.

New York: Chautauqua.

Ohio: Ashtabula.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	3.000
Homeowners without Credit Available Elsewhere	1.500
Businesses with Credit Available Elsewhere	7.750
Businesses without Credit Available Elsewhere	3.875
Non-Profit Organizations with Credit Available Elsewhere	2.750
Non-Profit Organizations without Credit Available Elsewhere	2.750
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.875
Non-Profit Organizations without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 16220 B and for economic injury is 16221 0.

The States which received an EIDL Declaration # are Pennsylvania, New York, Ohio.

(Catalog of Federal Domestic Assistance Number 59008)

Christopher Pilkerton,

Acting Administrator.

[FR Doc. 2019–27241 Filed 12–17–19; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice 10965]

Department of State Performance Review Board Members

In accordance with section 4314(c)(4) of 5 United States Code, the Department of State has appointed the following individuals to the Department of State Performance Review Board for Senior Executive Service members:

Douglas A. Pitkin, Chairperson, Director, Bureau of Budget and Planning, Department of State;

Ann K. Ganzer, Office Director, Bureau of International Security and Nonproliferation, Department of State;

Kathleen H. Hooke, Deputy Legal Adviser, Office of the Legal Adviser, Department of State;

Jeffrey C. Mounts, Deputy Comptroller, Comptroller, Global Financial Services, Department of State; and,

Gregory B. Smith, Director, Office of Civil Rights, Department of State;

Nilda R. Pedrosa, White House Liaison, Office of the White House Liaison, Department of State;

Carrie B. Cabelka, Assistant Secretary for Administration, Bureau of Administration, Department of State;

Roger D. Carstens, Deputy Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, Department of State.

Carol Z. Perez,

Director General of the Foreign Service and Director of Human Resources, Department of State.

[FR Doc. 2019–27254 Filed 12–17–19; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of modification of action.

SUMMARY: In accordance with the direction of the President, the U.S. Trade Representative has determined to modify the action being taken in this Section 301 investigation by suspending, until further notice, the additional duty of 15 percent on certain products of China, scheduled to take effect December 15, 2019.

DATES: Effective 12:01 a.m. eastern standard time on December 15, 2019, the additional duties scheduled to go into effect at that time, as set out in Annex C of the notice published at 84 FR 43304, are suspended until further notice.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, contact Associate General Counsel Arthur Tsao, Assistant General Counsel Philip Butler, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For questions on customs classification or implementation of additional duties, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Prior Determinations in the Investigation

For background on the proceedings in this investigation, please see the prior notices issued in this investigation, including 82 FR 40213 (August 24, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), and 83 FR 40823 (August 16, 2018), 83 FR 47974 (September 21, 2018), 83 FR 49153 (September 28, 2018), 84 FR 20459 (May 9, 2019), 84 FR 43304 (August 20, 2019), and 84 FR 45821 (August 30, 2019).

On August 20, 2019, the U.S. Trade Representative, at the direction of the President, determined to modify the action being taken in the investigation by imposing an additional 10 percent *ad valorem* duty on products of China with an annual aggregate trade value of approximately $300 billion. See 84 FR 43304 (August 20, 2019) (the August 20 notice). The tariff subheadings subject to the 10 percent additional duties were separated into two lists with different effective dates. The list in Annex A had an effective date of September 1, 2019. The list in Annex C had an effective date of December 15, 2019.

Subsequently, at the direction of the President, the U.S. Trade Representative determined to increase the rate of the additional duty applicable to the tariff subheadings covered by the action announced in the August 20 notice from 10 percent to 15 percent. See 84 FR 45821 (August 30, 2019).

B. Determination To Modify Action

The Section 301 statute (set out in Sections 301 to 308 of the Trade Act) (19 U.S.C. 2411–2418) includes authority for the U.S. Trade Representative to modify the action being taken in an investigation. In particular, Section 307(a)(1) authorizes the U.S. Trade Representative to modify or terminate any action taken under Section 301, subject to the specific direction, if any, of the President, if the burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the action has increased or decreased, or the action is being taken under Section 301(b) and is no longer appropriate.

The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. On December 13, 2019, following months of negotiations, the United States and China reached a historic and enforceable agreement on a Phase One trade deal that requires structural reforms and other changes to China's economic and trade regime, including with respect to certain issues covered in this Section 301 investigation.

In light of progress in the negotiations with China, and at the direction of the President, the U.S. Trade Representative has determined that the action announced on August 20, as modified by the August 30 notice, is no longer appropriate. Specifically, and in accordance with the President's direction, the U.S. Trade Representative has determined to suspend indefinitely the imposition of additional duties of 15 percent on products of China covered by Annex C of the August 20 notice, which otherwise would have been effective on December 15, 2019.

Furthermore, in light of the progress in the negotiations, the U.S. Trade Representative expects to issue in the near future a notice reducing the rate of additional duty applicable to the products of China covered by Annex A of the August 20 notice.

The U.S. Trade Representative's decision to modify the action being taken in this investigation takes into account the extensive comments and testimony previously provided in connection with the August 20 modification.

To give effect to the U.S. Trade Representative's decision, the additional duties set out in Annex C of the August 20 notice, as modified by the August 30 notice, are suspended indefinitely, as of the planned effective date of 12:01 a.m. eastern standard time on December 15, 2019. The additional duties that were provided for in heading 9903.88.16 of the Harmonized Tariff Schedule of the United States (HTSUS) and U.S. notes 20(t) and 20(u) to subchapter III of chapter 99 of the HTSUS and that were scheduled to take effect on December 15, 2019 are hereby suspended indefinitely.

The U.S. Trade Representative will continue to consider the actions being taken in this investigation. In the event that further modifications are appropriate, the U.S. Trade Representative intends to take into account the extensive comments and testimony previously provided.

Joseph Barloon,

General Counsel, Office of the U.S. Trade Representative.

[FR Doc. 2019–27306 Filed 12–13–19; 4:15 pm]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of New Approval of Information Collection: Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) Monitoring, Reporting, and Verification (MRV) Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on April 30, 2019. FAA received two comments to this notice. The collection involves a request that airplane operators subject to the applicability of Annex 16, Volume IV of the Convention on Civil Aviation (hereinafter the ''Chicago Convention'') submit electronically an Emissions Monitoring Plan (EMP) and an annual Emissions Report (ER) to the FAA. The information to be collected is necessary because FAA will use the information to fulfill the United States' responsibilities under the Chicago Convention.

DATES: Written comments should be submitted by January 17, 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th St. NW, Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Daniel Williams by email at: *daniel.williams@faa.gov;* phone: 202–267–7988.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–XXXX.

Title: Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) Monitoring, Reporting, and Verification (MRV) Program.

Form Numbers: Not applicable.

Type of Review: Clearance of a new information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on April 30, 2019 (84 FR 18,334). FAA received two comments in response to this notice.

The CORSIA MRV Program is a voluntary program for certain U.S. air carriers and commercial operators (collectively referred hereinafter as ''operators'') to submit certain airplane CO_2 emissions data to the FAA to enable the United States to establish uniformity with ICAO Standards And Recommended Practices (SARPs) for CORSIA, which were adopted in June 2018, as Annex 16, Volume IV to the Chicago Convention. The United States supported the decision to adopt the CORSIA SARPs based on the understanding that CORSIA is the exclusive market-based measure applying to international aviation, and that CORSIA will ensure fair and reciprocal commercial competition by avoiding a patchwork of country- or regionally-based regulatory measures that are inconsistently applied, bureaucratically costly, and economically damaging. Furthermore, continued U.S. support for CORSIA assumes a high level of participation by other countries, particularly by countries with significant aviation activity, as well as a final CORSIA package that is acceptable to, and implementable by, the United States.

Under CORSIA, all ICAO Member States whose airplane operators undertake international flights will need to develop a MRV system for CO_2 emissions from those international flights starting January 1, 2019. The FAA's CORSIA MRV Program is intended to be the United States' MRV system for monitoring, reporting, and verification of U.S. airplane operator CO_2 emissions from international flights.

Operators that are subject to the applicability of CORSIA will submit their EMPs and ERs electronically.[1] Both documents use Microsoft Excel-based templates and can be transmitted via email or uploaded to a web portal. EMPs that are submitted by operators will be used as a collaborative tool between the operator and FAA to document a given operator's chosen fuel use monitoring procedures. FAA will retain a copy of the EMP and will share with ICAO a list of operators that submit EMPs. FAA will not submit any specific EMPs from U.S. operators to ICAO. Large operators, *i.e.,* those emitting 500,000 metric tons or more of CO_2 per year, will gather data through a ''fuel use monitoring method.'' Small operators, *i.e.,* those emitting less than 500,000 metric tons of CO_2 per year, can use a simplified monitoring method. Annual ERs that are submitted to FAA by operators and verifiers will be used to document each operators' international emissions. FAA will use the ERs to calculate aggregated emissions data for all U.S. operators. FAA will submit the aggregated emissions data to ICAO to demonstrate U.S. implementation of CORSIA.

Respondents: Respondents will be airplane operators subject to the applicability of Annex 16, Volume IV of the Chicago Convention. From the outset, FAA expects between 11 and 49 operators to submit an EMP and ER. Some additional operators could submit an EMP and ER over time based on their international aviation activities.

Frequency: An EMP is a one-time submission. An ER is an annual submission.

Estimated Average Burden per Response:

—For an EMP (one-time submission), FAA expects that filling and submitting an EMP could on average take approximately 22.5 hours.

—For an ER (annual submission), FAA expects that the reporting burden could be approximately 60 and 17.5 hours per operator for operators using

[1] CORSIA applies to airplane operators that produce annual CO_2 emissions greater than 10,000 tonnes (*i.e.,* 10,000 metric tons) from international flights, excluding emissions from excluded flights. The following activities are excluded CORSIA:

—Domestic flights;

—Humanitarian, medical, and firefighting operations, including flight(s) preceding or following a humanitarian, medical, or firefighting flight provided such flight(s) were conducted with the same airplane, were required to accomplish the related humanitarian, medical, or firefighting activities or to reposition thereafter the airplane for its next activity;

—Operations using an airplane with a maximum certificated take-off mass equal to or less than 5,700 kg;

—Operations on behalf of the military.

a Fuel Use Monitoring Method and operators using a simplified Monitoring Method respectively.

Estimated Total Annual Burden: Based on the above, FAA expects that the annual submission of an EMP and ER could take approximately 33.5 to 107.5 hours for each of the 11 to 49 operators.

Issued in Washington, DC, on December 12, 2019.

Rebecca Cointin,

Director (Acting), Office of Environment and Energy.

[FR Doc. 2019–27232 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0255]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Training Certification for Drivers of Longer Combination Vehicles

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

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for approval and invites public comment. FMCSA requests approval to renew the ICR titled ''Training Certification for Drivers of Longer Combination Vehicles (LCVs),'' OMB Control No. 2126–0026. This ICR relates to Agency requirements for drivers to be certified to operate LCVs, and associated recordkeeping requirements that motor carriers must satisfy before permitting their drivers to operate LCVs. Motor carriers, upon inquiry by authorized Federal, State or local officials, must produce an LCV Driver-Training Certificate for each of their LCV drivers.

DATES: We must receive your comments on or before February 18, 2020.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2019–0255 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Instructions:* All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.
- *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.
- *Privacy Act:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*
- *Public Participation:* The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Ms. Pearlie Robinson, Driver and Carrier Operations Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–4325. Email: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

An LCV is any combination of a truck-tractor and two or more semi-trailers or trailers that operates on the National System of Interstate and Defense Highways (according to 23 CFR 470.107) and has a gross vehicle weight greater than 80,000 pounds. To enhance the safety of LCV operations on our Nation's highways, Section 4007(b) of the Motor Carrier Act of 1991 directed the Secretary of Transportation to establish Federal minimum training requirements for drivers of LCVs [Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102–240, 105 Stat. 1914, 2152]. The Secretary of Transportation delegated responsibility for establishing these requirements to FMCSA (49 CFR 1.87), and on March 30, 2004, after appropriate notice and solicitation of public comment, FMCSA established the current training requirements for operators of LCVs (69 FR 16722). The regulations bar motor carriers from permitting their drivers to operate an LCV if they have not been properly trained in accordance with the requirements of 49 CFR 380.113. Drivers receive an LCV Driver-Training Certificate upon successful completion of these training requirements. Motor carriers employing an LCV driver must verify the driver's qualifications to operate an LCV, and must maintain a copy of the LCV Driver-Training Certificate and present it to authorized Federal, State, or local officials upon request.

Renewal of This Information Collection (IC)

The currently approved burden hour estimate associated with this IC, approved by OMB on May 19, 2017, is 5,565 hours. The Agency requests a reduction in the burden hour estimates from 5,565 hours to 4,244 hours. The reduction in burden hour estimates and costs is the result of correcting an error; the incorrect growth rate from the Bureau of Labor Statistics was previously used to estimate the number of new drivers requiring LCV driver training certificates. As a result, FMCSA over-estimated the number of new drivers, annual burden hours, hours for preparing training certificates, number of drivers who undergo the hiring process, number of respondents, number of responses, and costs to respondents.

Separately, the currently approved version of this IC incorrectly accounted for LCV driver training costs, estimated to be $7,035,160 annually. Training is not considered to be an information collection burden. For this updated version of the ICR, the Agency is removing the costs associated with training. Instead, FMCSA has calculated the labor costs associated with the LCV driver training recordkeeping requirements. The annual cost burden is estimated to be $135,734.

The expiration date of the current ICR is May 31, 2020. Through this request,

FMCSA requests a renewal of the paperwork burden associated with the ICR titled ''Training Certification for Drivers of Longer Combination Vehicles (LCVs),'' OMB Control No. 2126–0026. This ICR corrects and updates all of the affected areas, as shown in the table below.

Estimate	Current approved IC	Proposed updated IC	Difference
Number of Drivers Engaged in the Operation of LCVs in the U.S	44,095	38,503	(5,592)
Total Annual Burden	5,565	4,244	(1,321)
Number of New Drivers	2,360	218	(2,142)
Number of Hours for Preparing Training Certificates	394	36	(358)
Number of Drivers Who Undergo Hiring Process	31,022	25,245	(5,777)
Number of Respondents	59,684	50,708	(8,976)
Number of Responses	59,684	50,708	(8,976)
Labor Costs to Respondents	$0	$135,734	$135,734
Annual Costs to Respondents	$7,035,160	$0	($7,035,160)

Title: Training Certification for Drivers of LCVs.

OMB Control Number: 2126–0026.

Type of Request: Renewal and correction of a currently-approved information collection.

Respondents: LCV training providers who train new LCV drivers; drivers who complete LCV training each year; current LCV drivers who submit their LCV Driver-Training Certificate to prospective employers; and employers (motor carriers) receiving and maintaining copies of the LCV Driver-Training certificates of their drivers.

Estimated Number of Respondents: 50,708, consisting of 218 LCV training providers, plus 218 newly-certified LCV drivers, plus 25,027 currently-certified LCV drivers, plus 25,245 motor carriers employing LCV drivers.

Estimated Time per Response: 10 minutes for preparation of LCV Driver-Training Certificates for drivers who successfully complete the LCV training, and 10 minutes for activities associated with the LCV Driver-Training Certificate during the hiring process.

Expiration Date: May 31, 2020.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 4,244 hours. The total number of drivers who will be subjected to these requirements each year is 25,245, consisting of 218 newly-certified LCV drivers, and 25,027 currently-certified LCV drivers obtaining new employment. Additionally, 218 LCV training providers will be required to prepare the training certificates for newly-certified drivers. The total annual information collection burden is approximately 4,244 hours, consisting of 36 hours for preparation of LCV Driver-Training Certificates [218 drivers successfully completing LCV driver training × 10 minutes ÷ 60 minutes/hour] and 4,208 hours for requirements related to the hiring of LCV drivers [25,245 LCV drivers obtaining new employment × 10 minutes ÷ 60 minutes/hour].

Estimated Total Cost to Respondents: $135,734.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA's performance; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87 on December 11, 2019.

Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2019–27256 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0269]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection: Request for Revocation of Authority Granted

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

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval to renew an ICR titled ''Request for Revocation of Authority Granted.''

DATES: We must receive your comments on or before February 18, 2020.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2019–0269 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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.

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

notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Jeff Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–385–2367; email *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background: FMCSA registers for-hire motor carriers of regulated commodities under 49 U.S.C. 13902, surface freight forwarders under 49 U.S.C. 13903, and property brokers under 49 U.S.C. 13904. Each registration is effective from the date specified under 49 U.S.C. 13905 (c).

Subsection (d) of 49 U.S.C. 13905 also provides that on application of the registrant, the Secretary may amend or revoke a registration, and hence the registrant's operating authority. Form OCE–46 allows these registrants to apply voluntarily for revocation of their operating authority or parts thereof. If the registrant fails to maintain evidence of the required level of insurance coverage on file with FMCSA, its operating authority will be revoked involuntarily. Although the effect of both types of revocation is the same, some registrants prefer to request voluntary revocation. For various business reasons, a registrant may request revocation of some part, but not all, of its operating authority.

This information collection, which supports the DOT Strategic Goal of Safety, is being revised to reflect modified estimates of burden hours and costs. For respondents, the program adjustment has resulted in increased total burden hours and an increase in respondent costs. The burden hour increase is due to an estimated increase in the number of annual filings of Form OCE–46 from 3,501 to 5,901 per year, resulting in an increase of 2,400 responses and 600 burden hours.

The previous iteration of this ICR did not include estimated labor costs for respondents; it only reported the estimated annual burden hours. This version adds estimated labor costs according to best practices. The estimated annual labor cost for industry resulting from submitting Form OCE–46 is $49,527.

The total annual respondent cost has decreased by $20,190. This decrease is due to the fact that respondents may now file the form online, at no charge. While the online submission option exists, FMCSA still estimates that approximately 1,567 respondents will continue to file the form by mail, which incurs notarization and postage fees.

For the Federal Government, the program costs have increased by $11,176. While this ICR revised the Federal labor wage load factor downward to be consistent with the methodology used in other FMCSA ICRs, the overall cost to the Federal Government increased due to the increase in the number of forms received by FMCSA.

Title: Request for Revocation of Authority Granted.

OMB Control Number: 2126–0018.

Type of Request: Renewal of a currently approved information collection.

Respondents: For-hire motor carriers, freight forwarders, and property brokers.

Estimated Number of Respondents: 5,901.

Estimated Time per Response: 15 minutes (0.25 hours).

Expiration Date: September 30, 2020.

Frequency of Response: Other (as needed).

Estimated Total Annual Burden: 1,475 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87 on: December 11, 2019.

Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2019–27257 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0328]

Agency Information Collection Activities; New Information Collection: Beyond Compliance

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the information collection request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. The primary purpose of the ICR is to obtain information from motor carriers, which will allow FMCSA to study and to assess the effectiveness of various technologies, programs, and policies on motor carrier safety performance in support of the implementation of the Fixing America's Surface Transportation Act (FAST Act) Beyond Compliance requirements.

DATES: FMCSA must receive your comments on or before February 18, 2020.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2018–0328 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Docket Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL 14—FDMS), which can be reviewed at *https://www.transportation.gov/privacy.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Ms. Nicole Michel, Research Division, U.S. Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–4354; email: *nicole.michel@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background: FMCSA requests OMB's review and approval of a new ICR to implement the Beyond Compliance Program, required by section 5222 of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114–94, 129 Stat. 1312, 1540, Dec. 4, 2015) (49 U.S.C. 31100 note).

The FAST Act requires FMCSA to allow recognition, including credit or an improved Safety Measurement System (SMS) percentile, for motor carriers that: (1) Install advanced safety equipment; (2) use enhanced driver fitness measures; (3) adopt fleet safety management tools, technologies, and programs; or (4) satisfy other standards determined appropriate by the Administrator.

The FAST Act also requires the FMCSA Administrator to carry out the Beyond Compliance provisions through: (1) Incorporating a methodology into the Compliance Safety Accountability (CSA) program; or (2) establishing a safety Behavior Analysis and Safety Improvement Category (BASIC).

FMCSA intends to meet the requirements of the FAST Act by: (1) Developing a process for identifying elements of technology and safety programs as a basis for recognition; (2) seeking input from stakeholders; (3) using a third party for a monitoring program; and (4) providing a report to Congress.

The primary purpose of the ICR is to obtain information from motor carriers, which will allow FMCSA to study and to assess the effectiveness of various technologies, programs, and policies on motor carrier safety performance in support of the implementation of the FAST Act Beyond Compliance requirements. To accomplish this, the study will complete the following three objectives:

(1) Identify high-performing carriers in terms of safety performance.

(2) Determine the safety technologies, programs, and policies employed by these carriers.

(3) Gauge the relative effectiveness of those safety technologies, programs, and policies based on the expert opinion and performance metrics of the high performing carriers.

The data being collected for this study consists of responses from a select group of motor carriers on the most effective technologies, programs, and policies for achieving safe operations. The study does not attempt to conduct a full survey of the motor carrier population. Instead, it relies on expert opinion from carriers that are objectively determined to exhibit safe operations that exceed industry averages as indicated by driver out-of-service rates, vehicle out-of-service rates, and crash rates. To identify these carriers, the study will utilize existing data from the Motor Carrier Management Information System (MCMIS) database.

FMCSA will collect data through an electronic survey of motor carriers who have safety performance records that are better than national averages. These carriers will be identified by examining Department of Transportation-reportable crash rates, driver out-of-service rates at roadside inspections, and vehicle out-of-service rates at roadside inspections. Only those carriers that perform near the top quartile (as determined by the selection criteria laid out below) across all three carrier size categories (large, medium, and small) are potential participants.

Participants would be invited to participate in an online webinar that explains the survey design (*i.e.,* analytic hierarchy process, or AHP). AHP is a tool for addressing complex decision-making that employs a series of structured, pairwise comparisons in which respondents must express a preference for one alternative over another according to various evaluation criteria. Participants may not know how to proceed through the pairwise comparisons. Instead of solely relying on written instructions to explain to participants how to complete the survey, the project team believes it would be useful to conduct an information session via a webinar so an example can be provided and any questions answered. The webinar would be conducted multiple times and participants would be given the option to select the one that best suits their schedules. In addition to the webinar, an online video would be made available to participants that explains the AHP.

Once participants complete the webinar, they will be given a link to complete the survey online using an online survey tool such as Survey Monkey or Qualtrics. In the context of the Beyond Compliance ICR, the AHP-based survey would work by presenting motor carriers with alternatives for what an ideal safety program looks like and allowing them to systematically compare the major elements of these programs. The survey results would then be analyzed to determine the safety program elements that were most frequently scored the highest across participants. The resulting information would reveal the elements of safety programs that these motor carriers are using and their achieved results. It would also reveal what these motor carriers believe to be the most effective for achieving safety and should be included in a Beyond Compliance program.

Data collection will be completed within 90 days of the end of the pilot program period and followed by a statistical analysis in 180 days. Both descriptive and analytical methods will be employed during the data analysis. The results of the study will be documented in a technical report that will be delivered to and maintained by FMCSA. This report will be available to the public on the FMCSA website, at *www.fmcsa.dot.gov.* The contents of the technical report will be utilized in developing the report to Congress that FMCSA is required to provide pursuant to section 5222 of the FAST Act.

FMCSA is requesting a one-time collection of data for the Beyond Compliance study. Currently, there is no existing data set that can be used for this project. Not collecting this data would result in the failure of FMCSA to fulfill the congressional mandate to develop a Beyond Compliance program, as specified in section 5222 of the FAST

Act. The draft supporting statement for this information collection is available in the docket.

Title: Beyond Compliance.

OMB Control Number: 2126–00XX.

Type of Request: New information collection.

Respondents: Motor carrier operational managers.

Estimated Number of Respondents: 225 (estimated that 225 will receive the survey with 112 fully completing the survey).

Estimated Time per Response: Email Invitation: 5 minutes. Webinar: 10 minutes. Survey: 45 minutes. Email Reminder (first): 5 minutes. Email Reminder (second): 5 minutes. Total time per response (estimated 113 that choose not to complete the survey): 10 minutes. Total time per response (estimated 112 that fully complete the survey): 70 minutes.

Expiration Date: This is a new ICR.

Frequency of Response: Once.

Estimated Total Annual Burden: 160 hours [225 email recipients × 15 minutes + 112 webinar respondents × 10 minutes + 112 survey respondents × 45 minutes].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; (4) ways that the burden could be minimized without reducing the quality of the collected information; and (5) whether the potential respondents should be expanded to include carriers who have made significant safety improvements and/or carriers who wish to participate in the study, and if so, how should ''significant safety improvements'' be defined. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87 on: December 11, 2019.

Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2019–27255 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2019–0105]

Petition for Waiver of Compliance

Under part 211 of title 49 of the Code of Federal Regulations (CFR), this provides the public notice that by letter received December 10, 2019, Kansas City Southern (KCS) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 236. FRA assigned the petition Docket Number FRA–2019–0105.

Specifically, KCS seeks relief from the 2-year periodic testing requirements in § 236.377, *Approach locking;* § 236.378, *Time locking;* § 236.379, *Route locking;* § 236.380, *Indication locking;* and § 236.381, *Traffic locking.* KCS also requests relief from the 1-year periodic testing period of § 236.109, *Time releases, timing relays, and timing devices,* on all vital microprocessor-based systems.

KCS proposes to verify and test signal locking systems controlled by microprocessor-based equipment by use of alternative procedures every 4 years after initial baseline testing or program change as follows:

- Verification of the Cyclic Redundancy Check (CRC)/Check Sum/ Universal Control Number (UNC) of an existing location's application logic to the baseline tested version.
- Comparison and verification of all input/output arrangement, vital timer durations, and vital program settings between the existing location and prints/records pertaining to the baseline tested version.
- Re-establishment of the baseline tested version via full compliance with 49 CFR part 236 when a discrepancy is caused/found between the existing and baseline versions.
- Incorporate recording of alternative method into KCS's test record-keeping system.

KCS states its current record-keeping system has all the information and requirements for baseline tests. Furthermore, the existing test records fulfil all the requirements for baseline test record keeping. Given this, KCS desires to use these test records as the existing baseline versions. Subsequent alternative tests would be recorded as such within KCS's record-keeping system.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 3, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of *regulations.gov*.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2019–27250 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2014–0048]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on September 13, 2019, Union Pacific Railroad Company (UP) petitioned the Federal Railroad Administration (FRA) to renew its waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232, Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment, End-of-Train Devices; 49 CFR part 229, Railroad Locomotive Safety Standards; and 49 CFR part 215, Railroad Freight Car Safety Standards. FRA assigned the petition Docket Number FRA–2014–0048.

Specifically, UP seeks relief from 49 CFR 232.205—*Class I brake test—initial terminal inspection,* section 229.21—*Daily inspection,* and part 215—Freight Car Standards, to permit movement from the Ferrocarriles Nacionales de Mexico interchange point at International Yard on the Lordsburg Subdivision in El Paso, Texas, to both UP's Dallas Street Yard for westbound traffic, a distance of 2.8 miles, and to UP's Alfalfa Yard for eastbound traffic, a distance of 7 miles.

Further, UP requests relief from provisions of § 174.59—*Marking and placarding of rail cars.* UP states that given continued compliance with Conditions 6 and 13 of this waiver, any necessary corrective actions required in accordance with § 172.504—*Placarding,* would be addressed at the Dallas Street and/or the Alfalfa Yards in conjunction with a part 215 inspection, as stipulated in Conditions 8 and 14 of the present waiver.

UP also requests to modify existing waiver condition language (Conditions 3, 4, 10, and 11) to be consistent with other UP southern border crossing waivers. Also for consistency purposes, UP requests adding two conditions that are in such other waivers, regarding a quarterly meeting and the capability of putting the train into emergency.

UP explains it has been operating under the original requirements set forth in this waiver since March 2015 and has found no adverse mechanical effect on operational safety. There have been no mechanical incidents in the movement from the International Bridge to the Dallas Street or Alfalfa Yards to date, inclusive of 2,945 trains interchanged northbound, involving no fewer than 180,700 freight cars.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 17, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *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.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2019–27251 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Solicitation for Annual Combating Human Trafficking in Transportation Impact Award

AGENCY: Office of the Secretary of Transportation, U.S. Department of Transportation.

ACTION: Notice.

SUMMARY: Pursuant to a recommendation by the Department of Transportation (DOT or the Department) Advisory Committee on Human Trafficking, the Secretary of Transportation is launching the annual Combating Human Trafficking in Transportation Impact Award (''the award'') to incentivize an increase in human trafficking awareness, training, and prevention among transportation stakeholders. The award will be a component of the Department's Transportation Leaders Against Human Trafficking initiative. Additional information regarding the Department's counter-trafficking activities can be found at *www.transportation.gov/stophumantrafficking.*

The award serves as a platform for transportation stakeholders to unlock their creativity, and empower them to develop impactful and innovative counter-trafficking tools, initiatives, campaigns, and technologies that can help defeat this heinous crime. The award is open to individuals and entities, including non-governmental organizations, transportation industry associations, research institutions, and State and local government organizations. Entrants compete for a $50,000 cash award that will be awarded to the individual(s) or entity selected for creating the most impactful counter-trafficking initiative or technology. The Department of Transportation intends to incentivize individuals and entities to think creatively in developing innovative solutions to combat human trafficking in the transportation industry, and to share those innovations with the broader community.

DATES: Submissions accepted January 1, 2020 through midnight on January 31, 2020.

FOR FURTHER INFORMATION CONTACT: For more information, and to register your intent to compete individually or as part

of a team, visit *www.transportation.gov/stophumantrafficking,* email *trafficking@dot.gov,* or contact the Office of International Transportation and Trade at (202) 366–4398.

SUPPLEMENTARY INFORMATION:

Award Approving Official: Elaine L. Chao, Secretary of Transportation.

Subject of Award Competition: The Secretary's Combating Human Trafficking in Transportation Impact Award will recognize impactful and innovative approaches to combating human trafficking in the transportation industry.

Problem

As many as 24.9 million men, women, and children are held against their will and trafficked into forced labor and prostitution. Transportation figures prominently in human trafficking enterprises when traffickers move victims, which uniquely positions the industry to combat the crime.

Challenge

The Human Trafficking in Transportation Impact Award is looking for the best innovators to develop original, impactful, and innovative human trafficking tools, initiatives, campaigns, and technologies that can help defeat this heinous crime in the transportation industry.

Eligibility

To be eligible to participate in the Secretary's Combating Human Trafficking in Transportation Impact Award competition, private entities must be incorporated in and maintain a primary place of business in the United States, and individuals must be citizens or permanent residents of the United States. There is no charge to enter the competition.

Rules, Terms, and Conditions

The following additional rules apply:

1. Entrants shall submit a project to the competition under the rules promulgated by the Department in this Notice;

2. Entrants must indemnify, defend, and hold harmless the Federal Government from and against all third-party claims, actions, or proceedings of any kind and from any and all damages, liabilities, costs, and expenses relating to or arising from participant's submission or any breach or alleged breach of any of the representations, warranties, and covenants of participant hereunder. Entrants are financially responsible for claims made by a third party;

3. Entrants may not be a Federal entity or Federal employee acting within the scope of employment;

4. Entrants may not be an employee of the Department;

5. Entrants shall not be deemed ineligible because an individual used Federal facilities or consulted with Federal employees during a competition, if the facilities and employees are made available to all individuals participating in the competition on an equitable basis;

6. The competition is subject to all applicable Federal laws and regulations. Participation constitutes the Entrants' full and unconditional agreement to these rules and to the Secretary's decisions, which are final and binding in all matters related to this competition;

7. Entries which in the Secretary's sole discretion are determined to be substantially similar to a prior submitted entry may be disqualified;

8. Entries must be original, be the work of the entrant and/or nominee, and must not violate the rights of other parties. All entries remain the property of the entrant. Each entrant represents and warrants that:

- Entrant is the sole author and owner of the submission;
- The Entry is not the subject of any actual or threatened litigation or claim;
- The Entry does not and will not violate or infringe upon the intellectual property rights, privacy rights, publicity rights, or other legal rights of any third party; and
- The Entry does not and will not contain any harmful computer code (sometimes referred to as ''malware,'' ''viruses,'' or, ''worms'').

9. By submitting an entry in this competition, entrants agree to assume any and all risks and waive any claims against the Federal Government and its related entities (except in the case of willful misconduct) for any injury, death, damage, or loss of property, revenue or profits, whether direct, indirect, or consequential, arising from their participation in this competition, whether the injury, death, damage, or loss arises through negligence of otherwise. Provided, however, that by registering or submitting an entry, entrants and/or nominees do not waive claims against the Department arising out of the unauthorized use or disclosure by the agency of the intellectual property, trade secrets, or confidential information of the entrant;

10. The Secretary and/or the Secretary's designees have the right to request additional supporting documentation regarding the application from the entrants and/or nominees;

11. The entries cannot have been submitted in the same or substantially similar form in any previous Federally-sponsored promotion or Federally-sponsored competition, of any kind;

12. Each entrant grants to the Department, as well as other Federal agencies with which it partners, the right to use names, likeness, application materials, photographs, voices, opinions, and/or hometown and state for the Department's promotional purposes in any media, in perpetuity, worldwide, without further payment or consideration;

13. If selected, the entrant and/or nominee must provide written consent granting the Department and any parties acting on their behalf, a royalty-free, non-exclusive, irrevocable, worldwide license to display publicly and use for promotional purposes the entry (''demonstration license''). This demonstration license includes posting or linking to the entry on Department websites, including the Competition website, and partner websites, and inclusion of the entry in any other media, worldwide;

14. Applicants which are Federal grantees may not use Federal funds to develop submissions;

15. Federal contractors may not use Federal funds from a contract to develop applications or to fund efforts in support of a submission; and

16. The submission period begins on January 1, 2020. Submissions must be sent by 11:59 p.m. Pacific standard time on January 31, 2020. The timeliness of submissions will be determined by the postmark (if sent in hard copy) or time stamp of the recipient (if emailed). Competition administrators assume no responsibility for lost or untimely submissions for any reason.

Expression of Interest: While not required, entrants are strongly encouraged to send brief expressions of interest to the DOT prior to submitting entries. The expressions of interest should be sent by January 15, 2020 to *trafficking@dot.gov,* and include the following elements: (1) Name of entrant/s; (2) telephone and email address; and (3) a synopsis of the concept, limited to no more than two pages.

Submission Requirements

Applicants must submit entries via email to or by mail. Electronic packages may be transmitted by email to *trafficking@dot.gov.* Hard copies should be forwarded with a cover letter to the attention of Secretary's Combating Human Trafficking in Transportation Impact Award, (Room W88–121), 1200

New Jersey Avenue SE, Washington, DC 20590.

Complete submission packages shall consist of the following elements:

1. Eligibility Statement

A statement of eligibility by private entities indicating that they are incorporated in and maintain a primary place of business in the United States, or a statement of eligibility by individuals indicating that they citizens or permanent residents of the United States.

2. Summary (1 Page)

An overall summary of the project that includes: (a) The project title, (b) a one paragraph synopsis, and, (c) a statement of the potential impact the concept will have on combating human trafficking in the transportation industry.

3. Supporting Documents (No Page Limit)

The paper(s) and/or technologies, programs, video/audio files, and other related materials, describing the project and addressing the selection criteria. As applicable, this can include a description of success of a previous or similar project and/or documentation of impact. You may also submit supporting letters, which may be from subject matter experts or industry, which may address the technical merit of the concept, originality, impact, practicality, measurability and/or applicability. DOT may request additional information, including supporting documentation, more detailed contact information, releases of liability, and statements of authenticity to guarantee the originality of the work. Failure to respond in a timely manner may result in disqualification.

Initial Screening

The Office of International Transportation and Trade will initially review applications to determine that all required submission elements are included and to determine compliance with eligibility requirements.

Evaluation

After Initial Screening, the Office of International Transportation and Trade, with input from the relevant Operating Administrations, will judge entries based on the factors described below: Technical merit, originality, impact, practicality, measurability, and applicability. All factors are important and will be given consideration.

The Office of International Transportation and Trade will present the most highly qualified entries to Assistant Secretary for Aviation and International Affairs, who will make recommendations to the Secretary of Transportation.

The Secretary will make the final selection.

The Department reserves the right to not award the prize if the selecting officials believe that no submission demonstrates sufficient potential for sufficient transformative impact.

Technical Merit

- Has the submission presented a clear understanding of the issue of human trafficking in the transportation industry?
- Has the submission developed a logical and workable solution and approach to addressing the problem?
- What are the most unique merits of this concept?
- Were survivors of human trafficking consulted on the merits of the project?
- Has the submission clearly described the breadth of impact of the project?

Originality

- Is this concept new or a variation of an existing idea, and in what way(s)?
- How is this work unique?

Impact

- To what extent will this project make a significant impact and/or contribution to the fight against human trafficking in the transportation industry?
- Which aspects of the issue of human trafficking is the submission attempting to address?

Practicality

- Who directly benefits from this work?
- Can this program or activity be implemented in a way that requires a finite amount of resources? Specifically, does the submission have high or low fixed costs, low or no marginal costs, and a clear path to implementation and scale beyond an initial investment?
- What are the anticipated resources and costs to be incurred by executing this concept?

Measurability

- How has this individual/group measured the impact of the project?
- To what extent does the project result in measurable improvements?

Applicability

- Can this effort be scaled?
- Is this work specific to one region, various regions, or to the entire nation?

Award

One winning entry is expected to be announced and will receive a cash prize of up to $50,000. A plaque with the winner(s) name and date of award will be on display at the Department of Transportation, and a display copy of the plaque(s) will be sent to the winner's headquarters. At the discretion of the Secretary, up to two additional plaques may be awarded to recognize the second and third place entrants. At the option of the Secretary of Transportation, DOT will pay for invitational travel expenses to Washington, DC for up to two individuals or representatives of the winning organization should selectees be invited to present their project/s for DOT officials.

Authority: 15 U.S.C. 3719 (America COMPETES Act).

Issued on: December 12, 2019.

Joel Szabat,

Acting Under Secretary of Transportation for Policy.

[FR Doc. 2019–27231 Filed 12–17–19; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The 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 based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; or Assistant Director for Regulatory Affairs, tel.: 202–622–4855.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional

information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 9, 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 authorities listed below.

Individuals

1. VIZCAINO GIL, Gustavo Adolfo, Caracas, Capital District, Venezuela; DOB 03 May 1966; Gender Male; Cedula No. 6297704 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of Executive Order 13692 of March 8, 2015, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela,'' 80 FR 12747, 3 CFR, 2015 Comp., p. 276 (E.O. 13692), as amended by Executive Order 13857 of January 25, 2019, ''Taking Additional Steps To Address the National Emergency With Respect to Venezuela,'' 84 FR 509 (E.O. 13857), for being a current or former official of the Government of Venezuela.

2. DUGARTE PADRON, Juan Carlos, Caracas, Capital District, Venezuela; DOB 16 Oct 1955; Gender Male; Cedula No. 4353212 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of E.O. 13692, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela.

Dated: December 9, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–27238 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The 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 based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: *OFAC:* Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; or Assistant Director for Regulatory Affairs, tel.: 202–622–4855.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available in OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On December 12, 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 authorities listed below.

Individual

1. ORTEGA MURILLO, Rafael Antonio (a.k.a. ''ORTEGA, Payo''), KM 13 Carretera Masaya, Managua, Nicaragua; DOB 09 Dec 1968; POB Managua, Nicaragua; nationality Nicaragua; Gender Male; Passport A00000204 (Nicaragua) issued 06 Aug 2012 expires 06 Aug 2022; National ID No. 0010912680053D (Nicaragua) (individual) (Nicaragua) (individual) [NICARAGUA].

Designated pursuant to section 1(a)(iv)(B) of Executive Order 13851 of November 27, 2018, ''Blocking Property of Certain Persons Contributing to the Situation in Nicaragua,'' 83 FR 61505, 3 CFR, 2018 Comp., p. 884 (''E.O. 13851'' or the ''Order''), for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods and services in support of, Rosario Maria Murillo De Ortega, a person whose property and interests in property are blocked pursuant to E.O. 13850.

Entities

1. INVERSIONES ZANZIBAR SOCIEDAD ANONIMA (a.k.a. INVERSIONES ZANZIBAR), De la Estatua Montoya 2 Cuadras Arriba ½ Cuadras al Sur, Managua, Nicaragua; RUC #J0310000146314 (Nicaragua) [NICARAGUA].

Designated pursuant to section 1(a)(v) of E.O. 13851 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Rafael Antonio Ortega Murillo, a person whose property and interests in property are blocked pursuant to E.O. 13851.

2. SERVICIO DE PROTECCION Y VIGILANCIA S.A. (a.k.a. ''EL GOLIAT''), De Los Semaforos De Seminole, 3 Cuadras al Sur, 2 Cuadras Arriba, 1 Cuadra al Sur, Casa #326, Managua, Nicaragua; website *www.elgoliat.com.ni/*; Email Address *ventas1@elgoliat.com.ni*; alt. Email Address *facturacion@elgoliat.com.ni*; RUC #J0310000119627 (Nicaragua) [NICARAGUA].

Designated pursuant to section 1(a)(v) of E.O. 13851 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Rafael Antonio Ortega Murillo, a person whose property and interests in property are blocked pursuant to E.O. 13851.

3. DISTRIBUIDORA NICARAGUENSE DE PETROLEO, S.A. (a.k.a. DNP PETRONIC; a.k.a. DNP-PETRONIC; a.k.a. NICARAGUAN PETROLEUM DISTRIBUTOR; a.k.a. ''DNP''; a.k.a. ''DNP S.A.''), Ofiplaza El Retiro Edificio 8, Segundo Piso, Managua, Nicaragua; Rotonda El Gueguense 2, Managua, Nicaragua; website *http://www.dnppetronic.com.ni*; Email Address *dnp@dnp.com.ni*; RUC #J0310000005010 (Nicaragua) [NICARAGUA].

Designated pursuant to section 1(a)(v) of E.O. 13851 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Rosario Maria Murillo De Ortega and Rafael Antonio Ortega Murillo, persons whose property and interests in property are blocked pursuant to E.O. 13851.

Dated: December 12, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–27233 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Recordkeeping for Tobacco Products Removed in Bond From a Manufacturer's Premises for Experimental Purposes

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in

accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before January 17, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Tax and Trade Bureau (TTB)

Title: Recordkeeping for Tobacco Products Removed in Bond from a Manufacturer's Premises for Experimental Purposes.

OMB Control Number: 1513–0110.

Type of Review: Extension without change of a currently approved collection.

Description: The Internal Revenue Code (IRC) at 26 U.S.C. 5704(a) provides that manufacturers of tobacco products may remove tobacco products for experimental purposes without payment of Federal excise tax, as prescribed by regulation. Under that authority, the TTB regulations at 27 CFR 40.232(e) require the keeping of certain usual and customary business records regarding the description, shipment, use, and disposition of tobacco products removed for experimental purposes outside of the factory. These records are subject to TTB inspection and are necessary to protect the revenue, as they allow TTB to account for the lawful experimental use and disposition of nontaxpaid tobacco products, and to detect diversion of such products into the domestic market.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 235.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 235.

Estimated Time per Response: 0 hours. There is no respondent burden associated with this information collection because it consists of usual and customary records kept by respondents at their premises during the normal course of business.

Estimated Total Annual Burden Hours: 0.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: December 12, 2019.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2019–27214 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; U.S. Individual Income Tax Return

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on this request.

DATES: Comments should be received on or before January 17, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

PRA Approval of Forms Used by Individual Taxpayers

Under the PRA, OMB assigns a control number to each ''collection of information'' that it reviews and approves for use by an agency. The PRA also requires agencies to estimate the burden for each collection of information. Burden estimates for each control number are displayed in (1) PRA notices that accompany collections of information, (2) **Federal Register** notices such as this one, and (3) OMB's database of approved information collections.

Taxpayer Burden

Burden is defined as the time and out-of-pocket costs incurred by taxpayers in complying with the Federal tax system and are estimated separately. Out-of-pocket costs include any expenses incurred by taxpayers to prepare and submit their tax returns.

Examples include tax return preparation fees, the purchase price of tax preparation software, submission fees, photocopying costs, postage, and phone calls (if not toll-free).

Taxpayer Burden Estimates

Table 1 shows the preliminary burden estimates for individual taxpayers filing 2020 Form 1040, Form 1040NR, Form 1040NR–EZ, Form 1040X, 1040–SR tax return. The estimate is preliminary and reflects only the change in burden from technical adjustments related to updating the number of affected taxpayers to reflect the FY2020 forecast. The estimate will be revised to reflect legislative and regulatory changes since 2018 and further detail about the burden estimates will be provided for the 30-day notice for this FRN. Reported time and cost burdens are national averages and do not necessarily reflect a ''typical'' case. Most taxpayers experience lower than average burden, with taxpayer burden varying considerably by taxpayer type.

Internal Revenue Service (IRS)

Title: U.S. Individual Income Tax Return.

OMB Control Number: 1545–0074.

Type of Review: Revision of a currently approved collection.

Description: These forms and schedules are used by individuals to report their income tax liability. IRS uses the data collected on these forms and their schedules to compute tax liability and determine that the items claimed are properly allowable. This information is also used for general statistical purposes.

Form: Form 1040; Form 1040NR; Form 1040NR–EZ, Form 1040X, 1040–

SR and all attachments and related forms (see the Appendix A to this notice).

Affected Public: Individuals and households.

Estimated Number of Respondents: 159,300,000.

Frequency of Response: Annually.

Total Estimated Time: 1.717 billion hours (1,717,000,000 hours).

Estimated Time per Respondent: 10.79 hours.

Total Estimated Out-of-Pocket Costs: $33.267 billion ($33,267,000,000).

Estimated Out-of-Pocket Cost per Respondent: $209.

Total Monetized Burden Costs: $60.997 billion ($60,997,000,000).

Estimated Total Monetized Burden per Respondent: $383.

Note: Amounts below are for FY2020. Reported time and cost burdens are national averages and do not necessarily reflect a ''typical'' case. Most taxpayers experience lower than average burden, with taxpayer burden varying considerably by taxpayer type. Detail may not add due to rounding.

TABLE 1—ICB ESTIMATES FOR THE 1040/SR/NR/NR–EZ/X SERIES OF RETURNS AND SUPPORTING FORMS AND SCHEDULES FY2020

	FY19	Program change due to adjustment	Program change due to new legislation	Program change due to agency	FY20
Number of Taxpayers	157,800,000	* 1,500,000			159,300,000
Burden in Hours	1,784,000,000	(57,000,000)	(10,000,000)		1,717,000,000
Burden in Dollars	31,764,000,000	1,630,000,000	(127,000,000)		33,267,000,000
Monetized Total Burden	60,225,000,000	997,000,000	(223,000,000)	(2,000,000)	60,997,000,000

Source RAAS:KDA (11–1–19).
* The Program change is 1,600,000. The table reflects the mathematical change after rounding.

Table 2 below provides information specific to taxpayer burden incurred by Form 1040 filers.

TABLE 2—ALL FORM 1040 FILERS

	Percentage of returns	Time burden					Money burden
		Average time burden (hours)					Average cost
		Total time	Record keeping	Tax planning	Form completion and submission	All other	
All Taxpayers	100	11	5	2	4	1	$210
Type of Taxpayer:							
Non-business *	72	7	2	1	3	1	130
Business *	28	20	11	3	5	1	410

Detail may not add to total due to rounding. Dollars rounded to the nearest $10.
* A ''business'' filer files one or more of the following with Form 1040: Schedule C, C–EZ, E, F, Form 2106, or 2106–EZ. A ''non-business'' filer does not file any of these schedules or forms with Form 1040.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: December 13, 2019.

Spencer W. Clark,

Treasury PRA Clearance Officer.

APPENDIX A

Form No.	Form name
Form 1040	U.S. Individual Tax Return.
Form 1040 X	Amended U.S. Individual Income Tax Return.
Form 1040 NR	U.S. Nonresident Alien Income Tax Return.
Form 1040 NR–EZ	U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents.
Schedule A (1040)	Itemized Deductions.
Schedule B (Form 1040)	Interest and Ordinary Dividends.
Schedule C (Form 1040)	Profit or Loss from Business.
Schedule C–EZ (Form 1040)	Net Profit from Business.
Schedule D (Form 1040)	Capital Gains and Losses.
Schedule E (Form 1040)	Supplemental Income and Loss.
Schedule EIC (Form 1040)	Earned Income Credit.
Schedule F (Form 1040)	Profit or Loss from Farming.
Schedule H (Form 1040) and Sch H(PR)	Household Employment Taxes.
Schedule J (Form 1040)	Income Averaging for Farmers and Fishermen.
Schedule R (Form 1040)	Credit for the Elderly or the Disabled.
Schedule SE (Form 1040)	Self-Employment Tax.
Form 1040 V	Payment Voucher.
Form 1040 ES/OCR	Estimated Tax for Individuals (Optical Character Recognition with Form 1040V).
Form 1040 ES	Estimate Tax for Individuals.

APPENDIX A—Continued

Form No.	Form name
Form 673	Statement for Claiming Exemption from Withholding on Foreign Earned Income Eligible for the Exclusions Provided by Section 911.
Form 926	Return by a U.S. Transferor of Property to a Foreign Corporation.
Form 970	Application to Use LIFO Inventory Method.
Form 972	Consent of Shareholder to Include Specific Amount in Gross Income.
Form 982	Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment).
Form 1045	Application for Tentative Refund.
Form 1116	Foreign Tax Credit.
Form 1127	Application for Extension of Time for Payment of Tax.
Form 1128	Application to Adopt, Change, or Retain a Tax Year.
Form 1310	Statement of Person Claiming Refund Due to a Deceased Taxpayer.
Form 2106	Employee Business Expenses.
Form 2106–EZ	Unreimbursed Employee Business Expenses.
Form 2120	Multiple Support Declaration.
Form 2210	Underpayment of Estimated Tax by Individuals, Estates, and Trusts.
Form 2210–F	Underpayment of Estimated Tax by Farmers and Fishermen.
Form 2350	Application for Extension of Time to File U.S. Income Tax Return.
Form 2350 SP	Solicitud de Prorroga para Presentar la Declaracion del Impuesto Personal sobre el Ingreso de lose Estados Unidos.
Form 2439	Notice to Shareholder of Undistributed Long-Term Capital Gains.
Form 2441	Child and Dependent Care Expenses.
Form 2555	Foreign Earned Income.
Form 2555 EZ	Foreign Earned Income Exclusion.
Form 2848	Power of Attorney and Declaration of Representative.
Form 3115	Application for Change in Accounting Method.
Form 3468	Investment Credit.
Form 3520	Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts.
Form 3800	General Business Credit.
Form 3903	Moving Expenses.
Form 4029	Application for Exemption from Social Security and Medicare Taxes and Waiver of Benefits.
Form 4070	Employee's Report of Tips to Employer.
Form 4070A	Employee's Daily Record of Tips.
Form 4136	Credit for Federal Tax Paid on Fuels.
Form 4137	Social Security and Medicare Tax on Underreported Tip Income.
Form 4255	Recapture of Investment Credit.
Form 4361	Application for Exemption From Self-Employment Tax for Use by Ministers, Members of Religious Orders, and Christian Science Practitioners.
Form 4562	Depreciation and Amortization.
Form 4563	Exclusion of Income for Bona Fide Residents of American Samoa.
Form 4684	Casualties and Thefts.
Form 4797	Sale of Business Property.
Form 4835	Farm Rental Income and Expenses.
Form 4852	Substitute for Form W–2, Wage and Tax Statement or Form 1099–R, Distributions From Pension Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.
Form 4868	Application for Automatic Extension of Time to Tile Individual U.S. Income Tax Return.
Form 4868 SP	Solicitud de Prorroga Automatica para Presentar la Declaracion del Impuesto sobre el Ingreso Personal de los Estados Unidos.
Form 4952	Investment Interest Expense Deduction.
Form 4970	Tax on Accumulation Distribution of Trusts.
Form 4972	Tax on Lump-Sum Distributions.
Form 5074	Allocation of Individual Income Tax To Guam or the Commonwealth of the Northern Mariana Islands (CNMI).
Form 5213	Election to Postpone Determination as to Whether the Presumption Applies that an Activity is Engaged in for Profit.
Form 5329	Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts.
Form 5405	First-Time Homebuyer Credit.
Form 5471	Information Return of U.S. Persons with Respect to Certain Foreign Corporations.
Schedule J (Form 5471)	Accumulated Earnings and Profits (E&P) and Taxes of Controlled Foreign Corporations.
Schedule M (Form 5471)	Transactions Between Controlled Foreign Corporation and Shareholders or Other Related Persons.
Schedule O (Form 5471)	Organization or Reorganization of Foreign Corporation, and Acquisitions and Dispositions of its Stock.
Form 5695	Residential Energy Credits.
Form 5713	International Boycott Report.
Schedule A (Form 5713)	International Boycott Factor (Section 999(c)(1)).
Schedule B (Form 5713)	Specifically Attributable Taxes and Income (Section 999(c)(2)).
Schedule C (Form 5713)	Tax Effect of the International Boycott Provisions.
Form 5754	Statement by Person(s) Receiving Gambling Winnings.
Form 5884	Work Opportunity Cost.
Form 6198	At-Risk Limitations.
Form 6251	Alternative Minimum Tax-Individuals.
Form 6252	Installment Sale Income.

APPENDIX A—Continued

Form No.	Form name
Form 6478	Credit for Alcohol Used as Fuel.
Form 6765	Credit for Increasing Research Activities.
Form 6781	Gains and Losses From Section 1256 Contracts and Straddles.
Form 8082	Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR).
Form 8275	Disclosure Statement.
Form 8275–R	Regulation Disclosure Statement.
Form 8283	Noncash Charitable Contributions.
Form 8332	Release of Claim to Exemption for Child of Divorced or Separated Parents.
Form 8379	Injured Spouse Claim and Allocation.
Form 8396	Mortgage Interest Credit.
Form 8453	U.S. Individual Income Tax Declaration for an IRS e-file Return.
Form 8582	Passive Activity Loss Limitation.
Form 8582–CR	Passive Activity Credit Limitations.
Form 8586	Low-Income Housing Credit.
Form 85948801	Asset Acquisition Statement.
Form 8606	Nondeductible IRAs.
Form 8609–A	Annual Statement for Low-Income Housing Credit.
Form 8611	Recapture of Low-Income Housing Credit.
Form 8615	Tax for Certain Children Who Have Investment Income of More than $1,800.
Form 8621	Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.
Form 8621–A	Late Deemed Dividend or Deemed Sale Election by a Passive Foreign Investment Company.
Form 8689	Allocation of Individual Income Tax to the Virgin Islands.
Form 8693	Low-Income Housing Credit Disposition Bond.
Form 8697	Interest Computations Under the Look-Back Method for Completed Long-Term Contracts.
Form 8801	Credit for Prior Year Minimum Tax—Individuals, Estates, and Trusts.
Form 8812	Additional Child Tax Credit.
Form 8814	Parents' Election to Report Child's Interest and Dividends.
Form 8815	Exclusion of Interest From Series EE and I U.S. Savings Bonds Issued After 1989.
Form 8818	Optional Form to Record Redemption of Series EE and I U.S. Savings Bonds Issued After 1989.
Form 8820	Orphan Drug Credit.
Form 8821	Tax Information Authorization.
Form 8822	Change of Address.
Form 8824	Like-Kind Exchanges.
Form 8826	Disabled Access Credit.
Form 8828	Recapture of Federal Mortgage Subsidy.
Form 8829	Expenses for Business Use of Your Home.
Form 8832	Entity Classification Election.
Form 8833	Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b).
Form 8834	Qualified Electric Vehicle Credit.
Form 8835	Renewable Electricity and Refined Coal Production Credit.
Form 8838	Consent to Extend the Time to Assess Tax Under Section 367—Gain Recognition Statement.
Form 8839	Qualified Adoption Expenses.
Form 8840	Closer Connection Exception Statement for Aliens.
Form 8843	Statement for Exempt Individuals and Individuals With a Medical Condition.
Form 8844	Empowerment Zone and Renewal Community Employment Credit.
Form 8845	Indian Employment Credit.
Form 8846	Credit for Employer Social Security and Medicare Taxes Paid on Certain Employee tips.
Form 8853	Archer MSAs and Long-Term Care Insurance Contracts.
Form 8854	Initial and Annual Expatriation Information Statement.
Form 8858	Information Return of U.S. Persons With Respect to Foreign Disregarded Entities.
Schedule M (Form 8858)	Transactions Between controlled Foreign Disregarded Entity and Filer or Other Related Entities.
Form 8859	District of Columbia First-Time Homebuyer Credit.
Form 8862	Information to Claim Earned Income Credit After Disallowance.
Form 8863	Education Credits.
Form 8864	Biodiesel Fuels Credit.
Form 8865	Return of U.S. Persons With Respect to Certain Foreign Partnerships.
Schedule K–1	Partner's Share of Income Deductions, Credits, etc.
Schedule O (Form 8865)	Transfer of Property to a Foreign Partnership.
Schedule P (Form 8865)	Acquisitions, Dispositions, and Changes of Interests in a Foreign Partnership.
Form 8866	Interest Corporation Under the Look-Back Method for Property Depreciated Under the Income Forecast Method.
Form 8873	Extraterritorial Income Exclusion.
Form 8874	New Markets Credit.
Form 8878	IRS e-file Signature Authorization for Form 4686 or Form 2350.
Form 8878 SP	Autorizacion de firma para presentar por medio del IRS e-file para el Formulario 4868 (SP) o el Formulario 2350 (SP).
Form 8879	IRS e-file Signature Authorization.
Form 8879 SP	Autorizacion de firm para presentar la Declaracion por medio del IRS e-file.
Form 8880	Credit for Qualified Retirement Savings Contributions.
Form 8881	Credit for Small Employer Pensions Plan Startup Costs.
Form 8882	Credit for Employer-Provided Childcare Facilities and Services.
Form 8885	Health Coverage Tax Credit.

APPENDIX A—Continued

Form No.	Form name
Form 8886	Reportable Transaction Disclosure Statement.
Form 8888	Direct Deposit of Refund to More than One Account.
Form 8889	Health Savings Accounts (HSAs).
Form 8896	Low Sulfur Diesel Fuel Production Credit.
Form 8898	Statement for Individuals Who Begin or End Bona Fide Residence in a U.S. Possession.
Form 8900	Qualified Railroad Track Maintenance Credit.
Form 8903	Domestic Production Activities Deduction.
Form 8906	Distills Spirits Credit.
Form 8907	Nonconventional Source Fuel Credit.
Form 8908	Energy Efficient Home Credit.
Form 8910	Alternative Motor Vehicle Credit.
Form 8911	Alternative Fuel Vehicle Refueling Property Credit.
8912	Credit to Holders of Tax Credit Bonds.
Form 8917	Tuition and Fees Deduction.
Form 8919	Uncollected Social Security and Medicare Tax on Wages.
Form 8925	Report of Employer-Owned Life Insurance Contracts.
Form 8932	Credit for Employer Differential Wage Payments.
Form 8933	Carbon Dioxide Sequestration Credit.
Form 8936	Qualified Plug-In Electric Drive Motor Vehicle Credit.
Form 9465	Installment Agreement Request.
Form 9465 SP	Solicitud para un Plan de Pagos a Plazos.
Form SS–4	Application for Employer Identification Number.
Form SS–8	Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.
Form T (Timber)	Forest Activities Schedules.
Form W–4	Employee's Withholding Allowance Certificate.
Form W–4 P	Withholding Certificate for Pension or Annuity Payments.
Form W–4 S	Request for Federal Income Tax Withholding From Sick Pay.
Form W–4 V	Voluntary Withholding Request.
Form W–4 (SP)	Certificado de Exencion de la Retencion del Empleado.
Form W–7	Application for IRS Individual Taxpayer Indentification Number.
Form W–7 A	Application for Taxpayer Identification Number for Pending U.S. Adoptions.
Form W–7 (SP)	Solicitud de Numero de Indenticacion Personal del Contribuyente del Servico de Impuestos Internos.
Form 1040 ES (NR)	U.S. Estimated Tax for Nonresident Alien Individuals.
Form 1040 ES (PR)	Federales Estimadas del Trabajo por Cuenta Propia y sobre el Impleo de Empleados Domestocs—Puerto Rico.
W–7 (COA)	Certificate of Accuracy for IRS Individual Taxpayer Identification Number.
Form 1040 Schedule 1	Form 1040 Schedule 1 Additional Income and Adjustments to Income.
Form 1040 Schedule 2	Form 1040 Schedule 2 Tax.
Form 1040 Schedule 3	Form 1040 Schedule 3 Nonrefundable Credits.
Form 1040 Schedule 4	Form 1040 Schedule 4 Other Taxes.
Form 1040 Schedule 5	Form 1040 Schedule 5 Other payments and Refundable Credits.
Form 1040 Schedule 6	Form 1040 Schedule 6 Foreign Address and Third Party Designee.
Form 1040–C	U.S. Departing Alien Income Tax Return.
Form 1040–SR	U.S. Income Tax Return for Seniors.
Form 8867	Paid Preparer's Due Diligence Checklist.
Form 8915–C	Qualified 2018 Disaster Retirement Plan Distributions and Repayments.
Form 8958	Allocation of Tax Amounts Between Certain Individuals in Community Property States.
Form 8962	Premium Tax Credit (PTC).
Form 965–C	Form 965–C, Transfer Agreement Under 965(h)(3).
Form 3911	Taxpayer Statement Regarding Refund.
Form 8857	Request for Innocent Spouse Relief.
Form 8302	Electronic Deposit of Tax Refund of $1 Million or more.
Form 14039	Identity Theft Affidavit.
Form 14095	The Health Coverage Tax Credit (HCTC) Reimbursement Request Form.
Form 8938	Statement of Specified Foreign Financial Assets.

[FR Doc. 2019–27285 Filed 12–17–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

RIN 1505–AC62

IMARA Calculation for Calendar Year 2020 Under the Terrorism Risk Insurance Program

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury (Treasury) is issuing this notice to advise the public of the calculation of the Terrorism Risk Insurance Program's (TRIP or Program) insurance marketplace aggregate retention amount (IMARA) under the Terrorism Risk Insurance Act, as amended, for purposes of calendar year

2020. The IMARA has been determined by Treasury to be $40,878,630,900.

DATES: The IMARA for purposes of calendar year 2020 is effective from January 1, 2020, until December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Richard Ifft, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202–622–2922, or Lindsey Baldwin, Senior Policy Analyst, Federal Insurance Office, 202–622–3220.

SUPPLEMENTARY INFORMATION:

I. Background

The Terrorism Risk Insurance Act of 2002 (as amended, the Act or TRIA) [1] was enacted on November 26, 2002, following the attacks of September 11, 2001, to address disruptions in the market for terrorism risk insurance, to help ensure the continued availability and affordability of commercial property and casualty insurance for terrorism risk, and to allow for the private markets to stabilize and build insurance capacity to absorb any future losses for terrorism events.[2] TRIA requires insurers to ''make available'' terrorism risk insurance for commercial property and casualty losses resulting from certified acts of terrorism (insured losses), and provides for shared public and private compensation for such insured losses. The Program has been reauthorized three times, most recently by the Terrorism Risk Insurance Program Reauthorization Act of 2015 (2015 Reauthorization Act).[3] The Secretary of the Treasury (Secretary) administers the Program. The Federal Insurance Office (FIO) assists the Secretary in administering the Program.[4]

The Act established an industry marketplace aggregate retention amount (IMARA) as a threshold figure to determine whether any Treasury payments under the Program are subject to mandatory recoupment. Under the Act, if total annual payments by participating insurers are below the IMARA, Treasury must recoup all amounts expended by it up to the IMARA threshold (mandatory recoupment). If total annual payments by participating insurers are above the IMARA, Treasury has the discretion to recoup all expended amounts above the IMARA threshold (discretionary recoupment).[5]

The 2015 Reauthorization Act provided for a schedule of defined IMARA values from calendar year 2015 through calendar year 2019.[6] The 2015 Reauthorization Act also provided that for calendar year 2020 and future years the IMARA ''shall be revised to be the amount equal to the annual average of the sum of insurer deductibles for all insurers participating in the Program for the prior 3 calendar years,'' as such sum is determined pursuant to final rules issued by the Secretary.[7] These final rules, which were issued by Treasury in 2016 and revised in 2019, added Program regulation 31 CFR 50.4(m).[8]

Under 31 CFR 50.4(m)(2), the IMARA for calendar year 2020 is calculated by reference to the average annual industry aggregate deductibles over the prior three calendar years for purposes of the Program, based upon the direct earned premium (DEP) reported to Treasury by insurers in Treasury's annual data calls. For purposes of 2020, Treasury will make the calculation based upon aggregate insurer deductibles for the previous three calendar years (2019, 2018, and 2017). Insurer deductibles under the Program are based upon the DEP of individual insurers in the year prior to the year in question. As a result, deductibles used in the 2020 IMARA are based on DEP for calendar years 2018, 2017, and 2016, as reported to Treasury in 2019, 2018, and 2017.

In the June 2019 Study of Small Insurer Competitiveness in the Terrorism Risk Insurance Marketplace (2019 Small Insurer Study),[9] Treasury identified DEP in the TRIP-eligible lines of insurance reported to Treasury in its 2017, 2018, and 2019 data calls as follows:

FIGURE 1—TRIP-ELIGIBLE DEP BY INSURER CATEGORY [10]

	2017 TRIP data call		2018 TRIP data call		2019 TRIP data call	
	2016 DEP in TRIP-eligible lines	% of total	2017 DEP in TRIP-eligible lines	% of total	2018 DEP in TRIP-eligible lines	% of total
Alien Surplus Lines Ins	$7,421,060,583	4	$9,492,933,571	5	$7,618,548,358	4
Captive Insurers	7,930,646,027	4	9,052,630,571	4	8,937,119,082	4
Non-Small Insurers	168,238,219,882	83	163,891,791,592	80	166,188,192,378	81
Small Insurers	20,085,947,637	10	21,806,195,201	11	22,516,178,612	11
Total	203,675,874,129	100	204,243,550,936	100	205,260,038,430	100

Source: 2017–2019 TRIP Data Calls.

The reported premiums in Figure 1 are the operative figures for purposes of calculating the IMARA for calendar year 2020 in accordance with 31 CFR 50.4(m)(2). The average annual DEP figure for the combined period of 2016, 2017, and 2018 is $204,393,154,498 ($203,675,874,129 + $204,243,550,936 + $205,260,038,430 = $613,179,463,495/3 = $204,393,154,498). The annual average of the sum of insurer deductibles for all insurers for the prior

[1] Public Law 107–297, 116 Stat. 2322, codified at 15 U.S.C. 6701 note. Because the provisions of TRIA (as amended) appear in a note instead of particular sections of the U.S. Code, the provisions of TRIA are identified by the sections of the law.

[2] TRIA, sec. 101(b).

[3] *See* Terrorism Risk Insurance Extension Act of 2005, Public Law 109–144, 119 Stat. 2660; Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law 110–160, 121 Stat. 1839; Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3.

[4] 31 U.S.C. 313(c)(1)(D).

[5] *See* TRIA, sec. 103(e)(7); *see also* 31 CFR part 50 subpart J (Recoupment and Surcharge Procedures).

[6] In 2015, the IMARA was $29.5 billion; it increased to $31.5 billion in 2016, $33.5 billion in 2017, $35.5 billion in 2018, and $37.5 billion in 2019. *See* TRIA, sec. 103(e)(6)(B).

[7] TRIA, sec. 103(e)(6)(B)(ii) and (e)(6)(C). An insurer's deductible under the Program for any particular year is 20 percent of its direct earned premium subject to the Program during the preceding year. TRIA, sec. 102(7). For example, an insurer's calendar year 2019 Program deductible is 20 percent of its calendar year 2018 direct earned premium.

[8] *See* 81 FR 93756 (December 21, 2016), which added 31 CFR 50.4(m) and other Program regulations, and 84 FR 62450 (November 15, 2019), which implemented technical changes to 31 CFR 50.4(m).

[9] *https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2019_TRIP_SmallInsurer_Report.pdf.*

[10] Some figures may not add to 100 percent due to rounding. *See* 2019 Small Insurer Study at 16.

three years is 20 percent of $204,393,154,498, or $40,878,630,900.[11] Accordingly, the IMARA for purposes of calendar year 2020 is $40,878,630,900.

Steven E. Seitz,

Director, Federal Insurance Office.

[FR Doc. 2019–27279 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–25–P

[11] *See* note 7 above.

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Imposition of Special Measure Against Banco Delta Asia

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before January 17, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Financial Crimes Enforcement Network (FinCEN)

Title: Imposition of Special Measure against Banco Delta Asia.

OMB Control Number: 1506–0045.

Type of Review: Extension without change of a currently approved collection.

Description: On March 14, 2007, the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury issued a final rule under the authority of section 5318A of Title 31, United States Code, to impose a special measure with respect to Banco Delta Asia. Specifically, FinCEN imposed special measure five prohibiting U.S. financial institutions from opening or maintaining accounts for, or on behalf of, Banco Delta Asia and requiring U.S. financial institution to apply due diligence to its correspondent accounts to ensure they are not used to provide Banco Delta Asia with indirect access to the U.S. financial system.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 23,615.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 23,615.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 23,615.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: December 12, 2019.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2019–27213 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Treasury International Capital (TIC) Forms CQ–1 and CQ–2

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before January 17, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Treasury Departmental Offices (DO)

Title: Treasury International Capital (TIC) Forms CQ–1 and CQ–2.

OMB Control Number: 1505–0024.

Type of Review: Extension without change of a currently approved collection.

Description: Forms CQ–1 and CQ–2 are required by law to collect timely information on international portfolio capital movements, in particular data on financial and commercial liabilities to, and claims on, unaffiliated foreign residents held by non-financial enterprises in the U.S. This information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

Form: CQ–1, CQ–2.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 125.

Frequency of Response: Quarterly.

Estimated Total Number of Annual Responses: 500.

Estimated Time per Response: 6.7.

Estimated Total Annual Burden Hours: 3,350.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: December 12, 2019.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2019–27208 Filed 12–17–19; 8:45 am]

BILLING CODE 4810–25–P

FEDERAL REGISTER

Vol. 84 Wednesday,

No. 243 December 18, 2019

Part II

Department of Transportation

49 CFR Part 24

Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 24

[FHWA Docket No. FHWA–2018–0039]

RIN 2125–AF79

Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is proposing to amend its Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) regulations. The revisions are prompted by enactment of the Moving Ahead for Progress in the 21st Century Act (MAP–21), which increases statutory relocation benefits and reduces length of occupancy requirements. This proposal is intended to update existing regulations on the use of those amendments. The FHWA is also proposing to update the Uniform Act regulations to reflect the Agency's experience with the Federal-aid highway program since the last comprehensive rulemaking for the part, which occurred in 2005. The updates include streamlining processes to better meet current Uniform Act implementation needs and eliminating duplicative and outdated regulatory language.

DATES: Comments must be received by March 17, 2020. Late-filed comments will be considered to the extent practicable.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.
- *Instructions:* You must include the Agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Arnold Feldman, Office of Real Estate Services, (202) 366–2028, email address: *Arnold.Feldman@dot.gov;* or David Sett, Office of the Chief Counsel (HCC), (404) 562–3676, email address: *David.Sett@dot.gov;* Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 7:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at *http://www.regulations.gov.* The website is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: *https://www.federalregister.gov.*

Table of Contents for Supplementary Information

I. Executive Summary
II. Background
III. Section-By-Section Discussion of the Proposals

I. Executive Summary

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601 *et seq.* (Uniform Act) provides important protections and assistance for people affected by federally funded projects. Congress enacted this law to ensure that people whose real property is acquired, or who move as a result of projects receiving Federal funds, are treated fairly and equitably and receive just compensation for, and assistance in moving from, the property they occupy. The governmentwide regulation implementing the Uniform Act is title 49 CFR part 24.

The Surface Transportation and Uniform Relocation Assistance Act (STURAA) (Pub. L. 100–17) of 1987 designated the U.S. Department of Transportation (DOT) as the Federal Lead Agency (Lead Agency) for the Uniform Act. Duties of the Lead Agency include developing, issuing, and maintaining the governmentwide regulation, providing assistance to other Federal Agencies, and reporting to Congress on Uniform Act implementation issues. The DOT has delegated these responsibilities to the FHWA at 49 CFR 1.85(d)(7).

Acting as Lead Agency, FHWA is proposing to amend and update 49 CFR part 24, which would affect the land acquisition and displacement activities of all Federal Agencies subject to the Uniform Act. The proposed changes to this regulation are necessitated in part by Section 1521 of the MAP–21 (Pub. L. 112–141, July 6, 2012). Section 1521 included increases in benefit levels for displaced persons, authority to develop a regulatory mechanism to consider and implement future adjustments to those benefit levels, the requirement for an annual report on governmentwide real property acquisitions subject to the Uniform Act, and provisions for the funding of Lead Agency services. In addition to these required changes, FHWA proposes to amend the regulations to clarify existing requirements for implementing the Uniform Act, meet modern needs, and improve the Agencies' service to individuals and businesses affected by Federal or federally assisted projects. The proposed changes would also reduce the paperwork and administrative burdens of Government regulations on Agencies subject to the Uniform Act.

The costs of the proposed rule for all Uniform Act Agencies are estimated to be minor: $1.8 million when discounted at 7 percent and $2.0 million when discounted at 3 percent. The 10-year annualized costs are estimated to be: $255,000 per year when discounted at 7 percent and $230,000 per year when discounted at 3 percent. Therefore, the costs associated with this rule are de minimis. Moreover, these minor costs should be fully offset, if not outweighed, by cost savings resulting from new flexibilities and streamlining contained in this proposal. These cost savings are not quantifiable.

The larger impact of this rule is in the form of transfers from the government to property owners whose real estate is acquired for Federal projects. The estimated amount of transfers resulting from this rule are $115 million when discounted at 7 percent and $146 million when discounted at 3 percent. This rule can therefore be thought of as predominantly a transfer rule, as the estimated costs are significantly smaller than the estimated transfers. The FHWA was the only agency that provided data upon which to base estimates of the transfers. Therefore, the magnitude of the change in transfers for all Federal Agencies may be larger than is reported here. The Regulatory Impact Analysis for this rulemaking contains further breakdown of costs associated with

FHWA's program. Other Federal Agencies may have additional regulatory or administrative updates specific to their programs as a result of this rulemaking.

The benefits of the proposed rule primarily relate to improved equity and fairness to entities that are displaced from their properties or that move as a result of projects receiving Federal funds. For example, the proposed rule raises the statutory maximums for payments to displaced entities to assist with the reestablishment of the business, farm, or nonprofit organization. There is strong evidence that entities experience reestablishment costs well above the current maximum amount. Raising the maximum payment levels will compensate those entities more fairly and equitably for the negative impacts they experience as a result of a Federal or federally assisted project. However, the fairness and equity benefits of the proposed rule cannot be definitively quantified or monetized. The higher level of payments may also contribute to more entities being able to successfully reestablish after displacement.

Background

The FHWA last updated 49 CFR part 24 in 2005. Since publication of the 2005 rule, FHWA has undertaken a comprehensive effort to identify potential opportunities for improving implementation of the Uniform Act. The FHWA initiatives have included research on the need for regulatory and statutory change to the Uniform Act; co-sponsorship of national symposiums on Uniform Act implementation issues; implementation of pilot projects designed to determine the effect of changes in certain Uniform Act requirements and procedures; and an examination of the experiences of several State departments of transportation (State DOT) in providing payments required by State law that supplemented Uniform Act benefits. These activities confirmed that there are a number of enhancements that could be made to clarify existing requirements, reduce administrative burdens, and improve the Government's service to individuals and businesses affected by Federal or federally assisted projects and programs.

The Uniform Act and the common rule govern the relocation and land acquisition programs of all Federal Agencies. Those Federal Agencies that, for convenience, provide a cross reference to this part, and the location of those cross-references, are listed below:

Department of Agriculture
7 CFR part 21
Department of Commerce
15 CFR part 11
Department of Defense
32 CFR part 259
Department of Education
34 CFR part 15
Department of Energy
10 CFR part 1039
Environmental Protection Agency
40 CFR part 4
General Services Administration
41 CFR part 105–51
Department of Health and Human Services
45 CFR part 15
Department of Housing and Urban Development
24 CFR part 42
Department of Justice
41 CFR part 128–18
Department of Labor
29 CFR part 12
National Aeronautics and Space Administration
14 CFR part 1208
Tennessee Valley Authority
18 CFR part 1306
Veterans Administration
38 CFR part 25
Department of Homeland Security
44 CFR part 25

The Uniform Act applies to all acquisitions of real property or displacements of persons resulting from Federal or federally assisted programs or projects; the Uniform Act's application is not affected by the absence of a cross reference to 49 CFR part 24 in an Agency's regulations. Further, Federal or federally assisted activities involving land acquisition or displacement, undertaken by a newly constituted Federal Agency, would be covered by the Uniform Act.

After the publication of the 49 CFR part 24 final rule, FHWA began a process to identify additional needs for regulatory updates and elicit input from Federal stakeholders and conducted research projects, which resulted in many of the regulatory changes proposed here. The primary focus of the various efforts was to identify opportunities to streamline processes to better meet current Uniform Act implementation needs and eliminate duplicative and outdated regulatory language in that rule. Beginning in 2012, and culminating in 2018, FHWA held working group meetings with representatives of the Federal Agencies subject to the Uniform Act. The meetings included a section-by-section review of the regulation, consideration of comments received during the 2005 rulemaking process, review of listening session comments, and consideration of research findings. Contributions from working group members were based on their experiences implementing the rule and feedback they had received from their partners and customers. The early review by the working group led to a compilation of potential changes to the rule. The FHWA considered the group's recommendations and proposed changes for each of the regulation's subparts and developed an initial draft rulemaking. Over a series of several working group meetings, the draft was refined and revised based on proposed edits and comments of the working group. When the working group meetings concluded, FHWA worked internally to finalize the draft rulemaking and continued to share drafts and receive additional comments from the Federal Agencies.

This rulemaking also considers comments received from two DOT **Federal Register** documents requesting public comments and recommendations for evaluating existing regulations. The DOT published these documents on June 8, 2017 (82 FR 26734) and October 2, 2017 (82 FR 45750). The FHWA received several comments requesting streamlining and updates of this rule. The NPRM is responsive to comments received through the DOT **Federal Register** documents and deregulatory efforts to update regulations and streamline processes.

Federal Agency Reporting Requirement

The Lead Agency convened a separate working group of Federal Agencies to discuss the reporting requirements contained in Section 1521(d) of MAP–21. Federal Agencies that are subject to the Uniform Act and have programs or projects requiring the acquisition of real property or causing a displacement from real property must provide the Lead Agency an annual summary report describing activities conducted by the Federal Agency.

This group discussed the new reporting requirements and developed a proposed template for the annual report. Each Federal Agency participant was given an opportunity to review and comment on draft versions of a proposed annual Agency report template. The proposed annual report template in appendix B of this NPRM is based on the feedback FHWA received from this group. The FHWA believes that the proposed report template provides Federal Agencies with a streamlined reporting format that balances the need to provide Federal Agencies with appropriate time to develop necessary reporting systems with the need to compile this information into a meaningful report. The FHWA understands that developing a data collection mechanism and system may take Federal Agencies several

years. In the interim Agencies may elect to provide an annual narrative summary report instead of the statistical report in appendix B.

Section-by-Section Discussion of Proposed Changes

Descriptions of the regulatory changes proposed in this part are set forth below. All members of the public who are affected by relocation or land acquisition activities undertaken or funded by Federal Agencies are encouraged to comment on this NPRM. Comments from interested State and local governments are particularly requested.

Subpart A—General

Section 24.2 Definitions and acronyms

In response to comments and questions from Federal and State partners, FHWA proposes to make additions and modifications to certain definitions and acronyms in order to provide clarification. The FHWA proposes several minor corrections, including renumbering definitions and acronyms and organizing them alphabetically. In addition, FHWA proposes updating appendix A references to reflect the proposed renumbering and alphabetizing of definitions.

Section 24.2(a) Definitions

Agency

Throughout this regulation, references are made to those who are carrying out real property acquisition and relocation assistance, which are subject to Uniform Act requirements. The current regulations use a combination of definitions—Agency, Acquiring Agency, and Displacing Agency—to describe Uniform Act applicability to those parties. The FHWA is proposing to simplify these references by revising the current definition of Agency so it can be used throughout the proposed regulation to describe all parties carrying out real property acquisition and relocation assistance which are subject to Uniform Act requirements. The FHWA is also proposing to delete definitions of Acquiring Agency and Displacing Agency as the singular definition of Agency will be used throughout the regulation to describe responsible parties and Uniform Act applicability.

Comparable Replacement Dwelling

The MAP–21 amended Section 203(a)(1) of the Uniform Act by reducing the number of days that a person must have occupied a displacement dwelling in order to be eligible for a replacement housing payment from 180 to 90 days. The FHWA proposes to modify this definition accordingly, and in each place it appears throughout the regulation. Many readers of this NPRM will notice that the length of time a valid lien (mortgage) must be in place to qualify for an increased mortgage interest costs payment remains 180 days prior to the initiation of negotiations. The MAP–21 did not change this requirement. The FHWA also proposes to combine portions of the appendix for this definition with the regulatory text with no change in requirement or meaning resulting from this reorganization.

Contribute Materially

The FHWA has received a number of questions regarding the correct interpretation of this definition, especially in regard to displaced businesses that have not been in operation for 2 full years prior to displacement. Practitioners have questioned whether this definition means a business must be in operation for 2 full taxable years prior to displacement in order to be eligible for the payment. They have also questioned how to correctly calculate a prorated fixed payment if a business were in operation for less than 2 full years. While there is no proposed change to this definition, FHWA is reiterating that a displaced business may be eligible to receive payment for a business that is open for less than 2 full years. The FHWA believes that this definition and the regulations at § 24.305(a)(6) and (e), as currently written, give clear direction for calculating the prorated payment and provide broad latitude for equitable treatment. The FHWA proposes a clarification of appendix A, *Section 24.305(e),* to provide a more detailed discussion about calculating a benefit and, if necessary, prorating the average annual net earnings of a business or farm operation. The proposed clarifications include sample calculations for businesses with less than 1 year in operation, more than 1 year but not 2 full years in operation, and seasonally operated businesses.

Decent, Safe, and Sanitary Dwelling

The Uniform Act requires that displaced persons must have decent, safe, and sanitary (DSS) housing made available to them. The FHWA has received a number of questions about which DSS requirements to apply, especially in cases where local housing codes are more stringent than DSS requirements. The FHWA proposes to revise the definition of ''DSS dwelling'' by adding language which states that an Agency must use the more stringent of either the local housing code, the regulations, or the Agency's regulation or written policy. The purpose of this change is to clarify that the requirements in the definition of DSS in § 24.2(a) are minimum requirements. The FHWA also proposes to strike the portion of this definition which states that a Federal funding Agency with good cause could waive those regulatory DSS requirements which were not met by local code. The FHWA believes this portion of the regulation is unnecessary because Federal Agencies retain such authority under § 24.7. The FHWA proposes to move a portion of the previous appendix from this item to the regulation to streamline the new rule. The proposed new organization does not change requirements or create new requirements.

In addition, the definition of DSS dwelling in § 24.2(a) uses the term ''housekeeping dwelling.'' However, several Federal Agencies have noted that housekeeping dwelling is undefined in the regulation and open to varying interpretations. The FHWA agrees that the lack of a definition for the term is contrary to the Uniform Act's goal of providing uniform and equitable treatment of persons displaced. The FHWA proposes to remove the ''housekeeping dwelling'' term from the regulation. The FHWA also proposes changes to this definition to clarify that the requirement that a kitchen be part of a comparable replacement dwelling is dependent on local housing code standards for residential occupancy. In parallel, FHWA proposes a new appendix A discussion to further clarify that FHWA recommends, as a good practice, that even in instances where local housing codes do not require a kitchen, Agencies select a comparable replacement dwelling that has a kitchen.

Displaced Person

At the request of Federal Agencies that have programs or projects that do not require the acquisition of real property, but instead may require the rehabilitation or demolition of real property, FHWA proposes adding the terms ''rehabilitate or demolish'' to the definition of a displaced person. The purpose of this addition is to clarify that the term displaced persons includes those required to move, or move their personal property, from the real property as a result of a written notice of intent to rehabilitate or demolish, even if the real property is not being acquired.

The term displaced person is used in the Uniform Act to describe persons that

move because of a Federal or federally assisted project or program. ''Persons not displaced'' is a term used to describe persons who do not qualify for Uniform Act benefits. Persons not displaced generally include those who will be temporarily relocated. The FHWA proposes to reorganize the definition to specifically address persons who are temporarily displaced and is proposing a new addition, § 24.202(a), to describe the required assistance and services that must be made available for persons temporarily displaced.

The FHWA also proposes to eliminate the use of the term ''guidelines'' in this definition. Several Federal Agencies have noted that their recipients often have questions regarding the use and meaning of this term despite the explanation in the appendix. Federal Agencies have also noted that they do not have ''guidelines,'' but instead have relevant policies. The FHWA proposes to clarify the definition of persons not displaced by deleting ''guidelines'' and replacing it with ''policy or guidance.'' The FHWA believes that the terms ''policy or guidance'' more accurately reflect how Federal Agencies provide programmatic direction to their recipients.

One Federal Agency requested an addition to this regulation that would require that a non-displacement relocation notice be provided which clearly states that a person will not be displaced by a program or project. It is FHWA's opinion that the current definition of persons displaced or not displaced already accomplishes this objective, that such a notice is generally not necessary for a majority of the Federal Agencies' programs, and that the clarification should not be included in the regulation. However, such a notice can be necessitated by Federal Agency policy. Based on the discussions in the working groups, FHWA also believes that Federal Agencies can and should ensure that informative materials and advisory services provide clear information on how to determine when someone is or is not displaced. Agencies may develop guidance to address questions specific to their programs to better direct those carrying out relocation assistance for their programs and projects.

The FHWA proposes adding a reference to a new definition of ''Federal down payment assistance.'' In addition to the new reference, FHWA proposes removing the existing example of American Dream Downpayment Initiative (ADDI) authorized by section 102 of the American Dream Downpayment Act (Pub. L. 108–186; codified at 42 U.S.C. 12821). The proposed removal would provide for a more general reference to similar programs. In some instances, a person may have Federal down payment assistance funds provided for the purpose of purchasing and occupying a dwelling. These funds are not Uniform Act benefits. Agencies providing persons with only such Federal down payment assistance funds are not Agencies causing displacement as defined by this regulation, and persons using those funds are not causing displacements as defined in this regulation. For example, a person using Federal down payment assistance to purchase a home that a tenant also occupies would not be causing displacement as defined by this regulation, and the tenant who would have to move as a result of the acquisition of the home would also not be a displaced person as defined by this regulation.

The FHWA has received numerous questions in recent years about whether persons in occupancy at temporary, daily, or emergency shelters that are acquired are in fact displaced persons. Persons who are occupying a shelter that only allows overnight stays, requires the occupants to remove their personal property and themselves from the premises on a daily basis, and offers no guarantee of reentry in the evening typically would not meet the definition of displaced persons. The FHWA believes that each relocation is unique and requires a fact-based determination in each instance. Those acquiring a shelter should consider factors including, but not limited to, whether the shelter has specific rules and requirements as to who can occupy or use the shelter and whether prolonged and continuous occupancy is allowed.

In order to clarify when a person would not be displaced in these scenarios, FHWA proposes three changes to this definition. First, FHWA proposes to add ''occupants of temporary, daily or emergency shelters'' to the definition of ''persons not displaced.'' Second, FHWA also recommends that, at a minimum, all occupants should receive advisory assistance at initiation of negotiations. Finally, FHWA proposes adding a new appendix item for this definition that provides a discussion of FHWA's view of determining occupancy and eligibility for those who occupy a shelter. It offers a discussion of certain shelter occupants who may be considered displaced persons due to extenuating reasons, such as employment by the shelter. The FHWA believes that acquisition of a shelter and/or displacement from a shelter creates many unique challenges and that Agencies should address potential acquisition of shelters early in the project development process and in the project environmental review process. Doing so can facilitate the identification of required environmental justice mitigation measures and ensure that all available assistance is provided to shelter occupants.

The FHWA also proposes to add a definition of ''temporary, daily, or emergency shelter (shelter)'' at § 24.2(a) to further assist Agencies in making a determination of whether a person residing in a shelter can be considered displaced.

Dwelling

The FHWA proposes to delete the term ''non-housekeeping unit'' from this definition as it is a term that is not defined elsewhere in the regulation and will not enhance an Agency's ability to implement the regulation. The FHWA also proposes to modify the definition of ''other residential units'' in this definition to include clarification that residential units that may seem to be non-standard dwellings, but that meet minimum Uniform Act requirements and local codes for residential occupancy as a dwelling, such as motel rooms, must be considered ''dwellings.''

Federal Down Payment Assistance

Some Federal programs provide some financial assistance to homebuyers to purchase a dwelling. These programs provide funds to an individual who will be buying a dwelling through an arm's length market transaction. The FHWA has responded to several questions about whether the use of Federal down payment assistance in purchasing a dwelling would trigger Uniform Act requirements. The FHWA is proposing to add a new definition of Federal down payment assistance to clarify that individuals using only Federal down payment assistance to purchase a home as their residence would not be considered users of *Federal financial assistance* for the Uniform Act as it is defined in § 24.2(a). To supplement this proposed change, this proposed rule also includes a new appendix item that provides further clarification and explanation on the use of Federal down payment assistance and Uniform Act applicability.

Federal Financial Assistance

Federal down payment assistance provided to a private individual to purchase a residence is Federal financial assistance, as defined by the Uniform Act. It results in an acquisition-

based displacement under the Uniform Act, however, only when the purpose of the acquisition is to advance a Federal project or program designed to benefit the public as a whole, such as highways, hospitals, and other public works projects. The FHWA believes that the purchase of a dwelling using Federal down payment assistance, standing alone, does not constitute an acquisition as contemplated by the Uniform Act.

Therefore, those who may relocate as a result of an acquisition funded in part with down payment assistance are not displaced persons within the meaning of the Uniform Act. The Federal Government's interest is only that the property would serve as the purchaser's dwelling and that it meets general criteria including those related to habitability. The lack of a conscious governmental decision requiring that a selected or specific property be acquired to advance a program or project demonstrates that the nature of the acquisition utilizing down payment assistance funds is nothing more than a person purchasing a dwelling with limited Federal financial assistance.

The FHWA also proposes to add a reference to low income housing tax credit (LIHTC) to this definition. Over the last several years, the FHWA has received numerous questions about the use of LIHTCs and whether they are Federal financial assistance as defined in this rule. The LIHTC is described by the Office of the Comptroller of the Currency as a program ''. . . established as part of the Tax Reform Act of 1986 and is commonly referred to as section 42, the applicable section of the Internal Revenue Code. The LIHTC program provides tax incentives to encourage individual and corporate investors to invest in the development, acquisition, and rehabilitation of affordable rental housing. The LIHTC is an indirect Federal subsidy that finances low-income housing. This allows investors to claim tax credits on their Federal income tax returns. The tax credit is calculated as a percentage of costs incurred in developing the affordable housing property, and is claimed annually over a 10-year period. Some investors may garner additional tax benefits by making LIHTC investments.'' [1] Given the nature of these tax credits and because they are not a grant, loan, or contribution provided by the United States, FHWA does not believe that LIHTC is Federal financial assistance as it is defined in § 24.2(a) and therefore is not subject to Uniform Act requirements.

Recipient

The proposed rule would add a new definition for the term ''recipient.'' The term would mean the party that is the direct recipient of Federal program funds, is not a Federal Agency and is accountable to the Federal funding Agency for the use of the funds and for compliance with applicable Federal requirements. This NPRM proposes to emphasize that the recipient remains responsible for ensuring compliance with Federal requirements when the recipient provides funds to a subrecipient.

Home Equity Conversion Mortgage

A home equity conversion mortgage (HECM) is the Federal Housing Administration's mortgage program that enables seniors to withdraw some of the equity in their homes. The HECMs are commonly referred to as reverse mortgages. Agencies can face unique challenges when displacing a homeowner whose dwelling has a HECM.

The FHWA proposes to add a definition for HECM to the regulation given that these mortgages are being encountered more frequently on federally-funded projects. The definition identifies a HECM as a valid lien and describes common terms and conditions of the HECM. To supplement the proposed definition, FHWA proposes to add a new provision at § 24.401(e), which would clarify how HECM expenses are an eligible replacement housing payment incidental expense and a new section to appendix A, *Section 24.401(e),* with examples of types of HECMs and sample calculations, both of which will be discussed later in this NPRM.

Household Income

Agencies have pointed out an inconsistency between the definition of ''household income'' and the corresponding appendix text. The regulation can be incorrectly read to state that a fulltime student must be under the age of 18. The FHWA proposes to clarify that income from ''dependent children under 18 or fulltime students'' is excluded from the household income calculation. For clarification, FHWA also proposes to adopt the standard definition of a fulltime student in accordance with the requirements set by the Working Families Tax Relief Act of 2004, Public Law 108–311. Under this regulation's revised definition, a fulltime student must be under the age of 24 and a fulltime student for at least 5 months of the year.

Initiation of Negotiations

At the request of Federal Agencies that have programs or projects that require rehabilitation or demolition of real property but do not necessarily require the acquisition of the real property, FHWA proposes to add ''rehabilitate and demolish'' real property to the definition. The FHWA agrees that some Federal Agency programs that rehabilitate or demolish establish eligibility criteria on a basis other than the initiation of negotiations. In most instances, a displaced person's eligibility for benefits is established at the initiation of negotiations. However, in some instances a person's eligibility may be established prior to the initiation of negotiations. This addition will serve to clarify that when persons move, or move their personal property from the real property as a result of a written notice of intent to rehabilitate or demolish, or move after that notice but before delivery of the initial written offer, initiation of negotiations means the actual move of the person from the property. These changes also allow Agencies to tailor their notices and more clearly describe when a displaced person may be eligible for benefits while ensuring that Federal funds are used in a manner that prevents waste, fraud and abuse.

The Federal Agencies that often acquire property as voluntary acquisitions, as defined in this regulation, have noted the current regulation provides that tenants are immediately eligible for relocation assistance at the initiation of negotiations for a property that the Agency may not ultimately be able to acquire through a voluntary and amicable agreement. Furthermore, in many cases, until an Agency approves or administratively accepts a conditional sale or purchase agreement, there is no obligation on the Agency's part to consummate or finalize a sale.

To address these concerns, FHWA proposes to modify the definition of ''initiation of negotiations'' by changing the timing for establishing the eligibility of tenants affected by an option to purchase, conditional sales, or purchase agreement as the result of the voluntary acquisition of real property described in § 24.101(b)(1)–(5). Under the current rule, tenants are eligible for relocation assistance at the initiation of negotiations. The new rule provides, when an option is being acquired, eligibility of tenants for relocation assistance occurs when there is a binding agreement for sale between the

[1] *https://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf.*

buyer and seller. An option to purchase, conditional sale, or purchase agreement is not considered a binding agreement to purchase real property. See appendix A, *Section 24.2(a) Initiation of negotiations, Tenants, (iv).* The use of the term ''binding'' in the context of this regulation refers to an agreement in which both parties have formally accepted the conditions contained in the agreement, have documented their agreement in writing, and with their signature acknowledged their acceptance. It is a legally enforceable document in which the property owner agrees to sell certain property rights necessary for a project and the Agency agrees to that purchase for a specified consideration.

Because State laws may require differing elements in an agreement in order to make it a legally binding contract under State law each recipient or displacing agency should consult with their legal counsel and develop required documents and documentation necessary to make a sufficiency determination under State law.

The FHWA also proposes including a similar change to the discussion in the appendix that describes the timing of eligibility for Uniform Act assistance, or trigger date, for a tenant. The FHWA believes that this change, from initial offer to acquire to acceptance of a binding written agreement, will not reduce benefits or assistance to tenants because it is coupled with the requirements for a clearly written notification to the tenant of the process being followed, an explanation of the trigger date of their eligibility, and for providing a notification that negotiations have failed to result in a binding agreement.

Owner's Representative

Several Federal Agencies believe that the current regulation requires that notifications and documents be given only to the property owner and thus is unnecessarily restrictive. The FHWA agrees that such a requirement, or interpretation, is too restrictive and believes that allowing either an owner or a designated representative to receive a written offer in no way diminishes a property owner's rights. The FHWA proposes to add a new definition for owner's designated representative.

Small Business

The FHWA has often been asked for guidance on the question of whether sites occupied solely by outdoor advertising signs, displays, or devices qualify for benefits under §§ 24.303 and 24.304.

The FHWA proposes to clarify that sites occupied solely by outdoor advertising signs, displays, or devices do not qualify for benefits under § 24.303 or § 24.304, by adding a reference to § 24.303 in the last sentence of the definition. The FHWA believes that outdoor advertising signs which are eligible for relocation benefits under this part are to be treated as personal property and, as such, would not be eligible for benefits under § 24.303. The FHWA continues to believe that § 24.301 provides owners of sites occupied solely by outdoor advertising signs, displays, or devices with sufficient allowances for the relocation of their personal property.

Subrecipient

This NPRM proposes to define ''subrecipient'' as a governmental Agency or other legal entity that enters into an agreement with a recipient to carry out part or all of the activity funded by Federal program grant funds.

There are instances when recipients enter into subgrant agreements with cities, towns, and other governmental entities, collectively often referred to as ''local public Agencies'' or ''local transportation Agencies,'' under which those public Agencies administer projects and construct facilities. This NPRM makes a number of changes to emphasize that the recipient remains responsible for ensuring compliance with Federal funding Agency requirements when the recipient delegates project activities to subrecipients, including public Agencies.

Temporary, Daily, or Emergency Shelter

The FHWA has responded to a number of questions about temporary, daily, or emergency shelters, and whether persons in occupancy at these shelters are displaced persons. The FHWA proposes to add a new definition of the term ''shelter.'' The definition of shelter clarifies that emergency, temporary, or daily shelters are typically intended as overnight, short term, short duration accommodation. Persons who are occupying a shelter that only allows overnight stays, requires the occupants to remove their personal property and themselves from the premises on a daily basis, and offers no guarantee of reentry in the evening, typically would not meet the definition of displaced persons.

The FHWA believes that each relocation is unique and requires a fact-based determination in each instance. Those acquiring a shelter should consider factors including, but not limited to, whether the shelter has specific rules as to who can occupy or use the shelter and whether prolonged and continuous occupancy is allowed. Also, there may be certain shelter occupants who may be considered displaced persons due to extenuating reasons such as employment by the shelter.

Utility Facility

The FHWA has received a number of questions regarding the interpretation of the phrase ''any transportation system'' as used in this definition. The common concern is that ''any transportation system'' can be viewed to mean a highway system or other similar transportation system. The FHWA believes that the current phrase can lead to an overly expansive view of what constitutes a utility facility for purposes of this regulation. The FHWA is proposing to replace the current definition of ''utility facility'' with the definition of ''utility facility'' found at 23 CFR 645.207. The proposed new definition will address the questions raised by offering a clear and consistent definition, along with several examples of utilities.

Section 24.2(b) Acronyms

The Bureau of Citizenship and Immigration Services (BCIS) has been renamed the U.S. Citizenship and Immigration Service (USCIS). The UA has been added as an acronym for the Uniform Relocation Assistance and Real Property Acquisition Policy of 1970. The FHWA proposes to make these changes in the acronym listing of this paragraph, remove numbers, and alphabetize the acronyms.

Section 24.5 Manner of Notices

The current regulation requires that Agencies personally serve or send notices to property owners or occupants by certified or registered first-class mail, return receipt requested. The FHWA proposes providing additional flexibility in the types of notices that can be used to communicate with property owners. The first type of flexibility we are proposing is to allow trackable delivery and signed receipts via companies other than the United States Postal Service that provide the same function as certified mail with return receipts.

The FHWA also believes that delivery of notices by digital or electronic means can provide Agencies and property owners with an optional communications method that can streamline the notice process while not reducing any benefits or protections to property owners. Delivery of notices by digital or electronic means must be done in a manner that will provide verification of delivery and receipt and

acceptance confirmation similar to the current standard of certified mail. The proposed regulation provides several minimum requirements that an Agency must follow if they choose to allow electronic notices and electronic signatures.

The FHWA proposes to require that property owners or occupants must voluntarily elect to receive notices by electronic means. The FHWA continues to believe that there is no substitute for face-to-face meetings with property owners but also recognizes that for a variety of reasons face-to-face meetings may not be practical. Agencies may not determine in advance to use this proposed flexibility for all property owners on a project or program-wide basis. The acquisition of a person's real property and or displacement from their real property usually requires an Agency to make every effort to make personal contact.

The FHWA proposes to add a new appendix item that further explains FHWA's position regarding when the use of electronic notifications may be appropriate and provides several examples of when it may and may not be a good option. The new appendix item describes additional safeguards that should be included as part of an Agency's process. It also reemphasizes that, should an owner or occupant elect not to receive offers and notices by electronic means, an Agency must accommodate that property owner or occupant by using certified first class mail, return receipt requested, or by personally serving notices. The FHWA is also proposing a new addition to this section, paragraph (d), which provides property owners with the flexibility to designate a representative to receive required notices and documents. This proposal requires that a designation of an owner's representative must be in writing and must identify any notices or documents that the designated representative is not authorized to receive. A properly designated property owner's representative would be able to receive required notices and information including acquisition and relocation information and/or the written offer of the property's fair market value on behalf of the owner.

Section 24.9(c) Recordkeeping and Reports

Section 1521(d) of MAP–21 requires that each Federal Agency that has programs or projects requiring the acquisition of real property or causing a displacement from real property subject to the provisions of the Uniform Act provide an annual summary report to the Lead Agency that describes the activities conducted by the Federal Agency. The FHWA proposes to modify the reporting requirements in this paragraph accordingly by changing the first sentence requiring that a Federal Agency submit a report of its real property acquisition and displacement activities to the Federal Agency funding the project from ''if required'' to ''as required.'' We also propose to delete the second sentence requiring the reports not more than every 3 years and unless the Federal Agency shows good cause for requiring the report. The last sentence in this paragraph is deleted and further discussion of reporting requirements has been added in the appendix.

The FHWA proposes to add new language in this paragraph to detail the annual reporting requirements that Section 1521 of MAP–21 introduced. The proposed paragraph will discuss the new annual reporting requirements for each Federal Agency subject to the Uniform Act. It includes a narrative on the overarching program and/or related activities, as well as specific program metrics, including the number of acquisitions, relocations, condemnations, total dollars spent, and use of housing of last resort. The report would be due by November 15th of each year.

The FHWA also proposes to add a new appendix section explaining that FHWA realizes that not all Federal Agencies subject to this reporting requirement currently have the ability to collect all information requested on the reporting form. However, FHWA envisions that the Federal Agencies may elect to provide a narrative report focusing on their respective efforts to improve and enhance delivery of Uniform Act benefits and services. Narrative report information would include training offered, reviews conducted, or technical assistance provided to recipients.

Section 24.10(g) Determination and Notification After Appeal

The FHWA proposes to revise the language in the last sentence of this paragraph to clarify that the determination on appeal is the Agency's final decision. The language on content and procedures for the written determination on appeal, including informing a displaced person of the right to judicial review of the final decision, is not substantively changed. The proposed changes are intended to more clearly describe the authorities and rights created by the appeals process and to more directly provide information on the process to follow should a determination on the appeal be desired.

Section 24.11 Adjustments of Payments

The FHWA proposes to add a new section to the regulation to implement the new provision in MAP–21 at Section 1521(d)(2) which provides that if the head of the Lead Agency determines that the cost of living, inflation, or other factors indicate the relocation assistance benefits should be adjusted to meet the policy objectives of the Uniform Act, that the head of the Lead Agency may adjust: The amounts of relocation benefits for reestablishment expenses-nonresidential moves; fixed payment for moving expenses-nonresidential moves; replacement housing payment for 90-day homeowner-occupants; and replacement housing payment for 90-day tenants and certain others.

Prior to MAP–21, FHWA led research projects to examine whether inflation had an effect on relocation benefit levels. The research concluded that since publication of the final rule in 1989, the benefit levels were not able to meet the policy objectives of the Act due to inflation.

The FHWA's research focused primarily on the use of indexes as a tool to evaluate inflation's effects on Uniform Act benefits. In considering the most appropriate indexes, several Consumer Price Indexes appeared to provide a suite of goods and services that are related to housing and other costs associated with displacement.

The FHWA is proposing to evaluate inflation's effect on the benefits for reestablishment for nonresidential moves, fixed payment for non-residential moving expenses, replacement housing payments for 90-day owners, and rental assistance payments for 90-day tenants and certain others by using the Consumer Price Index for All Urban Consumers (CPI–U) Seasonally Adjusted.[2] Guidelines FHWA used in choosing this index:

1. The CPI–U is a measure of the average change in consumer prices over time for a fixed market basket of goods and services, including food, clothing, shelter, fuels, transportation, and charges for medical and dental services and drugs. The all urban consumers group represents about 87 percent of the total U.S. population. It is based on the expenditures of almost all residents of urban or metropolitan areas, including professionals, the self-employed, the poor, the unemployed and retired persons as well as urban wage earners and clerical workers. Bureau of Labor

[2] *https://www.bls.gov/news.release/cpi.t01.htm.*

Statistics (BLS) publishes a CPI–U report monthly and releases an Annual Report at the end of each fiscal year.

2. It is available on a monthly basis, free of charge and can be expected to be tabulated regularly into the future. The CPI–U is widely used by other Federal Agencies including FEMA and HUD.

3. The CPI–U is used by other Federal Agencies for inflation adjustment indexing. The CPI–U is produced by the BLS and is subject to verification and oversight.

Additional information on consumer price indexes can be found on the Bureau of Labor Statistics website.[3] The FHWA is proposing that this determination of whether an increase in benefit amounts is necessary would be made no more frequently than every 5 years. If the FHWA determines that the cost of living, inflation, or other factors indicate the relocation assistance benefits should be adjusted to meet the policy objectives of the Uniform Act, FHWA will issue a **Federal Register** notice of that determination and the specific adjustments of the relocation assistance benefits that are being made. The FHWA believes Federal and State partners will benefit from several years of stable and predictable regulatory benefit amounts.

The FHWA proposes a new item in appendix A, *Section 24.11,* which provides a sample calculation showing how FHWA will determine whether future adjustments to these benefit amounts should be proposed. In addition to a temporal limit on adjustments, FHWA attempted to identify an inflationary impact threshold or other regulatory condition indicating when an adjustment should be proposed. The FHWA recognizes that prior to MAP–21, relocation benefit amounts had not been adjusted for several decades. The FHWA welcomes comments on use of the CPI–U Seasonally Adjusted Index, and suggestions on the inflationary impact threshold that would warrant adjustments to the maximum benefit amounts.

Subpart B—Real Property Acquisition

The FHWA intends for the terms ''fair market value'' and ''market value,'' which may be more typical terminology in private transactions, to be synonymous in this regulation. In order to make this clarification, FHWA proposes to modify the appendix item for subpart B by deleting ''may be'' and inserting ''are'' to indicate that ''fair market value'' (as used throughout this subpart) and ''market value'' are the same.

Section 24.101(a)(2) Applicability of Acquisition Requirements

Section 24.101(a)(2) currently includes the same reference twice, which may create confusion. The FHWA is proposing to modify this paragraph by deleting the first reference to 49 CFR 24.2(a) and by editing the second reference at the end of the paragraph to cross reference § 24.2(a). The FHWA believes that making a single reference at the end of the paragraph to this definition accurately points readers to the requisite section and eliminates the need for redundant references in this paragraph.

Section 24.101(b)(1)(i) Applicability of Acquisition Requirements

Some Federal Agencies reported that the terms ''site'' and ''geographic area'' were close enough in meaning that they caused confusion in the second sentence. They stated that the term ''site'' did not accurately describe the type of project needs encountered in delivering their programs and recommended changing the term to property. The FHWA proposes to strike the term ''site(s)'' and insert ''property or properties.'' The FHWA believes the proposed change accurately reflects the types of acquisitions that Agencies may make and this requirement's goal of ensuring that voluntary acquisitions are truly independent of site and corridor.

The FHWA also proposes to revise the appendix item for this paragraph. A Federal Agency suggested that the appendix to this paragraph be changed to further define the term ''general geographic area.'' Some Federal Agencies expressed concern that the appendix definition was too restrictive for their programs or some projects. The FHWA reviewed the NPRM and final rule comments and was unable to determine why the term ''geographic area'' was inserted into the appendix during the 2005 rulemaking. That rulemaking stated that is was ''not to be construed to be a small limited area.'' The FHWA proposes to delete that clause and insert a sentence that describes a ''general geographic area'' as any of several properties that are not necessarily contiguous or are not limited to a specific group of properties.

Section 24.101(b)(1)(iii)–(iv) and (b)(2)(i)–(ii) Applicability of Acquisition Requirements

Several Federal Agencies believe that the current language of these paragraphs requiring that notification be given only to the property owner is unnecessarily restrictive. The FHWA agrees and believes that allowing either an owner or a designated representative to receive a written offer in no way diminishes a property owner's rights. The FHWA proposes to make minor revisions to the language of these parts by adding allowances for an owner's properly designated representative to be able to receive acquisition and relocation information and/or the written offer of the property's fair market value on behalf of the owner. The FHWA is proposing that such designation must be in writing.

Section 24.101(b)(2)(iii) Applicability of Acquisition Requirements

Some Agencies possess the power of eminent domain but do not use it for specific projects. The FHWA has received questions about the interpretation of this paragraph from several Agencies. Some Agencies have interpreted this paragraph to mean that if an Agency possesses the power of eminent domain but will not use it on the project, the Agency would not be able to use the voluntary acquisition authority for its project or program. The FHWA proposes to clarify this paragraph's applicability by simplifying the language so it clearly states that if eminent domain will not be used, then an Agency may use the voluntary acquisition requirements provided by this section. The FHWA believes that whether an Agency has such authority is not the relevant issue in determining whether this section's requirements are being met. The relevant issue is that eminent domain may not be used as part of the offer and negotiation to acquire property needed for the project.

Also, FHWA proposes adding language in appendix A that recognizes some Agencies may have an unanticipated need that may require use of eminent domain authority. The FHWA views the clear purpose of the provision as ensuring that voluntary acquisitions are not simply preludes to an eminent domain acquisition, should voluntary acquisition negotiations fail.

The FHWA is proposing a new paragraph to allow the Federal funding Agency to permit acquisitions by eminent domain in extraordinary circumstances when negotiations were initially undertaken under the requirements for voluntary acquisitions. The FHWA further recognizes that property owners subjected to such acquisitions should be assured that they are being afforded all protections and eligibilities of this regulation. Therefore, FHWA is proposing that, should an Agency carrying out a project advanced as a voluntary acquisition find an

[3] *https://www.bls.gov/cpi/.*

extraordinary instance requiring the use of eminent domain, it must request a waiver of regulations, under authority of § 24.7 of this part, from the Federal Agency funding the project. This proposed addition is in response to requests from Agencies that often acquire property as voluntary acquisitions. The FHWA is interested in commenters' opinions on whether the use of a waiver of regulations should be required, whether criteria necessary for a waiver should be included in this regulation, what that criteria should include, and whether and how to define the exceptional circumstances under which eminent domain authority may be permitted under this section.

Section 24.101(d) Federally Assisted Projects

The FHWA is proposing to add a new paragraph to respond to questions it has received about the applicability of Uniform Act requirements to properties that were acquired in advance of a federally-funded project. The FHWA recognizes that Agencies may acquire or own previously acquired properties for several reasons. This proposed change will clarify that if such a property were acquired with the intent of including it in a planned, anticipated, or designated federally-funded program or project, then the acquisition would be subject to the requirements in subparts B–F, as applicable. This proposed change would incorporate guidance that FHWA has included in its Frequently Asked Questions for 49 CFR part 24, see current question number five.[4] This proposed change does not create a new requirement but is proposed to ensure that those Agencies acquiring properties which may be incorporated into a planned, anticipated, or designated federally assisted program or project understand when, why, and how the requirements of this rule apply. The FHWA is interested in commenters' suggestions on how to further clarify when, how, and why the requirements of this rule apply.

Section 24.102 Basic Acquisition Policies

The term ''waiver valuation'' in this regulation and the more commonly used term ''appraisal waiver'' means the valuation process used and the product produced, when the Agency determines that an appraisal is not required, pursuant to § 24.102(c)(2). In 1989, FHWA first adopted a rule on appraisal waivers. Under that rule, Agencies were allowed to decide when an appraisal was not needed if they first determined that the valuation was uncomplicated and the property was ''low-value.'' Over the years, we have used the terms ''low-value'' and ''uncomplicated'' interchangeably. The FHWA is proposing to eliminate the term ''low-value'' since this proposed regulation now defines the range of values to which a waiver can be applied. The rule initially defined uncomplicated as being $2,500 or less.

Beginning in 1995, FHWA approved, for its recipients, increases for the uncomplicated definition of up to $10,000 on a State-by-State basis. Since 2002, some agencies have received approval to use a $25,000 uncomplicated threshold when applying the appraisal waiver provisions of the 1989 rule. In January 2005, FHWA issued an updated rule that acknowledged the trend toward increasing the threshold for uncomplicated acquisitions. The current rule contained in § 24.102(c)(2)(ii) provides Agencies the latitude to define ''uncomplicated'' as being up to $10,000. It also permits an increase in the amount up to $25,000 provided the Federal funding Agency approves, and the Agency agrees to provide the property owner the option to request an appraisal.

Appraisal waiver requirements have proven to be an effective tool in containing costs and in fostering accelerated project delivery while protecting the rights of property owners under the Uniform Act. A national survey and various process reviews have confirmed this to be the case.[5] The FHWA is proposing changes to § 24.102(c)(2)(ii)(C) waiver valuation requirements, as described in the following three sections, in recognition of the positive experience using them.

Section 24.102(b) Notice to Owner

The FHWA is proposing to add a new appendix item which states that when condominiums and other types of housing with common areas or community property are being acquired, an Agency should determine who must receive notification, which could include a condo or homeowner's board, a designated representative, or all individual owners when common or community property is being acquired for the project.

Section 24.102(c)(2) Appraisal Waiver

The FHWA proposes to modify the appendix for this paragraph to further explain the term ''uncomplicated acquisitions.'' The FHWA also proposes to modify the regulation to emphasize that the person making the determination to use the waiver valuation must have sufficient understanding of the local markets, and should have knowledge of appraisal principles and use of valuations to be able to determine whether the valuation problem is uncomplicated. The FHWA also proposes to add to this appendix that Agencies should put procedures in place to ensure that waiver valuations are accurate and are consistent with the unit values as determined by appraisals and appraisal reviews. The FHWA proposes to strike the term ''sophisticated'' and insert ''complex'' in the appendix to more accurately reflect the intent that the waiver valuation frees up appraisers to do more complicated appraisal work. The FHWA also proposes inserting in the appendix that those who prepare waiver valuations have an understanding of appraisal principles and use of appraisals so as not to imply that they must be appraisers. The FHWA is also proposing to add a reference to the appendix item for this paragraph.

Section 24.102(c)(2)(ii)(A) Appraisal Waiver

The FHWA has received questions about whether and how a licensed appraiser could develop a waiver valuation which would be consistent with professional standards and licensure requirements. The appendix states that waiver valuations are not appraisals under this rule. There is no national consensus or standard about the implications of having a licensed or certified appraiser prepare a waiver valuation. In some States, when a State-certified or licensed appraiser estimates a value, they may be obligated under the licensing requirements of their State to perform an appraisal even if the client requests something less than an appraisal. Performing appraisals rather than waiver valuations in situations where the valuation problem is not complex can cause unnecessary delay and adds unnecessary cost to an acquisition. However, some States have laws that interpret waiver valuations as appraisals, and those States only permit appraisers to perform appraisals, which effectively nullifies the benefits of the waiver valuation. In order to encourage those States to take advantage of the

[4] See current question number five at: *https://www.fhwa.dot.gov/real_estate/policy_guidance/uafaqs.cfm.*

[5] The FHWA has developed, collected or reviewed several supporting documents. They include an FHWA national survey of waiver valuation in 2005, results from 4 SDOTs which carried out waiver valuation pilot projects and a Colorado study of Waivers. FHWA is also embarking on a new national survey of waiver valuations in support of this NPRM effort.

streamlining efficiencies offered by the waiver valuation, and in an effort to avoid the increased time and increased cost associated with providing fully documented appraisals, FHWA proposes to incorporate a jurisdictional exception that preserves the original intent of the waiver valuation process while offering appraisers that wish to perform this type of work for Agencies an avenue for accepting waiver valuation assignments while remaining compliant with the provisions of the State appraisal licensing enforcement Agencies. The FHWA also recognizes that some States prefer to have waiver valuations reviewed even though this regulation does not require a formal review of waiver valuations. Appraisers can accept these types of assignments as well with this proposed language. The FHWA is proposing to add language to this paragraph that would preclude an appraiser from complying with standards rules 1, 2, 3, and 4 of the ''Uniform Standards of Professional Appraisal Practice'' (USPAP), as promulgated by the Appraisal Standards Board of The Appraisal Foundation.[6] This proposed modification would afford those States a solution that preserves the intent of this regulation to streamline processes and provide programmatic efficiencies. This proposal would provide States and licensed or certified appraisers with clarity about the requirements of this regulation and the implications of developing a waiver valuation. The FHWA invites comments or suggestions on this proposed change.

Section 24.102(c)(2)(ii)(D) Appraisal Waiver Thereof, and Invitation to Owner

The FHWA proposes to add a new paragraph (c)(2)(ii)(D) to this section to institute a three-tiered approach to waiver valuations. The proposed new third tier of waiver valuations would be a $50,000 waiver value ceiling available under clearly defined circumstances. This change is presented as an option that Federal funding Agencies and recipients may consider using on a project-by-project basis. In proposing this change, it is important to note that additional safeguards have been created to ensure the full protection of property owners' rights and interests. The safeguards include the use of the third tier being limited to Federal funding Agencies and recipients, with no delegation to subrecipients, and that approvals may be granted on a project-by-project basis with requests made in writing and when the six pieces of information required in this paragraph are provided. The required information is: The anticipated benefits of raising the ceiling, administrative/managerial oversight mechanisms, names and credentials of those performing the waiver valuations, quality controls to be used, performance metrics with quarterly reports, and a close-out report measuring cost/time benefits and lessons learned. The FHWA believes that the proposed required information provides a set of requirements that ensure use of waiver valuations above $25,000 would be carefully considered and used in appropriate circumstances with specific safeguards. An important safeguard of this proposal is the requirement that the Agency offer an appraisal. The procedures described in this paragraph may not be used if the property owner elects to have the Agency appraise the property.

Section 24.102(n)(1) Conflict of Interest

The FHWA proposes to change the word ''making'' to ''developing'' an appraisal in this paragraph to more accurately describe the activity of preparing an appraisal or waiver valuation. This paragraph ensures that the valuation process continues to operate in an independent manner by prohibiting the compensation for an appraisal or waiver valuation to be based on the amount of the valuation estimate.

Section 24.102(n)(3) Conflict of Interest

The current regulation allows single agents who valued properties to also perform negotiations on properties that were valued at less than $10,000. The FHWA has conducted reviews that provided no indication that the use of the single agent created a problem to administer, or led to property owners receiving offers that were less than the Agency's best estimate of just compensation. The FHWA's experience is that the $10,000 limit has been managed effectively and property owners' rights and protections have not been diminished by this process.

The FHWA now proposes to raise the limit to $25,000 with a two-tiered approach. Under the proposed changes, the single agent concept could still be applied with waiver valuations up to the $10,000 amount. The FHWA is proposing that acquisitions estimated to be greater than $10,000 but less than $25,000 would require an appraisal, and review of the appraisal, if the valuation preparer is also acting as the negotiator.

The FHWA also proposes that the Agency or recipient desiring to exercise this option for acquisitions estimated to be greater than $10,000 but less than $25,000 on a project or a program basis must submit a request in writing to the Federal funding Agency. The FHWA proposes to require that Agencies and recipients that implement this provision have a separate and distinct quality control process in place and written procedures which include an outline of the quality control process approved by the Federal funding agency. Federal Agencies may elect whether to use this single agent tool and to establish guidance for its use. The proposed increase to a $25,000 limit may be extended to a subrecipient when the Agency or recipient determines and documents that the subrecipient has a separate and distinct quality control process in place and outlined in written procedures approved by the Federal funding agency. The FHWA is also proposing to add a new appendix item for this paragraph, which explains the objective of using the conflict of interest provisions, the purpose of the three parts of this provision, and the new third tier of the conflict of interest provisions.

Section 24.103(a) Appraisal Requirements

The FHWA proposes to delete date and publication information from the description of ''Uniform Standards of Professional Appraisal Practice (USPAP).'' The FHWA believes this change is needed because the USPAP has been updated several times since the publication of the current rule and may be updated several times over the next several years. The FHWA also proposes to add new updated web links for the USPAP in this paragraph. The FHWA will monitor future publications of USPAP to ensure that those publications continue to be consistent with the requirements of this rule and will make technical corrections when necessary.

We also propose to modify the appendix item for this part by changing ''Standard Rules 1, 2, 3'' by striking the word ''Rules'' to ''Standards 1, 2, 3 & 4'' and inserting ''2018–2019 edition of the'' before ''USPAP'' to ensure consistency with USPAP. The FHWA also proposes to delete ''Supplemental Standard Rule'' as it is no longer contained in USPAP.

Subpart C—General Relocation Requirements

Section 24.202(a) Persons Required To Move Temporarily

Several Agencies have questioned whether persons temporarily displaced should receive benefits because they are

[6] *http://www.uspap.org.*

identified in the rule as persons not displaced. The FHWA is proposing to revise the definition of displaced persons and to specify the services and assistance that must be provided to a temporarily displaced person in this part. The FHWA also proposes to incorporate the majority of the appendix discussion on minimum Agency actions for temporary displacements into this section of the regulation. Several Federal Agencies noted that the proposed reorganization will provide their recipients with a more easily understood and concise discussion of minimum standards and actions required when temporarily displacing a person.

The FHWA believes that the proposed change to the regulation aligns the regulation more closely with the language and requirements of Section 4621 of the Uniform Act. These requirements include a recognition that relocation assistance policies must provide for fair, uniform, and equitable treatment of all affected persons. In addition, FHWA believes that providing services and assistance to temporarily displaced persons is necessary to minimize the impacts of displacement and to maintain the economic and social well-being of communities. The proposed changes require that persons displaced from their dwelling or business be reimbursed for out-of-pocket expenses associated with the move and that temporary relocations may not last more than 12 months. The FHWA believes that the language in the current appendix that limits temporary relocations to no more than 12 months reflects a standard that some recipients were not aware of due to its placement in the appendix. The FHWA believes that more clearly establishing this standard as a regulatory requirement by incorporating it into the regulatory text will provide recipients with a more easily understood requirement for persons who are temporarily displaced. The new proposal also requires that appropriate advisory services be provided. The FHWA is not proposing to develop an all-inclusive list of actual and reasonable out-of-pocket expenses because each temporary relocation is unique and fact-specific. However, reimbursement should be provided for those additional costs necessitated by the temporary move, including lodging, cost of meals when temporary lodgings do not include kitchen facilities, and cost to move personal property when necessary.

The FHWA is also proposing to add an item to this part to explicitly state that aliens not lawfully present in the United States are not eligible for temporary relocation assistance unless such denial of benefits would create an extremely unusual hardship to a designated family member in accordance with § 24.208(g). This clarification is not an additional prohibition or change to the regulation. The addition is intended to assist Agencies that frequently do temporary relocations by ensuring that the existing provisions and prohibitions are easily understood.

Section 24.203(a) General Information Notice

Several Agencies have indicated that the term ''scheduled'' in this paragraph does not have a clear meaning in the context of their programs. These Agencies believe that ''may be displaced'' more closely fits the processes they follow since a large part of their programs are voluntary acquisitions and ''scheduled to be displaced'' could be interpreted to mean a decision to displace had been made regardless of the outcome of the negotiation process. The FHWA believes that the proposed change would fit both voluntary and eminent domain acquisitions and subsequent relocations. This proposed change would also promote consistency between this paragraph and the following paragraph since the phrase ''may be displaced'' is already used in § 24.203(a)(1).

Section 24.203(b) Notice of Relocation Eligibility and Section 24.203(d) Notice of Intent To Acquire

One Agency has requested that the existing ''Notice of intent to acquire'' in § 24.203(d) be revised to eliminate confusion and to expand its applicability to rehabilitation and demolition activities where no acquisition is involved. They propose to replace it with an ''Advanced Notice of relocation eligibility'' which would serve to establish relocation eligibility.

Rather than rewriting § 24.203(d) and eliminating § 24.203(b) in the regulation, FHWA proposes to simply rename the ''Notice of intent to acquire'' as ''Notice of intent to acquire, rehabilitate, or demolish'' to cover the situations unique to the Agency and similar programs when an acquisition does not occur but persons are required to move for some period of time. As a result, several other parts of the regulation will be modified to reflect this new title. Specifically, FHWA proposes to reword the definition of a ''displaced person'' at § 24.2(a) and the definition of ''initiation of negotiations'' at § 24.2(a) wherever this it appears. The FHWA also proposes to add ''rehabilitate or demolish'' wherever ''notice of intent to acquire'' occurs in § 24.203(b) and (d). In § 24.203(d), FHWA proposes to also strike ''acquired'' from ''property acquired'' to again emphasize that the Notice of Intent to Acquire clearly includes rehabilitation and demolition projects.

The FHWA believes that renaming the notice of intent to acquire to include rehabilitation and demolition clearly conveys the many types of displacements to which this notice is intended to apply. The FHWA believes that this is the simplest solution to tailor applicability of this notice to all programs.

Section 24.204(a) Introductory Text Through (a)(1) Availability of Comparable Replacement Dwelling Before Displacement

The FHWA has received a number of questions regarding the meaning of the term ''made available'' in the context of this paragraph's discussion of comparables. The questions are focused on the general requirements of this paragraph's language providing direction on the number of comparables that should be used in the determination process and is not focused on benefit determination or eligibility. A majority of practitioners believe that ''made available'' simply requires that information on the comparable replacement dwellings be provided to a displaced person. Others believe that the regulation requires that all comparables be inspected before being used in estimating eligibility.

The FHWA proposes to modify the language in this paragraph to clearly state that ''made available'' means providing information in writing on the location of actual comparable replacement dwellings that were used in the determination process. The regulation continues to state that three or more comparable replacement dwellings shall be made available, whenever possible in the determination process. The FHWA believes that providing information on at least three comparable replacement dwellings should be the standard practice because it provides the displaced person with the assurance that the selected comparable replacement dwellings fairly represent comparable properties available on the market. The FHWA is also proposing changes to *§ 24.205(c)(2)(ii)(C) Relocation Planning, Advisory Services, and Coordination* which are discussed in detail below. The FHWA agrees that an inspection of a comparable dwelling should be made prior to its use in any eligibility determination. The proposed change requires Agencies to inform displaced

persons in writing of the reason(s) a DSS inspection of a comparable replacement dwelling was not made (in cases where inspections were not made) and to indicate that, should a displaced person select one of the comparable dwellings, a replacement housing payment cannot be made until a DSS inspection is made of that dwelling.

Section 24.205(c)(2)(ii)(C) Relocation Planning, Advisory Services, and Coordination

The FHWA proposes to modify the language in this paragraph to require Agencies to inform displaced persons in writing of the reason(s) a DSS inspection of a comparable replacement dwelling was not made (in cases where inspections were not made) and to indicate that, should a displaced person select one of the comparable dwellings, a replacement housing payment cannot be made until a DSS inspection is made of that dwelling.

The FHWA also proposes adding a new item to appendix A, *Section 24.205(c)(2)(ii)(C),* explaining what constitutes a DSS inspection and a further discussion of the requirement that an Agency must make full disclosure and explanation to the displaced person if the comparable replacement dwelling was not inspected.

It is the position of FHWA that comparable replacement housing must be inspected whenever possible and that the selected comparable replacement dwelling should be inspected (*e.g.,* walk through/physical inspection). The FHWA proposes to add a part in the appendix which explains that reliance on an exterior visual inspection, or examination of an MLS listing, does not constitute a full DSS inspection as required by the regulation in most cases.

Section 24.205(c)(2)(ii)(D) Relocation Planning, Advisory Services, and Coordination

The FHWA is proposing to revise the appendix for this part to include a reminder that Agencies should ensure that they are appropriately documenting their efforts to provide comparables and replacement dwellings which are not in areas of minority concentration.

Section 24.207(f) No Waiver of Relocation Assistance

The FHWA proposes to add a reference to appendix A, *Section 24.207,* which further explains the requirements when a displaced person chooses not to accept some or all of the payments or assistance to which they are entitled.

Section 24.207(h) Entitlement to Payments-Deductions From Relocation Payments

To date, the practice of withholding a portion of, or deducting from, a relocation replacement housing payment to satisfy non-payment of rent to an Agency, or to satisfy an obligation to any other creditor, has been clearly prohibited. Because the current prohibition is only found in § 24.404(a)(6) pertaining to replacement housing payments, several questions have been raised regarding whether the withholding prohibition applies to all relocation assistance payments or only to replacement housing payments. The FHWA proposes to add a new paragraph to the general requirements for claims for relocation payments to emphasize that withholdings or deductions may not be made from any type of relocation payments for non-payment of rent or to satisfy an obligation to any other creditor. The proposed addition would also clarify that Agencies must deduct any advanced relocation payment from the relocation payments to which the displaced person is otherwise entitled.

Section 24.208(c) Aliens Not Lawfully Present in the United States

The FHWA proposes to add a reference to a new addition to the appendix for this paragraph that provides examples of how to calculate relocation payments if some members of a displaced family are lawfully present but others are aliens not lawfully present. The new addition would provide calculations that are based on the ratio of ownership between aliens not lawfully present and eligible displaced persons. The proposed addition to appendix A also incorporates several current Uniform Act Frequently Asked Questions,[7] to provide specific calculation examples.

Section 24.208(f)(1)

The FHWA proposes to update the acronym for the BCIS to the current USCIS and add a corrected link to that Agency's website. The FHWA also proposes to amend this paragraph by requiring the use of the USCIS's Systematic Alien Verification for Entitlements (SAVE) program to confirm certifications which an agency believes may be invalid. The FHWA seeks comments on whether there may be other resources that can be used when an agency considers a certification invalid. The FHWA would also like comments on whether and how the certification process in this part should be updated. The FHWA is interested in comments on whether revisions should include document review and collection for all displaced persons.

Section 24.208(g) Aliens Not Lawfully Present in the United States

The FHWA has received questions from several Federal Agencies about providing temporary relocation assistance to aliens not lawfully present in the United States. The question arises because the requirements focus on displaced persons. In instances of temporary relocation, persons are not displaced persons but are eligible for certain temporary benefits. The Federal Agencies question whether this paragraph's restriction on providing relocation benefits or assistance would prohibit or allow an Agency to deny temporary relocation assistance to an alien not lawfully present in the United States. The FHWA believes that the clear intent in statute and this regulation do not allow for any Uniform Act benefits or assistance to be provided to an alien not lawfully present in the United States, with the exception being cases where an exceptional and extremely unusual hardship to a spouse, child, or parent who is a U.S. citizen or alien lawfully admitted for permanent residence would be created by denying such benefits and assistance. This regulation provides specific considerations and requirements that allow for benefits to be provided in this limited instance. Given that this regulation allows and defines instances when an alien not lawfully present in the United States may receive Uniform Act benefits, the FHWA believes that the hardship exception also applies to temporary relocations in cases where an exceptional and extremely unusual hardship to a designated family member would be created by denying such benefits and assistance. The FHWA does not believe that any additional changes are needed to this regulation given the restrictive and specific language in this paragraph.

Section 24.208(h) Aliens Not Lawfully Present in the United States

Some Agencies have asked FHWA how to determine when there is an ''exceptional and extremely unusual hardship'' to a spouse, parent, or child of a person not lawfully present in the United States when the determination results in more than the loss of relocation payments and/or assistance alone. The FHWA proposes to add a reference to appendix A, *Section 24.208(h),* which incorporates FHWA's previously published FAQ explaining the meaning and intent of the term

[7] *https://www.fhwa.dot.gov/real_estate/policy_guidance/uafaqs.cfm.*

''exceptional and extremely unusual hardship.'' [8] The FHWA believes that including existing guidance into the appendix will provide a clear resource to address the questions raised.

Subpart D—Payments for Moving and Related Expenses

Section 24.301(b)(2) Moves From a Dwelling

The FHWA requests comments on adding an option, similar to that found in this part for business self-moves, to allow self-moves from dwellings to be eligible for reimbursement in the amount of the lower of two bids or estimates prepared by a commercial mover or based on an estimate prepared by a qualified Agency staff person. The FHWA would like comments on whether and how adding new self-move options for moves from a dwelling would reduce administrative burden on the displaced person and the Agency. The FHWA believes that self-move options would reduce administrative burden and eliminate the burden to the property owner of providing receipts or proof of expenditures to support residential self-move claims for payment. The FHWA is also interested in comments on how reimbursement should be made if a self-move reimbursement is based on a commercial move bid. Should the reimbursement be for the full commercial move bid, or should it be made after subtracting an amount to account for overhead and profit in the commercial move bid?

Section 24.301(b)(3), (c)(2)(ii), and (d)(2)(ii) Moving Cost Finding and (d)(2)(iii) Non-Residential Moving Cost Schedule

The FHWA is interested in incorporating methods in this regulation that can reduce administrative burdens and improve the government's service to individuals and businesses affected by Federal or federally assisted projects and programs. In previous rules, there was a provision that allowed moving expenses to be determined by a qualified staff person for small, uncomplicated personal property moves, commonly called a ''moving cost finding'' or ''a finding.'' Persons displaced from their dwellings can elect to receive reimbursement for moving their personal property by use of a streamlined process that does not require commercial move estimates or receipts documenting moving costs. The Fixed Residential Moving Cost Schedule allows an Agency to determine, document, and establish moving cost eligibility based on the number of rooms of furniture being moved. The FHWA is considering a similar tool for nonresidential moves. A business move cost schedule would conceptually be established by regulation and would allow an SDOT to determine eligibility for reimbursement based on a predetermined metric such as number of rooms or number of items. If a non-residential moving cost schedule were allowed by regulation, Agencies would no longer need to document costs based on moving estimates or receipted bills.

The FHWA would like comments about move cost findings and development of a non-residential moving cost schedule, and whether they should be considered for incorporation in a final rule. Specifically, FHWA would like to know if any Agencies use a similar process for their programs and projects which are not subject to the requirements of the Uniform Act; whether that process has produced administrative cost savings; and, whether the process has been found satisfactory by displaced persons relocated by the Agency.

Section 24.301(e) Personal Property Only

The FHWA proposes to modify appendix A, *Section 24.301(e),* to provide Agencies with additional flexibility for use in residential moves where the only personal property to be moved is located outside of the dwelling. The FHWA recognizes that in some instances the costs of obtaining moving bids for moving personal property located outside of the dwelling may exceed the cost of the actual move. The FHWA proposes to allow a payment for moves of residential personal property located outside of the dwelling to be based on the ''additional room'' category of the Fixed Residential Move Cost Schedule. We also propose to include the link to the Schedule on the FHWA website in this appendix.

Section 24.301(g)(3) Disconnecting, Dismantling, Removing, Reassembling, and Reinstalling Relocated Household Appliances and Other Personal Pproperty

The FHWA proposes to add a clarification in the appendix of this paragraph to address questions received about the eligibility of certain costs to build or rehabilitate structures as a reimbursable expense. Generally, costs to construct, rehabilitate, or reconstruct are capital expenditures and are ineligible for reimbursement. In instances where these costs may be required, a waiver of regulation by the Federal funding Agency must be obtained.

Section 24.301(g)(11) Eligible Actual Moving Expenses—License, Permit, Fees

The FHWA proposes to add ''actual, reasonable, and necessary'' before the words ''license, permit, fees or certification'' and ''farms or non-profits'' and after ''business'' in this paragraph. The FHWA believes that each business, farm, or non-profit move is unique due to varying local, State, and Federal requirements and requires a careful review of the facts in order to determine whether a permit or fee should be reimbursable for a specific move. The FHWA also proposes to clarify that the permit or fees allowed under this paragraph are for those necessary to operate a business, farm, or non-profit by adding ''to operate a business, farm, or non-profit'' after ''required'' in the first sentence of this paragraph. The proposed change would clarify that permit fees associated with construction are not included as an actual moving expense. In most instances, reimbursing for building a new structure at the replacement location is not a permissible actual moving cost expense. Consequently, the cost of a permit for new construction in almost all instances is not an eligible expense under this part. A new construction permit for repairs or improvements to the replacement property or modification to accommodate the business, farm, or non-profit operation or make the replacement structure suitable for conducting the business, farm, or non-profit may, however, be eligible for reimbursement if determined to be reasonable and necessary under *§ 24.304 Reestablishment expenses* or if required by local law, code, or ordinances.

Section 24.301(g)(13) Re-Lettering Signs and Replacing Sationary on Hand

Currently, the regulation specifies that re-lettering signs and replacing stationery made obsolete at the time of the displacement are eligible moving expenses. The FHWA proposes to modify this paragraph to recognize that many businesses use media other than printed media by adding the phrase ''and making updates to other media.'' We propose making a reference to a new item in appendix A, *Section 24.301(g)(13),* which includes examples of other potentially reimbursable costs for other media such as DVDs or CDs and modification of websites to update contact and location information made necessary because of the move. This proposed change would allow Agencies to determine if expenses incurred to update media on hand, such as DVDs,

[8] *https://www.fhwa.dot.gov/real_estate/uniform_act/relocation/illegaqa.cfm*

CDs, or updating a website to reflect information on the new location of the business, are actual, reasonable, and necessary expenses which would be eligible under this paragraph. The FHWA intends that the compensation would be limited to costs to reproduce the number of DVDs and CDs on hand at the time of displacement, and, in the case of a website update, only those costs necessary to edit and modify the location information.

Section 24.301(g)(14)(i)–(ii) Actual Direct Loss of Tangible Personal Property

The FHWA has received a number of questions regarding the appropriate method for calculating the actual direct loss of tangible personal property and the meaning of ''value in place for continued use'' as used in these paragraphs. Some Agencies have reported that it can be difficult and very costly to find machinery and equipment (M&E) valuation experts who are able to determine value in place for continued use. Other Agencies have noted that considering the value in place for continued use ensures that payments made under provisions of these paragraphs are reasonable and that procuring the services of an M&E valuation expert is relatively easy. The FHWA believes that procuring the services of an M&E valuation expert is achievable but perhaps not always easily.

The FHWA proposes to modify these paragraphs to allow for a new two-part consideration of the actual direct loss of tangible personal property payment. First, FHWA proposes separate paragraphs for calculating payments for items currently in use and for items not currently in use. For items in use, reimbursement is based on the lesser of the cost to move and reinstall the item or fair market value in place of the item ''as is for continued use.'' The FHWA believes that by using ''the lesser of'' consideration, the eligibility determination provides options to both the Agency and the displaced person.

For items not currently in use, FHWA proposes to base the reimbursement on the cost to move the item as is, with no allowance for storage.

The FHWA also proposes to reorganize these paragraphs by proposing a separate subordinate paragraph for goods held for sale. When payment for property loss is claimed for goods held for sale, the fair market value shall be based on the cost of the goods to the business, not the potential selling prices. The FHWA proposes to add a reference to appendix A for this paragraph.

The FHWA also proposes to add a discussion to the end of appendix A about procuring M&E valuation expert services. The FHWA welcomes comments that identify such services and methods that may be used to direct the reader to reasonable methods of estimating value in place either by hiring an M&E appraiser or by estimating via websites available for M&E valuations. Finally, FHWA proposes updating regulatory references in the appendix for these paragraphs due to renumbering and reorganization of the regulation section.

Section 24.301(g)(17)(i)–(ii) Searching for a Replacement Location

The FHWA's Business Relocation Assistance Retrospective Study [9] reported that businesses incur searching expenses that routinely exceed the current regulatory limit of $2,500. The report recommended increasing the limit on searching expenses to $5,000 and lessening the burden of documentation. The FHWA proposes to increase searching expenses' eligibility from $2,500 to $5,000. The FHWA believes that in some instances requiring documentation for all searching expenses can be administratively burdensome to both the Agency and the displaced person. As such, FHWA proposes to add a new provision at § 24.301(g)(17)(ii) of this regulation that would provide Federal Agencies with the option to allow, on a project or program wide basis, a one-time alternative searching payment of up to $1,000 with little or no documentation. The FHWA believes that the potential savings in administrative costs offset the possibility of fraud, waste, and abuse. The FHWA also proposes to modify the appendix for these paragraphs by striking $2,500 and inserting $5,000 and by proposing new flexibility by allowing one time alternative searching payments of up to $1,000 with little or no documentation.

The FHWA also proposes to incorporate a frequently asked question into the appendix to clarify that search expenses may be incurred anytime the business anticipates it may be displaced, including prior to project authorization or the initiation of negotiations. However, such expenses should not be reimbursed until the business has received the notice, required in § 24.203(b), and only after the Agency has determined such costs to be actual, reasonable, and necessary.

[9] *https://www.fhwa.dot.gov/real_estate/publications/business_relocation_assistance/final_report/page06.cfm.*

Section 24.301(g)(17)(i)(F) Searching for a Replacement Location

The FHWA proposes to change this paragraph to allow expenses to include attorney's fees. The FHWA recognizes that displaced business owners may incur actual, reasonable, and necessary costs for either time spent or fees paid for services necessary to determine the adequacy of a potential replacement property. These costs may include those necessary to determine appropriate zoning and resolve other issues during a search for a replacement location. Several State Agencies have reasoned that in a number of instances having attorneys negotiate for the purchase of replacement sites could be an actual, reasonable, and necessary expense. The FHWA agrees that attorney's fees for negotiating a purchase can be considered a reasonable expense under this part. The FHWA also proposes to strike ''time spent'' and insert ''expenses'' negotiating the purchase of a replacement site.

The FHWA is proposing to amend the appendix for this paragraph to clarify that attorney's fees could be considered eligible as a searching expense. The FHWA also believes that because the fees are reimbursed at the Agency's discretion based on the actual, reasonable, and necessary test, the potential for waste, fraud, and abuse is manageable.

Section 24.301(h)(13) Ineligible Moving and Related Expenses

State DOTs have asked about the eligibility of costs to make cosmetic alterations or improvements to replacement dwellings, such as painting, fitting draperies, and replacing carpet or flooring. The FHWA believes that expenses for cosmetic changes to a dwelling are not moving costs which are reimbursable under the Uniform Act. This proposed change is not intended to prohibit alterations to a dwelling to make it accessible and free of barriers for ingress, egress, or use as required under the definition of a *DSS dwelling,* for a displaced person with a disability at § 24.2(a).

Section 24.302 Fixed Payment for Moving Expenses-Residential Moves

Persons displaced from a seasonal residence or dormitory style room may receive a fixed moving cost payment as an alternative to a payment for actual moving and related expenses. A number of questions have been raised about the appropriate uses of the moving cost schedule, including whether storage can be included as part of a fixed cost move and what the allowance for storage can

include. The FHWA proposes to add language to the appendix to clarify that if an Agency determines that storage is an actual, reasonable, and necessary expense in conjunction with this schedule, payment may be paid in accordance with § 24.301(g)(4) for a period not to exceed 12 months. The FHWA also proposes to revise language in appendix A, *Section 24.302,* to clarify the applicability of the Fixed Residential Move Cost Schedule (Schedule) to seasonal residents and temporary moves from a dwelling and to add a reference to the revised appendix item.

The FHWA proposes to add a new paragraph to this section to allow for actual reasonable and necessary storage. This proposed addition requires that the Agency notify the displaced person in writing that the Fixed Residential Move Cost Schedule is only for one move. In instances where storage was approved, only the costs to move the personal property from the displacement location to storage would be reimbursable. The FHWA believes that in most cases the use of a fixed cost move is meant to be a one-time uncomplicated move, and if storage is necessary, it would be in the displaced person's interest to use a commercial move to ensure that all costs related to moving and storage are reimbursed.

Section 24.303(a) Related Non-Residential Eligible Expenses

The FHWA has received a number of questions regarding the meaning of ''nearby utilities'' and whether ''nearby'' allows for reimbursement for certain utility service modifications and reconnection costs. In general, there has been confusion about whether ''nearby'' meant from the property line or some other defined point. The intent of this paragraph was to recognize that relocating a business may require some utility service modifications and reconnection costs. ''Nearby'' has sometimes been interpreted to mean anywhere from several feet to several miles away. The FHWA proposes to strike ''nearby'' and ''right-of-way'' and add ''from the replacement site's property line.'' The FHWA believes that the proposed changes will more clearly and accurately indicate the kinds of expenses that are eligible under this part. The FHWA proposes adding a new appendix item for this paragraph that includes examples to more clearly describe eligible costs. The FHWA also proposes to add a reference to the new appendix A, *Section 24.303(a),* to the end of this paragraph.

Section 24.303(c) Related Nonresidential Eligible Expenses—Impact Fees or One-Time Assessments

Impact fees or one-time assessment for anticipated heavy utility usage are eligible expenses. The FHWA is proposing to clarify that ''impact fees'' are only related to anticipated ''heavy utility usage'' at the replacement location. Generally, the terms ''heavy utility usage'' and impact fees recognize costs associated with utility usage including water, sewer, gas, and electric. Impact fees associated with major infrastructure construction, such as adding a lane for additional traffic capacity or other similar required infrastructure improvements, fire stations, regional drainage improvements, and parks are not eligible. The FHWA proposes changing the ''or'' before ''one time assessments'' to ''and.'' The FHWA believes this change, a subsequent new appendix A, *Section 24.303(c),* and a reference to it in the regulation will adequately respond to the questions about correctly interpreting and applying this benefit.

Section 24.304 Reestablishment Expenses—Non-Residential Moves

Section 1521(a)(1) of MAP–21 amends Section 202 of the Uniform Act by raising the statutory limit to $25,000. The FHWA proposes to revise this section to reflect the new statutory limit of $25,000.

Section 24.304(b) Ineligible Expenses

Several Federal Agencies and FHWA have received questions from their program partners regarding whether construction of a facility, where little or no structure currently exists, would be an eligible reestablishment expense. They have reasoned that § 24.401(a)(1), which allows for ''improvements to the real property,'' and § 24.401(a)(2), which allows for ''modifications to the replacement property,'' may be read to allow for new construction or substantially new construction where there is little or no structure.

The FHWA proposes to add a new § 24.304(b)(5) to clarify exclusion of costs to construct a new facility such as a new business building on a vacant replacement property or to substantially construct or reconstruct a building. These costs are considered capital expenditures and are generally ineligible for reimbursement as a reestablishment expense. The FHWA believes that building from the ground up or substantially reconstructing a building, or the rehabilitation or rebuilding of a shell, is beyond the intended scope of § 24.304(a). The FHWA recognizes that there may be special cases where substantial reconstruction or building from the ground up may be necessary. Agencies will need to consider each request for eligibility on a case-by-case basis and determine whether that eligibility should be requested. Agencies that determine that eligibility should be provided must request a waiver of § 24.304(b)(1) under the provisions of § 24.7 from the Federal Agency funding the project or program

The FHWA also proposes incorporating two current Frequently Asked Questions into a new appendix item with an example of when such a waiver is requested and discusses the costs that may be eligible for reimbursement.

Section 24.305 Fixed Payment for Moving Expenses-Nonresidential Moves, Paragraphs (a) Business, (c) Farm Operation, and (d) Nonprofit Organization

Section 1521(a)(2) of MAP–21 amends Section 202 of the Uniform Act by raising the statutory limit for a fixed payment for moving expenses-nonresidential moves to $40,000. The FHWA proposes to revise these three paragraphs to reflect the new statutory limit of $40,000.

Several Federal Agencies and some program partners have raised questions about whether a fixed payment for moving expenses in nonresidential moves prohibits other relocation assistance payments for moving and related expenses and reestablishment payments. The FHWA proposes to add clarifying language to ensure that the regulation is clearly understood to prohibit payments for any moving and related expenses or reestablishment payments when a displaced person elects to receive a fixed cost moving payment under this section of the regulation. The fixed payment option's purpose is to provide a displaced person with an alternative method of receiving reimbursement for all costs associated with a move. This alternative fixed payment is a one-time payment that exhausts and eliminates other eligibilities and payments for any moving and related expenses (including actual direct loss of tangible personal property and searching) or reestablishment payments.

The FHWA also proposes a new appendix item for these parts to further clarify that this fixed payment represents a one-time alternative for businesses, farms, and non-profits.

Section 24.305(e) Average Annual Net Earnings

Practitioners have asked FHWA about the requirement that a business must have been in operation for at least 2 full years to qualify for the fixed payment based on the average annual net earnings and what to do in instances where the business was not in operation for two full years. The FHWA proposes to add a reference in this paragraph to a revised appendix A, *Section 24.305(e).* The revisions clarify that a business must only contribute materially to the income of the displaced person for a period of time during the 2 taxable years prior to displacement but does not have to be in existence for 2 full years prior to displacement in order to be eligible for this benefit. The proposed new appendix item also provides sample calculations of benefits when a business was in operation for less than 1 year, more than 1 year but not 2 full years, and when a business only operates seasonally. We propose that the seasonal net income be considered the entire income for that year when making the payment calculation. The appendix also restates, as currently provided for in the regulation, that average annual net earnings may be based upon a different period of time that an Agency determines to be more equitable. The FHWA believes that the combination of the proposed new item in appendix A and the specific examples of calculations will ensure that businesses that contribute materially, but are in operation less than 2 years prior to displacement, will have their annual net earnings correctly determined.

Section 24.306(a) Discretionary Utility Relocation Payments

The FHWA proposes to revise the reference to § 24.2(a), *Utility facility.*

Subpart E—Replacement Housing Payments

Section 24.401 Replacement Housing Payment for 90-Day Homeowner-Occupants

Section 1521(b)(2) of MAP–21 amends Section 203(a)(1) of the Uniform Act by reducing the number of days a person must have owned and occupied a displacement dwelling from 180 days to 90 days in order to be eligible for a replacement housing payment. The FHWA proposes to modify the heading for § 24.401 and paragraphs (a) introductory text and (a)(1) and the appendix entries for these parts by deleting ''180 days'' and inserting ''90 days'' in each place it appears.

Section 24.401(b) Amount of Payment

Section 1521(b)(1) of MAP–21 amends Section 203(a)(1) of the Uniform Act by raising the statutory limit for replacement housing payments to $31,000. The FHWA proposes to modify this section by deleting $22,500 and inserting $31,000 in each place it appears.

Section 24.401(d) Introductory Text Through (d)(1) Increased Mortgage Interest Costs

The FHWA is not proposing a change in this section but believes it is important to note that MAP–21 did not change the requirement that a lien must have been in place for 180 days prior to the initiation of negotiations in order to be considered a valid lien and to be eligible for an increased mortgage interest cost payment under this part. Prior to MAP–21, the eligibility requirements for occupancy of a displacement dwelling and for a valid lien were both 180 days prior to the initiation of negotiations.

The FHWA proposes to modify the appendix item for § 24.401(d) to improve clarity by striking ''and that the person must obtain a mortgage of at least the same amount as the old mortgage and for at least the same term in order to receive the full amount of this payment'' from the sentence after the sample computation. This does not necessarily occur often in practice since a displaced person may obtain a lesser mortgage amount or term on their replacement dwelling. The rest of the sentence remains to inform the displaced person of the approximate amount of the payment and interest rate and points used to calculate the payment.

The FHWA also proposes to add a link in the appendix to increased interest cost calculators available on its website.

Section 24.401(e) HECM

The FHWA proposes to add a new definition, paragraph, and appendix item to address HECM (also known as reverse mortgages). Although the actual number of HECM type mortgages is still relatively low in comparison to all types of mortgages, FHWA believes that this may change in the future due in part to the number of aging homeowners in the marketplace and also because the marketplace and marketing practices for HECMs are evolving and growing.

Since these mortgages did not exist when the Uniform Act was enacted, their unique and particular financial construction was not accounted for in the development of relocation assistance benefits. Because there are unknown factors in calculating exact costs to replace a HECM, the services of a mortgage broker are required. The FHWA believes that there is ample authority in the Uniform Act, its legislative history, and implementing regulations to support the strategies proposed in this NPRM for addressing displaced persons with HECMs.

We have incorporated in the NPRM information from a 2013 Study of Reverse Mortgages in Relocation Assistance conducted by FHWA. These mortgages often have unique terms. We are proposing that every reasonable attempt should be made to make available a replacement HECM with similar terms. The FHWA is also proposing that the displaced homeowner is eligible for costs associated with origination of a replacement HECM, such as mortgage insurance, origination fee, and other incidental expenses, in accordance with § 24.401(f).

Our research has revealed that the cost of replacing a HECM can be substantial, especially when the owner has little or no equity left and their equity is being dispersed as term or tenure payments. The FHWA is also proposing options to replace the HECM with a mortgage with terms similar to the displacement HECM loan or the use of other methods such as a life estate for securing a dwelling for the person's remaining lifetime. In cases where there is a tenure or term payment, FHWA has developed a simple online calculator to estimate the cost to purchase a replacement HECM. However, the exact payment required to purchase a replacement HECM includes information and calculations which are proprietary to HECM mortgage brokerages. The FHWA believes the use of a calculator which provides an estimate will serve to inform the Agency and displaced person of approximate eligibility and a method for determining whether HECM replacement costs are actual, reasonable, and necessary.

The new item in appendix A presents the various HECM terms that can be encountered with solutions for Agencies to consider. It also provides a link to the FHWA online calculator to estimate the eligibility and costs to replace the HECM. This calculator uses basic information readily available to an Agency to calculate this estimated payment. It only requires the value of the acquired dwelling, existing balance of the displacement HECM, and price of the selected comparable or actual replacement dwelling. Next, it calculates an estimate of the remaining equity on the displacement HECM, the

initial principal limit of the replacement HECM (current HUD rules require 60 percent minimum equity in the dwelling be available at the time of purchase of the HECM) and funds needed to purchase a replacement HECM. Then, it subtracts the remaining equity and price differential payment from the total funds needed to arrive at the estimated HECM supplemental payment eligibility.

Section 24.401(f) Rental Assistance Payment

This paragraph has been re-lettered (g) due to the insertion of the new § 24.401(e) on HECMs. Section 1521(c)(1) of MAP–21 amends Section 204(a) of the Uniform Act by increasing the statutory limit for rental assistance payments to $7,200. Similarly, section 1521(b)(2) of MAP–21 also amends Section 203(a)(1) of the Uniform Act by reducing the number of days a person must have owned and occupied an acquired dwelling in order to be eligible for a rental assistance payment from 180 days to 90 days. The FHWA proposes to modify this paragraph and the appendix to reflect both changes.

Section 24.402 Replacement Housing Payments for 90-Day Tenants and Certain Others

The FHWA proposes to strike ''90-day occupants,'' which included tenants or owner-occupants, from this section's current title and replace it with ''tenants and certain others.'' The FHWA is proposing this change to be consistent with the heading ''Tenants and certain others'' contained in both the Uniform Relocation Assistance and Real Property Acquisition Polices Act as amended in 1987, and the statute Title 42, U.S.C. Chapter 61, section 4624—*Replacement housing for tenants and certain others.*

Section 24.402(a) Eligibility

Section 24.402 of the regulations sets out criteria for when 90-day tenants and certain others displaced from a dwelling are eligible for a payment for rental assistance or down payment assistance. Section 1521(b)(2) of MAP–21 amends Section 204(a) of the Uniform Act by increasing the statutory limit for replacement housing payment to tenants to $7,200. The FHWA proposes to update the amount listed in this paragraph accordingly.

Section 24.402(a)(2) Eligibility

The FHWA proposes to add ''the date he or she moves from the displacement dwelling'' to the end of § 24.402(a) and to delete the remainder of this paragraph. These changes are necessary because of changes to eligibility criteria for owners in Section 1521(a)(1) of MAP–21, which reduced the number of days a person must have owned and occupied a displacement dwelling in order to be eligible for a replacement housing payment from 180 days to 90 days. This change eliminates the need or requirement to discuss eligibilities for homeowners of more than 90 but less than 180 days. Consequently, FHWA is proposing to reorganize the section.

Section 24.402(b) Rental Assistance Payment

Section 1521(a)(1) of MAP–21 amends Section 204(a) of the Uniform Act by increasing the statutory limit for replacement housing payment to tenants to $7,200. The FHWA proposes to update the amount listed in this paragraph accordingly.

The FHWA also proposes to correct the web link to the Uniform Act Low Income Limits Survey, which currently points to an inactive website.

Section 24.402(b)(1)(i) Rental Assistance Payment

The FHWA has received some questions about calculating and developing a base monthly rental. Developing a base monthly rental requires information on costs of utilities. The question that arises is whether the allowance in § 24.402(b)(1)(i) of using the ''. . . estimated average monthly cost of utilities for a comparable replacement dwelling'' can be applied, as opposed to the actual utility costs, when determining base monthly rental of the displacement dwelling. The FHWA believes that Agencies should attempt to secure actual costs of utilities from the displaced person in order to calculate and determine base monthly rental, to the extent practicable. Should those costs not be available, the Agency should so document its file and then utilize an estimate to develop a base monthly rental at the displacement dwelling. The FHWA invites comments and suggestions as to what estimates may best approximate actual monthly utility costs and what additional guidance or support may be needed in meeting the requirements of this paragraph.

Section 24.402(b)(2) Rental Assistance Payments

The FHWA is proposing to revise the low income calculation example in the appendix by striking reference to ''(a)(14)'' and inserting to refer to the definition of ''household income'' in § 24.2(a).

Section 24.402(b)(3) Manner of Disbursement

The FHWA proposes to add the word ''replacement'' to housing in this paragraph to clarify the type of housing covered. The sentence states that the full amount of the rental assistance payment vests with a tenant regardless of the later condition or location of the replacement dwelling.

Section 24.402(c) Down Payment Assistance Payment

Section 204 of the Uniform Act sets criteria for when 90-day tenants and certain others displaced from a dwelling are eligible for a payment for rental assistance or down payment assistance. Section 1521(c)(1) of MAP–21 amends Section 204(c) of the Uniform Act by increasing the statutory limit for down payment assistance to $7,200. The FHWA proposes to update the amount listed in this paragraph and the appendix accordingly.

The FHWA also proposes to modify this paragraph by deleting ''180 days'' and inserting ''90 days'' in each place it appears in this paragraph and appendix. The FHWA also proposes to add clarifying language in the appendix to describe rental assistance payment eligibilities for a displaced homeowner who fails to meet the 90-day occupancy requirements.

Section 24.403(a)(1) Additional Rules Governing Replacement Housing Payments

Comparable replacement housing must be inspected whenever possible. The selected comparable replacement dwelling should be inspected with a walk through or physical inspection. Reliance on an exterior visual inspection of comparables, or examination and review of an MLS listing's details, does not, in most cases, constitute a full DSS inspection as required by the regulation and may not reveal deficiencies in a property that would render it not decent, safe, and sanitary.

The FHWA proposes to modify language in this paragraph to require that Agencies inform displaced persons in writing of the reason the full DSS inspection of the comparable replacement dwelling was not made and that, should a displaced person select one of the comparable dwellings as a replacement dwelling, a replacement housing payment cannot be made until a DSS inspection is made of that dwelling.

The FHWA also proposes to add a new item to appendix A, *Section 24.205(c)(2)(ii)(C),* explaining what

constitutes a DSS inspection and a further discussion of the requirement that an Agency must make full disclosure and explanation to the displaced person if the comparable replacement dwelling did not receive a full DSS inspection.

The FHWA also is proposing to change the sentence in the regulation ''if available, at least three comparable replacement dwellings shall be *examined*'' to ''shall be *considered.*'' The FHWA also proposes to add an appendix clarification at *Section 24.403(a)(1)* that the term ''examined'' does not necessarily equate to ''inspected'' for the payment computation.

Section 24.403(a)(3) Acquisition of a Portion of a Typical Residential Property

The FHWA has received questions regarding the term ''buildable lot,'' in particular regarding circumstances when a lot might not be buildable but the Agency determines it does have economic value to the owner and/or the market. The FHWA believes clarification of the term buildable lot is warranted and thus proposes to replace the phrase ''is a buildable lot'' with the phrase ''and the Agency determines that the remainder has economic value to the owner, which more accurately describes these remainders.

In the past, some Agencies, when a remainder had economic value to the owner or market, would allow a displaced person to decide to retain the ''buildable lot'' or remainder and would calculate a replacement housing eligibility based on only the portion of the property that the Agency was acquiring. This could cause a substantial increase in calculated eligibility or a windfall by virtue of the property owner electing to retain the remainder. The FHWA believes that it is more reasonable to allow Agencies the option to offer to purchase the remainder and to base the replacement housing eligibility on the offer for the entire parcel regardless of the owner's decision to sell or retain the remainder.

The FHWA also proposes to offer a sample calculation and to add language to appendix A, *Section 24.403(a)(3),* to explain that the purpose of this paragraph is to clarify when to apply this calculation method and how to correctly calculate relocation eligibility and payments. Also in appendix A, *Section 24.403(a)(3),* FHWA proposes to explain that if an Agency presents a written offer to acquire the whole parcel, the price differential portion of the replacement housing payment should be based upon the difference between the comparable replacement dwelling and the Agency's written offer to acquire the whole parcel. Under the proposed changes, property owners may elect to retain the remainder, but the decision to do so would not require a recalculation of relocation assistance eligibility.

Subpart F—Mobile Homes

In the 2005 rulemaking, FHWA reorganized the mobile home section to streamline and better describe the requirements for determining eligibility and calculating benefits for mobile home occupants. We continue to receive questions which point to an undue complexity in both determining eligibility and calculating benefits in this subpart. The FHWA believes that the majority of the questions arise because there is a two-part benefit determination process that considers the dwelling and the site the mobile home is on as independent eligibilities. Because they are independent eligibilities (for example, a displaced person could be a dwelling owner and a tenant on the land), the permutations and combinations of eligibilities and related policy questions about proper application of benefits are complex and unwieldy. The FHWA has several FAQs on the FHWA website [10] to address these issues but continues to receive questions about the determination and calculation of benefits.

During the development of this NPRM, FHWA conducted several meetings with its Federal Agency partners to identify methods of restructuring and reorganizing Subpart F. Several proposed changes were considered but ultimately not adopted. One method of clarifying mobile home occupant payment eligibility and computation would be based on the displaced person's ownership or rental of the mobile home dwelling (dwelling test). If the displaced person owns the mobile home, he or she would be considered an owner regardless of whether he or she owns or rents the site, and, as a dwelling owner, would not be eligible for a utility payment. If the displaced person is a tenant in the mobile home, he or she would be a tenant regardless of whether he or she owns or rents the site, and, as such, would be eligible for a utility payment. Ultimately this approach was not included in this NPRM. Some Agencies were concerned that the dwelling test would reduce overall benefits available to displaced mobile home occupants under the current two-part eligibility calculation method and specifically to those who are displaced low income mobile home occupants.

The FHWA would like comments and suggestions on methods to reorganize and streamline the calculation and determination of benefits for displaced mobile home occupants, or whether further changes are warranted. The FHWA is interested in comments on whether the dwelling test would streamline and improve the process of calculating and determining benefits for a mobile home occupant, why and how would benefits be reduced using the dwelling test for mobile home occupants, examples of how and why the current regulation and method of benefit determinations work well, or have not worked well and implementation challenges which the current rule creates.

Section 24.502 Replacement Housing Payment for 90-Day Mobile Homeowner Displaced From a Mobile Home, and/or From the Acquired Mobile Home Site

Section 1521(b)(2) of MAP–21 amends Section 203(a)(1) of the Uniform Act by reducing the eligibility requirement from 180 days to 90 days the number of days a person must have owned and occupied a displacement dwelling in order to be eligible for a replacement housing payment. The FHWA proposes to update this paragraph accordingly.

Section 24.502(a) Eligibility

Section 1521(b)(1) of MAP–21 amends Section 203(a)(1) of the Uniform Act by raising the statutory limit for replacement housing payments to $31,000. The FHWA proposes to modify this paragraph by deleting $22,500 and inserting $31,000 in each place it appears.

Section 24.502(b) Replacement Housing Payment Computation for a 90-Day Owner That Is Displaced From a Mobile Home

Section 1521(a)(1) of MAP–21 amends Section 203(a)(1) of the Uniform Act by reducing the number of days a homeowner-occupant must have owned and occupied a displacement dwelling in order to be eligible for a replacement housing payment from 180 days to 90 days. The FHWA proposes to update this paragraph accordingly.

Section 24.502(c) Rental Assistance Payment for a 90-Day Owner-Occupant Displaced From a Leased or Rented Mobile Home Site

Section 1521(b)(2) of MAP–21 amends Section 203(a)(1) of the Uniform Act by reducing the eligibility requirement for the number of days a person must have owned and occupied a displacement

[10] *https://www.fhwa.dot.gov/real_estate/.*

dwelling in order to be eligible for a replacement housing payment from 180 days to 90 days. The FHWA proposes to update this section and the appendix accordingly.

This paragraph of the regulation was not substantially changed except to clarify that the base monthly rent for the displacement site shall be the actual cost paid to the landlord for the site. If the tenant paid little or no rent, the new regulation states that the market rent is to be used, unless it would result in a hardship to the displaced person.

Section 24.502(d) Owner-Occupant Not Displaced From a Mobile Home

This paragraph was not substantially changed. The FHWA continues to believe that if a mobile home is personal property and may be relocated, but the owner elects not to move it, that the owner is not entitled to a replacement housing payment (RHP) for the purchase of a replacement mobile home, but that they are entitled to moving costs.

Section 24.503 Replacement Housing Payment for 90-Day Mobile Home Tenants and Certain Others

Section 1521(c)(1) of MAP–21 amends Section 204(a) of the Uniform Act by increasing the statutory limit for replacement housing payment to tenants to $7,200. The FHWA proposes to update this section accordingly.

The FHWA also proposes to change this section heading from ''90-day mobile home occupants,'' which included tenants or owner-occupants, to ''tenants and certain others'' since all possible entitlements for 90-day owner-occupants are now addressed in § 24.401. This section now addresses only 90-day tenants ''and certain others'' to cover displaced persons under § 24.404, housing of last resort. The FHWA proposes this change because the heading ''Tenants and certain others'' is contained in the statutory language. Those persons may not meet length of occupancy requirements, or a project may not be able to proceed on a timely basis, because replacement rental dwellings are not available within the monetary limits for those owners and tenants, as specified in §§ 24.401–24.402. When these situations arise, the Agency provides additional or alternative assistance under the section housing of last resort, which then may include a calculation of a replacement rental assistance payment covering 42 months.

A displaced person may claim a rental assistance payment to apply it to the purchase of a DSS conventional dwelling or mobile home. The FHWA also proposes to add language to appendix A, *Section 24.503,* to clarify that the combined mobile home and site replacement housing payment cannot exceed the cost of the actual replacement dwelling or site.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA may also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period and after DOT has had the opportunity to review the comments submitted.

The FHWA filed a redline version of 49 CFR part 24 in the docket to show all changes to the regulation text and facilitate public review and comment.

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 Regulatory Policies and Procedures

Executive Orders (E.O.) 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This proposed rule is a significant regulatory action within the meaning of E.O. 12866 and DOT's regulatory policies and procedures (44 FR 11032). This action complies with EOs 12866, 13563, and 13771 to improve regulation.

A more detailed discussion of the economic analysis associated with this rulemaking can be found in the Regulatory Impact Analysis, which is available in the docket. The FHWA invites comments on its cost estimates and discussion of benefits. Many of the changes that this rule proposes are requirements mandated by MAP–21, which increased the statutory limits of relocation residential and business benefit eligibility and reduced the length of occupancy requirements prior to initiation of negotiations for homeowners from 180 days to 90 days. This NPRM also proposes to streamline program requirements and carry out a comprehensive update of 49 CFR part 24 to better align the language of the regulations with current program needs and best practices. This proposed rule would also address changes identified by the public in response to the DOT's initiative on implementation of January 18, 2011, E.O. 13563, Improving Regulation and Regulatory Review in **Federal Register** Notice 82 FR 45750 published on October 2, 2017.[11] The FHWA believes that the proposed streamlining and updating in this NPRM will result in a reduction of Federal requirements and will afford the States and Federal Agencies subject to the Uniform Act new flexibilities to more efficiently acquire real property and relocate displaced persons.

The FHWA has had an ongoing dialog with stakeholders and has developed the proposed rule in a manner that balances stakeholder concerns and practical implementation issues to allow SDOTs and Federal Agency recipients to utilize the new flexibilities while minimizing their effects on existing requirements and procedures.

The Uniform Act provides important protections and assistance for people affected by federally-funded projects. Congress passed the law to safeguard people whose real property is acquired or who move from their homes, businesses, or farms as a result of projects receiving Federal funds. The most recent Federal act authorizing surface transportation spending modified the statutory payment levels for which displaced persons may be eligible under the Uniform Act's implementing regulations, necessitating the current proposed rulemaking. In addition, FHWA is proposing to make changes to wording and section organization to better reflect the Federal experience implementing Uniform Act programs. At the Federal level, 18 departments and Agencies are subject to the Uniform Act and their input is reflected in the proposed changes.

The costs of the proposed rule for all Uniform Act Agencies over a 10-year analysis period from 2019 to 2028 are estimated to be: $1.8 million when discounted at 7 percent and $2.0 million when discounted at 3 percent. The bulk of the costs are related to updating program materials to reflect the changes in the regulation.

The benefits of the proposed rule primarily relate to improved equity and fairness to entities that are displaced

[11] *https://www.federalregister.gov/documents/2017/10/02/2017-21101/notification-of-regulatory-review.*

from their properties or that move as a result of projects receiving Federal funds. For example, the proposed rule raises the statutory maximums for payments to displaced businesses to assist with the reestablishment of the business. There is strong evidence that businesses experience reestablishment costs well above the current maximum amount.[12] Raising the maximum payment levels, as required by statute, will compensate those businesses more fairly and equitably for the negative impacts they experience as a result of a Federal or federally-assisted project. However, the fairness and equity benefits of the proposed rule cannot be quantified or monetized. The higher level of payments may also contribute to more businesses being able to successfully reestablish after displacement.

The proposed rule contains changes, such as a requirement for annual reporting, that can be expected to improve transparency, and, therefore, oversight of the program. Again, that benefit cannot be quantified or monetized. The proposed rule changes also provide clarity on how to implement the Uniform Act and offer Agencies additional options for streamlining the administration of their Uniform Act programs. These benefits have not been quantified. Some minor administrative cost savings have been estimated. The FHWA was the only Agency that had a detailed dataset available for its Uniform Act program, and, therefore, only the administrative cost savings to FHWA have been estimated here. Based on communications with other Uniform Act Agencies, FHWA analysts believe that FHWA has the largest Uniform Act program; however, other Agencies have sizable programs, as well. Therefore, the total cost savings across all Agencies will likely be larger.

The table below offers a summary of the costs and benefits of the proposed rule over the 10-year analysis period. Given that the benefits of the rule related to equity and fairness have not been quantified, it would be misleading to report a calculation of net benefits for this proposed rule. Nonetheless, the benefits related to equity and fairness are believed to be sufficient to justify the modest cost of the rule.

SUMMARY OF COSTS AND BENEFITS FOR ANALYSIS PERIOD 2019–2028

Item	Discounted 7%	Discounted 3%	Annualized 7%	Annualized 3%
Costs:				
Home Equity Conversion Mortgage (HECM)	$11,947	$15,073	$1,701	$1,767.
Revising Program Material	1,787,731	1,947,651	254,533	228,324.
Federal Agency Reporting Requirement	166,290	209,804	23,676	24,595.
Revising Max. RHP/RAP (FHWA Cost Savings)	(160,025)	(204,380)	(22,784)	(23,960).
Homeowner 90 Eligibility (FHWA Cost Savings)	(7,040)	(8,882)	(1,002)	(1,041).
Appraisal Waivers	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Third Tier of Waiver Valuations	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Use of Single Agents	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Inspection of Comparable Housing	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Clarity & Streamlining	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Total Costs *	1,798,903	1,959,266	256,123	229,686.
Benefits:				
Equity & Fairness	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Program Oversight	Not Quantified	Not Quantified	Not Quantified	Not Quantified.

* Totals may not match sums due to rounding.

The proposed rule would result in additional payments made to displaced businesses. However, these expenditures are reimbursements for costs that these businesses incur regardless of the proposed rule and are therefore considered transfers in the context of a benefit-cost analysis. The table below presents the estimated amount of these transfers for FHWA's Uniform Act program. The FHWA was the only Agency that provided data upon which to base estimates. Therefore, the magnitude of the change in transfers for all Federal Agencies may be larger than is reported here.

TRANSFERS TO DISPLACED PERSONS FOR ANALYSIS PERIOD 2019–2028

Item	Discounted 7%	Discounted 3%	Annualized 7%	Annualized 3%
Residents:				
Revising Replacement Housing and Rental Assistance Payments.	$1,792,926	$2,272,671	$255,272	$266,426.
Homeowner 90-day Eligibility	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Home Equity Conversion Mortgages	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Non-residential displaced persons:				
Reimbursement for Updating Other Media	Not Quantified	Not Quantified	Not Quantified	Not Quantified.
Search Expenses	8,117,037	10,285,293	1,164,226	1,249,723.
Re-Establishment Expenses	82,335,367	104,271,810	11,722,704	12,223,837.
Fixed Payments	22,649,659	28,709,348	3,224,802	3,365,611.

[12] The FHWA and other Agencies have conducted studies over the years which conclude that benefit levels are inadequate. Examples include FHWA's business relocation retrospective study: *https://www.fhwa.dot.gov/real_estate/publications/business_relocation_assistance/index.cfm* and GAO report GAO–07–28GA, Eminent Domain, *https://www.gao.gov/assets/260/253929.pdf.*

TRANSFERS TO DISPLACED PERSONS FOR ANALYSIS PERIOD 2019–2028—Continued

Item	Discounted 7%	Discounted 3%	Annualized 7%	Annualized 3%
Total	114,954,990	145,539,123	16,357,004	17,061,625.

* Totals may not match sums due to rounding.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 60l–612), FHWA has evaluated the effects of this proposed rule on small entities and anticipates that this action would not have a significant economic impact on a substantial number of small entities, which includes SDOTs, Local Public Agencies, other State governmental Agencies or recipients and subrecipients of Federal Agencies subject to this regulation. This action proposes to update the government-wide regulation that provides assistance for persons, including small businesses, displaced by government acquisition of real property. One of the reasons for proposing the update is to increase assistance for the small number displaced small businesses impacted by the Uniform Relocation Act. We anticipate this proposal would have a positive impact on those relatively few small businesses that are affected by government acquisition of real property. We anticipate the number of small businesses potentially impacted at all by this proposed rule to be small. For example, between 2013 to 2017 FHWA had an average of 1,511 non-residential relocations annually. The FHWA does not have the data to determine how many of the 1,511 non-residential moves were small businesses, but even if one were to assume each of those moves impacted a small business, that impact would account for .005 percent of all U.S. small businesses.[13] Financial impacts on local governments are mitigated by the fact that any increased costs would accrue only on federally-assisted programs, which would include participation of Federal funds. For these reasons, FHWA certifies that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $155 million or more in any 1 year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA would evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. 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.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires Agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed action has been analyzed in accordance with the principles and criteria contained in E.O. 13132, and FHWA has preliminarily determined that this proposed action would not warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed action would not preempt any State law or State regulation or affect any State's ability to discharge traditional State governmental functions.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under E.O. 13175 and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on tribal governments; and, would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal Agencies must obtain approval from the OMB for collections of information they conduct, sponsor, or require through regulations. The PRA applies to Federal Agencies' collections of information imposed on 10 or more persons. ''Persons'' include a State, territorial, tribal, or local government, or branch thereof, or their political subdivisions.

This NPRM would call for a collection of information under the PRA. As defined in 5 CFR 1320.3(c), ''collection of information'' comprised of reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. This action contains amendments to the existing information collection requirements previously approved under OMB Control Number 2125–0586. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow and are outlined in full in the RIA contained in the docket for this rulemaking.

The Uniform Act provides important protections and assistance for people affected by federally funded projects. Congress passed the law to safeguard people whose real property is acquired or who move from their homes,

[13] The United States Small Business Administration's 2018 Small Business Profile estimates 30.2 million small businesses in the United States.

businesses, nonprofit organizations, or farms as a result of projects receiving Federal financial assistance. The Moving Ahead for Progress in the 21st Century Act (MAP–21) modified the statutory payment levels for which displaced persons may be eligible under the Uniform Act's implementing regulations, necessitating the current proposed rulemaking. Additionally, FHWA is proposing to make changes to wording and section organization to better reflect the Federal experience implementing Uniform Act programs, since the last comprehensive rulemaking for 49 CFR part 24 occurred in 2005.

This proposed requirement would amend an existing collection of information by increasing the number of instances requiring information to be collected under OMB control number 2125–0586. The burden hours reserved under these requirements are not sufficient to cover the additional in-depth updates resulting from regulatory revisions; thereby necessitating this request for additional burden hours. The hours requested are in addition to the hours already set aside.

Agencies conducting a program or project under the Uniform Act must carry out their legal responsibilities to affected property owners and displaced persons. Recipients and subrecipients must collect information in order to determine, document and provide Uniform Act benefits and assistance. Federal agencies are also required to develop and provide to the lead agency, FHWA, an annual summary report the describes the Uniform Act activities conducted by the Federal agency and their funding recipients.

The FHWA does not have available to it information which would allow for the calculation of burden hours for each Federal agencies administration and oversight of the government-wide program. Each Federal agency will separately develop information collection requests for their program's administration and oversight. The FHWA has developed a separate regulatory impact analysis which documents the costs for its program administration and oversight. That analysis is included as part of the 49 CFR part 24 NPRM publication.

The FHWA can estimate the one-time government-wide cost of implementing the new provisions of this rule to be 37,800 hours. This estimate includes costs and benefits for the necessary updates and revisions to program materials including operations manuals. The FHWA bases this estimate on approximately 168 respondent's efforts to perform the necessary updates and revisions. The estimated burden hours are for a one-time update and result from the publication of a final rule.

The FHWA is required to submit this proposed collection of information to OMB for review and approval and, accordingly, seeks public comments. Interested parties are invited to send comments regarding any aspect of these information collection requirements, including, but not limited to: (1) Whether the collection of information is necessary for the performance of the functions of the FHWA, including whether the information has practical utility; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collection of information; and (4) ways to minimize the collection burden without reducing the quality of the information collected.

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 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (the DOT Order), 91 FR 27534 (May 10, 2012) [14] require DOT Agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT Agencies to address compliance with E.O. 12898 and the DOT Order in all rulemaking activities. In addition, FHWA has issued additional documents relating to administration of E.O. 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (the FHWA Order).[15]

The FHWA has evaluated this proposed rule under the E.O., the DOT Order, and the FHWA Order. The FHWA has determined that the proposed regulations, if finalized, would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. The proposed regulations, if finalized, would establish procedures and requirements for agencies and others when acquiring, managing, and disposing of real property interests. The EJ principles, in the context of acquisition, management, and disposition of real property, should be considered during the planning and environmental review processes for the particular proposal. The FHWA will consider EJ when it makes a future funding or other approval decision on a project-level basis.

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

The FHWA does not anticipate that this proposed action would effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. This action proposes to update the government-wide regulation that provides assistance for persons displaced by government acquisition of real property. This action updates this regulation to reflect increases in benefit levels for displaced persons and to improve the Agencies' service to individuals and businesses affected by Federal or federally assisted projects.

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an environmental impact statement; those that normally require preparation of an environmental assessment; and; those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The proposed action is the adoption of regulations that provide the policies, procedures, and requirements for acquisition of real property interests for Federal and federally assisted projects. The proposed action has no potential for environmental impacts until the

[14] Available online at *www.fhwa.dot.gov/enviornment/environmental_justice/ej_at_dot/order_56102a/index.cfm.*

[15] Available online at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm.*

regulations, if adopted, are applied at the project level. The FHWA would have an obligation to evaluate the potential environmental impacts of such a future project-level action if the action constitutes a major Federal action under NEPA.

This proposed action qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and 771.117(c)(1) (activities that do not lead directly to construction). The FHWA has evaluated whether the proposed action would involve unusual circumstances or extraordinary circumstances and has determined that this proposed action would not involve such circumstances. As a result, FHWA finds that this proposed rulemaking would not result in significant impacts on the human environment.

Regulation Identification Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 24

Appraisal, Appraisal review, Just compensation, Real property acquisition, Relocation assistance, Reporting and recordkeeping requirements, Transportation, Waiver valuations.

Issued on November 19, 2019 under authority delegated in 49 CFR 1.85(d)(7):

Nicole R. Nason,

Administrator, Federal Highway Administration.

■ In consideration of the foregoing, FHWA proposes to revise title 49, Code of Federal Regulations, part 24 as follows:

PART 24—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

Subpart A—General

Sec.
24.1 Purpose.
24.2 Definitions and acronyms.
24.3 No duplication of payments.
24.4 Assurances, monitoring, and corrective action.
24.5 Manner of notices.
24.6 Administration of jointly-funded projects.
24.7 Federal Agency waiver of regulations in this part.
24.8 Compliance with other laws and regulations.
24.9 Recordkeeping and reports.
24.10 Appeals.
24.11 Adjustments of relocation benefits.

Subpart B—Real Property Acquisition

24.101 Applicability of acquisition requirements.
24.102 Basic acquisition policies.
24.103 Criteria for appraisals.
24.104 Review of appraisals.
24.105 Acquisition of tenant-owned improvements.
24.106 Expenses incidental to transfer of title to the Agency.
24.107 Certain litigation expenses.
24.108 Donations.

Subpart C—General Relocation Requirements

24.201 Purpose.
24.202 Applicability.
24.203 Relocation notices.
24.204 Availability of comparable replacement dwelling before displacement.
24.205 Relocation planning, advisory services, and coordination.
24.206 Eviction for cause.
24.207 General requirements—claims for relocation payments.
24.208 Aliens not lawfully present in the United States.
24.209 Relocation payments not considered as income.

Subpart D—Payments for Moving and Related Expenses

24.301 Payment for actual reasonable moving and related expenses.
24.302 Fixed payment for moving expenses—residential moves.
24.303 Related nonresidential eligible expenses.
24.304 Reestablishment expenses—nonresidential moves.
24.305 Fixed payment for moving expenses—nonresidential moves.
24.306 Discretionary utility relocation payments.

Subpart E—Replacement Housing Payments

24.401 Replacement housing payment for 90-day homeowner-occupants.
24.402 Replacement housing payment for 90-day tenants and certain others.
24.403 Additional rules governing replacement housing payments.
24.404 Replacement housing of last resort.

Subpart F—Mobile Homes

24.501 Applicability.
24.502 Replacement housing payment for a 90-day mobile homeowner displaced from mobile home.
24.503 Rental assistance payment for 90-day mobile home tenants and certain others.

Subpart G—Certification

24.601 Purpose.
24.602 Certification application.
24.603 Monitoring and corrective action.
Appendix A to Part 24—Additional Information
Appendix B to Part 24—Statistical Report Form

Authority: 42 U.S.C. 4601 *et seq.;* 49 CFR 1.85.

Subpart A—General

§ 24.1 Purpose.

The purpose of this part is to promulgate rules to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*) (Uniform Act), in accordance with the following objectives:

(a) To ensure that owners of real property to be acquired for Federal and federally assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally assisted land acquisition programs;

(b) To ensure that persons displaced as a direct result of Federal or federally assisted projects are treated fairly, consistently, and equitably so that such displaced persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and

(c) To ensure that Agencies implement the regulations in this part in a manner that is efficient and cost effective.

§ 24.2 Definitions and acronyms.

(a) *Definitions.* Unless otherwise noted, the following terms used in this part shall be understood as defined in this section:

Agency. The term *Agency* means any entity utilizing Federal funds or Federal financial assistance for a project or program that acquires real property or displaces a person.

(i) *Federal Agency.* The term *Federal Agency* means any department, Agency, or instrumentality in the executive branch of the United States Government, any wholly owned U.S. Government corporation, the Architect of the Capitol, the Federal Reserve Banks and branches thereof, and any person who has the authority to acquire property by eminent domain under Federal law.

(ii) *State Agency.* The term *State Agency* means any department, Agency or instrumentality of a State or of a political subdivision of a State, any department, Agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States, and any person who has the authority to acquire property by eminent domain under State law.

Alien not lawfully present in the United States. The phrase *alien not*

lawfully present in the United States means an alien who is not ''lawfully present'' in the United States.

(i) An alien present in the United States who has not been admitted or paroled into the United States pursuant to the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) and whose stay in the United States has not been authorized by the Secretary of Homeland; and

(ii) An alien who is present in the United States after the expiration of the period of stay authorized by the Secretary of Homeland Security or who otherwise violates the terms and conditions of admission, parole, or authorization to stay in the United States.

Appraisal. The term *appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

Business. The term *business* means any lawful activity, except a farm operation, that is conducted:

(i) Primarily for the purchase, sale, lease, and/or rental of personal and/or real property, and/or for the manufacture, processing, and/or marketing of products, commodities, and/or any other personal property;

(ii) Primarily for the sale of services to the public;

(iii) Primarily for outdoor advertising display purposes, when the display must be moved as a result of the project; or

(iv) By a nonprofit organization that has established its nonprofit status under applicable Federal or State law.

Citizen. The term *citizen* for purposes of this part includes both citizens of the United States and noncitizen nationals.

Comparable replacement dwelling. The term *comparable replacement dwelling* means a dwelling which is:

(i) Decent, safe, and sanitary as described in the definition of *decent, safe, and sanitary* in this paragraph (a);

(ii) Functionally equivalent to the displacement dwelling. The term *functionally equivalent* means that it performs the same function and provides the same utility. While a comparable replacement dwelling need not possess every feature of the displacement dwelling, the principal features must be present. Generally, functional equivalency is an objective standard, reflecting the range of purposes for which the various physical features of a dwelling may be used. However, in determining whether a replacement dwelling is functionally equivalent to the displacement dwelling, the Agency may consider reasonable trade-offs for specific features when the replacement unit is equal to or better than the displacement dwelling (*see* appendix A of this part, *Section 24.2(a) Comparable replacement dwelling*);

(iii) Adequate in size to accommodate the occupants;

(iv) In an area not subject to unreasonable adverse environmental conditions;

(v) In a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities and commercial and public facilities, and reasonably accessible to the person's place of employment;

(vi) On a site that is typical in size for residential development with normal site improvements, including customary landscaping. The site need not include special improvements such as outbuildings, swimming pools, or greenhouses. (*See also* § 24.403(a)(2));

(vii) Currently available to the displaced person on the private market except as provided in paragraph (ix) of this definition (*see* appendix A of this part, *Section 24.2(a) Comparable replacement dwelling*); and

(viii) Within the financial means of the displaced person:

(A) A replacement dwelling purchased by a homeowner in occupancy at the displacement dwelling for at least 90 days prior to initiation of negotiations (90-day homeowner) is considered to be within the homeowner's financial means if the homeowner will receive the full price differential as described in § 24.401(c), all increased mortgage interest costs as described at § 24.401(d) and all incidental expenses as described at § 24.401(e), plus any additional amount required to be paid under § 24.404.

(B) A replacement dwelling rented by an eligible displaced person is considered to be within his or her financial means if, after receiving rental assistance under this part, the person's monthly rent and estimated average monthly utility costs for the replacement dwelling do not exceed the person's base monthly rental for the displacement dwelling as described at § 24.402(b)(2).

(C) For a displaced person who is not eligible to receive a replacement housing payment because of the person's failure to meet length-of-occupancy requirements, comparable replacement rental housing is considered to be within the person's financial means if an Agency pays that portion of the monthly housing costs of a replacement dwelling which exceeds the person's base monthly rent for the displacement dwelling as described in § 24.402(b)(2). Such rental assistance must be paid under § 24.404, Replacement housing of last resort.

(ix) For a person receiving government housing assistance before displacement, a dwelling that may reflect similar government housing assistance. In such cases any requirements of the government housing assistance program relating to the size of the replacement dwelling shall apply. However, nothing in this part prohibits an Agency from offering, or precludes a person from accepting, assistance under a government housing program, even if the person did not receive similar assistance before displacement, subject to the eligibility requirements of the government housing assistance program. An Agency is obligated to inform the person of his or her options under this part. If a person accepts assistance under a government housing assistance program, the rules of that program governing the size of the dwelling apply, and the rental assistance payment under § 24.402 would be computed on the basis of the person's actual out-of-pocket cost for the replacement housing and associated utilities after the applicable government assistance has been applied. In determining comparability of housing under this part:

(A) A public housing unit may qualify as a comparable replacement dwelling only for a person displaced from a public housing unit.

(B) A privately owned dwelling with a housing program subsidy tied to the unit may qualify as a comparable replacement dwelling only for a person displaced from a similarly subsidized unit or public housing unit.

(C) A housing program subsidy that is paid to a person (not tied to the building), such as a HUD Section 8 Housing Voucher Program, may be reflected in an offer of a comparable replacement dwelling to a person receiving a similar subsidy or occupying a privately owned subsidized unit or public housing unit before displacement. (*See* appendix A of this part, *Section 24.2(a) Comparable replacement dwelling.*)

Contribute materially. The term *contribute materially* means that during the 2 taxable years prior to the taxable year in which displacement occurs, or during such other period as the Agency determines to be more equitable, a business or farm operation:

(i) Had average annual gross receipts of at least $5,000; or

(ii) Had average annual net earnings of at least $1,000; or

(iii) Contributed at least 33⅓ percent of the owner's or operator's average annual gross income from all sources.

(iv) If the application of the above criteria creates an inequity or hardship in any given case, the Agency may approve the use of other criteria as determined appropriate. (*See* appendix A of this part, *Section 24.305(e) Average annual net earnings of a business or farm operation.*)

Decent, safe, and sanitary dwelling. The term *decent, safe, and sanitary (DSS) dwelling* means a dwelling which meets the requirements of paragraphs (i) through (vii) of this definition or the most stringent of the local housing code, Federal Agency regulations, or the Agency's regulations or written policy. The DSS dwelling shall:

(i) Be structurally sound, weather tight, and in good repair;

(A) Many local housing and occupancy codes require the abatement of deteriorating paint, including lead-based paint and lead-based paint dust, in protecting the public health and safety. Where such standards exist, they must be honored;

(B) [Reserved]

(ii) Contain a safe electrical wiring system adequate for lighting and other devices;

(iii) Contain a heating system capable of sustaining a healthful temperature (of approximately 70 degrees) for a displaced person, except in those areas where local climatic conditions do not require such a system;

(iv) Be adequate in size with respect to the number of rooms and area of living space needed to accommodate the displaced person. The number of persons occupying each habitable room used for sleeping purposes shall not exceed that permitted by local housing codes or the more stringent the Federal funding Agency requirements. In addition, the Federal funding agency shall follow the requirements for separate bedrooms for children of the opposite gender included in local housing codes or in the absence of local codes, the policies of such Agencies;

(v) There shall be a separate, well lighted and ventilated bathroom that provides privacy to the user and contains a sink, bathtub or shower stall, and a toilet, all in good working order and properly connected to appropriate sources of water and to a sewage drainage system. When required by local code standards for residential occupancy, there shall be a kitchen area that contains a fully usable sink, properly connected to potable hot and cold water and to a sewage drainage system, and adequate space and utility service connections for a stove and refrigerator (*see* appendix A of this part, *Section 24.2(a),* definition of *DSS*);

(vi) Contains unobstructed egress to safe, open space at ground level; and

(vii) For a displaced person with a disability, be free of any barriers which would preclude reasonable ingress, egress, or use of the dwelling by such displaced person. (*See* appendix A of this part, *Section 24.2(a),* definition of *DSS.*)

Displaced person—(i) *General.* The term *displaced person* means, except as provided in paragraph (ii) of this definition, any person who moves from the real property or moves his or her personal property from the real property. (This includes a person who occupies the real property prior to its acquisition, but who does not meet the length of occupancy requirements of the Uniform Act as described at §§ 24.401(a) and 24.402(a)):

(A) As a direct result of a written notice of intent to acquire, rehabilitate, and/or demolish (*see* § 24.203(d)), the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project;

(B) As a direct result of rehabilitation or demolition for a project; or

(C) As a direct result of a written notice of intent to acquire, or the acquisition, rehabilitation or demolition of, in whole or in part, other real property on which the person conducts a business or farm operation, for a project. However, eligibility for such person under this paragraph (i)(C) applies only for purposes of obtaining relocation assistance advisory services under § 24.205(c), and moving expenses under § 24.301, § 24.302, or § 24.303.

(ii) *Persons required to move temporarily.* A person who is not required to relocate permanently as a direct result of a project. Such determination shall be made by the Agency in accordance with any requirement, policy, or guidance established by the Federal Agency funding the project (*see* appendix A of this part, *Section 24.2(a)*). At a minimum, for persons required to move on a temporary basis, Agencies must ensure that required services and assistance are provided (*see* § 24.202(a)).

(iii) *Persons not displaced.* The following is a nonexclusive listing of persons who do not qualify as displaced persons under this part:

(A) A person who moves before the initiation of negotiations (*see* § 24.403(d)), unless the Agency determines that the person was displaced as a direct result of the program or project;

(B) A person who initially enters into occupancy of the property after the date of its acquisition for the project;

(C) A person who has occupied the property for the purpose of obtaining assistance under the Uniform Act;

(D) An owner-occupant who moves as a result of an acquisition of real property as described in § 24.101(a)(2) or (b)(1) or (2), or as a result of the rehabilitation or demolition of the real property. (However, the displacement of a tenant as a direct result of any acquisition, rehabilitation or demolition for a Federal or federally assisted project is subject to this part.);

(E) A person whom the Agency determines is not displaced as a direct result of a partial acquisition;

(F) A person who, after receiving a notice of relocation eligibility (described at § 24.203(b)), is notified in writing that he or she will not be displaced for a project. Such written notification shall not be issued unless the person has not moved and the Agency agrees to reimburse the person for any expenses incurred to satisfy any binding contractual relocation obligations entered into after the effective date of the notice of relocation eligibility;

(G) An owner-occupant who conveys his or her property, as described in § 24.101(a)(2) or (b)(1) or (2), after being informed in writing that if a mutually satisfactory agreement on terms of the conveyance cannot be reached, the Agency will not acquire the property. In such cases, however, any resulting displacement of a tenant is subject to the regulations in this part;

(H) A person who retains the right of use and occupancy of the real property for life following its acquisition by the Agency;

(I) An owner who retains the right of use and occupancy of the real property for a fixed term after its acquisition by the Department of the Interior under Public Law 93–477, Appropriations for National Park System, or Public Law 93–303, Land and Water Conservation Fund, except that such owner remains a displaced person for purposes of subpart D of this part;

(J) A person who is determined to be in unlawful occupancy prior to or after the initiation of negotiations, or a person who has been evicted for cause, under applicable law, as provided for in § 24.206. However, advisory assistance may be provided to unlawful occupants at the option of the Agency in order to facilitate the project;

(K) A person who is not lawfully present in the United States and who has been determined to be ineligible for relocation assistance in accordance with § 24.208; or

(L) Tenants required to move as a result of the sale of their dwelling to a person using *Federal down payment assistance* funds as they are defined in this section (*See* appendix A of this part, *Section 24.2(a)*).

(M) Temporary, daily, or emergency shelter occupants are typically not considered displaced persons. However, Agencies may determine that a person occupying a shelter is a displaced person due to factors which could include reasonable expectation of a prolonged stay, or other extenuating circumstances. At a minimum, Agencies shall provide advisory assistance to all occupants at initiation of negotiations. (*See* appendix A of this part, *Section 24.2(a)* (*Displaced persons*).)

Dwelling. The term *dwelling* means the place of permanent or customary and usual residence of a person, according to local custom or law, including a single-family house; a single-family unit in a two-family, multi-family, or multi-purpose property; a unit of a condominium or cooperative housing project; a mobile home; or any other residential unit.

Dwelling site. The term *dwelling site* means a land area that is typical in size for similar dwellings located in the same neighborhood or rural area. (*See* appendix A of this part, *Section 24.2(a).*)

Farm operation. The term *farm operation* means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

Federal down payment assistance. The term *Federal down payment assistance* means funds other than Uniform Act benefits provided to an individual for the purpose of purchasing and occupying a residence. (*See* appendix A of this part, *Section 24.2(a).*)

Federal financial assistance. The term *Federal financial assistance* means a grant, loan, or contribution provided by the United States, except any Federal down payment assistance, tax credits such as the Low Income Housing Tax Credit (LIHTC), guarantee or insurance and any interest reduction payment to an individual in connection with the purchase and occupancy of a residence by that individual.

Home Equity Conversion Mortgage (HECM) (also known as a reverse mortgage). A HECM is a first mortgage which provides for future payments to the homeowner based on accumulated equity and which a housing creditor is authorized to make under any Federal law or State constitution, law, or regulation. See 12 U.S.C. 1715z–20. It is a class of lien generally available to persons 62 years of age or older. HECMs do not require a monthly mortgage payment and can also be used to access a home's equity. The HECM becomes due when none of the original borrowers lives in the home, if taxes or insurance become delinquent, or if the property falls into disrepair.

Household income. The term *household income* means total gross income received for a 12-month period from all sources (earned and unearned) including, but not limited to wages, salary, child support, alimony, unemployment benefits, workers compensation, social security, or the net income from a business. It does not include income received or earned by dependent children under 18, or full-time students who are students for at least 5 months of the year and are under the age of 24. (*See* appendix A of this part, *Section 24.2(a),* for examples of exclusions to income.)

Initiation of negotiations. Unless a different action is specified in applicable Federal program regulations, the term *initiation of negotiations* means the following:

(i) Whenever the displacement results from the acquisition of the real property by a Federal Agency or State Agency, the *initiation of negotiations* means the delivery of the initial written offer of just compensation by the Agency to the owner or the owner's representative to purchase the real property for the project. However, if the Federal Agency or State Agency issues a notice of its intent to acquire, rehabilitate, or demolish the real property, and a person moves after that notice, but before delivery of the initial written purchase offer, the *initiation of negotiations* means the actual move of the person from the property.

(ii) Whenever the displacement is caused by rehabilitation, demolition, or privately undertaken acquisition of the real property (and there is no related acquisition by a Federal Agency or a State Agency), the *initiation of negotiations* means the notice to the person that he or she will be displaced by the project or, if there is no notice, the actual move of the person from the property.

(iii) In the case of a permanent relocation to protect the public health and welfare, under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (Pub. L. 96–510, or Superfund) (CERCLA) the *initiation of negotiations* means the formal announcement of such relocation or the Federal or federally-coordinated health advisory where the Federal Government later decides to conduct a permanent relocation.

(iv) In the case of permanent relocation of a tenant as a result of a voluntary acquisition of real property described in § 24.101(b)(1) through (5), the initiation of negotiations means the actions described in paragraphs (i) and (ii) of this definition, except that the tenant is not eligible for relocation assistance under this part, until there is a binding written agreement between the Agency and the owner to purchase the real property. An option to purchase, conditional sale, or purchase agreement is not considered a binding agreement to purchase real property. (*See* appendix A of this part, *Section 24.2(a).*)

Lead Agency. The term *Lead Agency* means the Department of Transportation acting through the Federal Highway Administration.

Mobile home. The term *mobile home* includes manufactured homes and recreational vehicles used as residences. (*See* appendix A of this part, *Section 24.2(a).*)

Mortgage. The term *mortgage* means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of the State in which the real property is located, together with the credit instruments, if any, secured thereby.

Nonprofit organization. The term *nonprofit organization* means an organization that is incorporated under the applicable laws of a State as a nonprofit organization, and exempt from paying Federal income taxes under section 501 of the Internal Revenue Code (26 U.S.C. 501).

Owner of a dwelling. The term *owner of a dwelling* means a person who is considered to have met the requirement to own a dwelling if the person purchases or holds any of the following interests in real property:

(i) Fee title, a life estate, a land contract, a 99-year lease, or a lease including any options for extension with at least 50 years to run from the date of acquisition; or

(ii) An interest in a cooperative housing project which includes the right to occupy a dwelling; or

(iii) A contract to purchase any of the interests or estates described in this section; or

(iv) Any other interest, including a partial interest, which in the judgment of the Agency warrants consideration as ownership.

Owner's designated representative. A property owner may designate a representative to receive all required notifications and documents from the Agency. The owner must provide the Agency a written notification which states that they will be designating a representative, provide that person's name and contact information and what if any notices or information, the representative is not authorized to receive.

Person. The term *person* means any individual, family, partnership, corporation, or association.

Program or project. The phrase *program or project* means any activity or series of activities undertaken by a Federal Agency or with Federal financial assistance received or anticipated in any phase of an undertaking in accordance with the Federal funding Agency guidelines.

Recipient. The term *recipient* means a non-Federal entity that receives a Federal award directly from a Federal Agency to carry out an activity under a Federal program. The recipient is accountable to the Federal-funding Agency for the use of the funds and for compliance with applicable Federal requirements. The term recipient does not include subrecipients.

Salvage value. The term *salvage value* means the probable sale price of an item offered for sale to knowledgeable buyers with the requirement that it be removed from the property at a buyer's expense (*i.e.,* not eligible for relocation assistance). This includes items for re-use as well as items with components that can be re-used or recycled when there is no reasonable prospect for sale except on this basis.

Small business. A *small business* is a business having not more than 500 employees working at the site being acquired or displaced by a program or project, which site is the location of economic activity. Sites occupied solely by outdoor advertising signs, displays, or devices do not qualify as a business for purposes of § 24.303 or § 24.304.

State. Any of the several States of the United States or the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or a political subdivision of any of these jurisdictions.

Subrecipient. The term *subrecipient* means a government Agency or legal entity that enters into an agreement with a recipient to carry out part or all of the activity funded by Federal program grant funds. A subrecipient is accountable to the recipient for the use of the funds and for compliance with applicable Federal requirements.

Temporary, daily, or emergency shelter (shelter). The phrase *temporary, daily, or emergency shelter (shelter)* means any facility, the primary purpose of which is to provide a person with a temporary overnight shelter which does not generally allow prolonged or guaranteed occupancy. A shelter typically requires the occupants to remove their personal property and themselves from the premises on a daily basis, offers no guarantee of reentry in the evening, and does not meet the definition of dwelling as used in this part.

Tenant. The term *tenant* means a person who has the temporary use and occupancy of real property owned by another.

Uneconomic remnant. The term *uneconomic remnant* means a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which the Agency has determined has little or no value or utility to the owner.

Uniform Act. The term *Uniform Act* or *Act* means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, 84 Stat. 1894; 42 U.S.C. 4601 *et seq.*), and amendments thereto.

Unlawful occupant. A person who occupies without property right, title, or payment of rent, or a person legally evicted, with no legal rights to occupy a property under State law. An Agency, at its discretion, may consider such person to be in lawful occupancy for the purpose of determining eligibility for assistance under the Uniform Act.

Utility costs. The term *utility costs* means expenses for electricity, gas, other heating and cooking fuels, water, and sewer.

Utility facility. The term *utility facility* means:

(i) Any line, facility, or system for producing, transporting, transmitting, or distributing communications, cable, television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public; any fixtures, equipment, or other property associated with the operation, maintenance, or repair of any such system. A utility facility may be publicly, privately, or cooperatively owned.

(ii) The term shall also mean the utility company including any substantially owned or controlled subsidiary. For the purposes of this part the term includes those utility-type facilities which are owned or leased by a government Agency for its own use, or otherwise dedicated solely to governmental use. The term utility includes those facilities used solely by the utility which are part of its operating plant.

Utility relocation. The term *utility relocation* means the adjustment of a utility facility required by the program or project undertaken by the Agency. It includes removing and reinstalling the facility, including necessary temporary facilities; necessary right-of-way on a new location; moving, rearranging, or changing the type of existing facilities; and, taking any necessary safety and protective measures. It shall also mean constructing a replacement facility that has the functional equivalency of the existing facility and is necessary for the continued operation of the utility service, the project economy, or sequence of project construction.

Waiver valuation. The term *waiver valuation* means the valuation process used and the product produced when the Agency determines that an appraisal is not required, pursuant to § 24.102(c)(2) appraisal waiver provisions.

(b) *Acronyms.* The following acronyms are commonly used in the implementation of programs subject to this part:

DOT (U.S. Department of Transportation).

FEMA (Federal Emergency Management Agency).

FHA (Federal Housing Administration).

FHWA (Federal Highway Administration).

FIRREA (Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

HLR (Housing of last resort).

HUD (U.S. Department of Housing and Urban Development).

MIDP (Mortgage interest differential payment).

RHP (Replacement housing payment).

STURAA (Surface Transportation and Uniform Relocation Act Amendments of 1987).

UA or URA (Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970).

USCIS (U.S. Citizenship and Immigration Service).

USPAP (Uniform Standards of Professional Appraisal Practice).

§ 24.3 No duplication of payments.

No person shall receive any payment under this part if that person receives a payment under Federal, State, local law, or insurance proceeds which is determined by the Agency to have the same purpose and effect as such

payment under this part. (*See* appendix A of this part, *Section 24.3.*)

§ 24.4 Assurances, monitoring, and corrective action.

(a) *Assurances.* (1) Before a Federal Agency may approve any grant to, or contract, or agreement with, an Agency under which Federal financial assistance will be made available for a project which results in real property acquisition or displacement that is subject to the Uniform Act, the Agency must provide appropriate assurances that it will comply with the Uniform Act and this part. An Agency's assurances shall be in accordance with sections 210 and 305 of the Uniform Act. The Agency's section 305 assurances must contain specific reference to any State law which the Agency believes provides an exception to section 301 or 302 of the Uniform Act. If, in the judgment of the Federal Agency, Uniform Act compliance will be served, an Agency may provide these assurances at one time to cover all subsequent federally assisted programs or projects. An Agency, which both acquires real property and displaces persons, may combine its sections 210 and 305 assurances in one document.

(2) If a Federal Agency or recipient provides Federal financial assistance to a party or person causing displacement, such Federal Agency or recipient is responsible for ensuring compliance with the requirements of this part, notwithstanding the person's contractual obligation to the recipient to comply with the requirements of this part.

(3) As an alternative to the assurance requirement described in paragraph (a)(1) of this section, a Federal Agency may provide Federal financial assistance to a recipient after it has accepted a certification by such recipient in accordance with the requirements in subpart G of this part.

(b) *Monitoring and corrective action.* The Federal Agency will monitor compliance with this part, and the recipient shall take whatever corrective action is necessary to comply with the Uniform Act and this part. The Federal Agency may also apply sanctions in accordance with applicable program regulations. (*Also see* § 24.603.)

(c) *Prevention of fraud, waste, and mismanagement.* The Agency shall take appropriate measures to carry out this part in a manner that minimizes fraud, waste, and mismanagement.

§ 24.5 Manner of notices.

(a) Each notice which the Agency is required to provide to a property owner or occupant under this part, except the notice described at § 24.102(b), shall be personally served or sent by certified or registered first-class mail, return receipt requested (or by companies other than the United States Postal Service that provide the same function as certified mail with return receipts) and documented in Agency files. A Federal funding Agency may approve the use of electronic delivery of notices in lieu of the use of certified or registered first-class mail, return receipt requested, or personally served notices, when an Agency demonstrates a means to document receipt of such notices by the property owner or occupant.

(b) An Agency requesting use of electronic delivery of notices must include the following safeguards:

(1) A process to inform property owners and occupants that they must voluntarily elect to receive electronic notices.

(2) A process to document and record when information is legally delivered in digital format. A date and timestamp must establish the date of delivery and receipt with an electronic record capable of retention.

(3) A method to link the electronic signature with an electronic document in a way that can be used to determine whether the electronic document was changed subsequent to when an electronic signature was applied to the document.

(4) A certification that use of electronic notices or signatures is consistent with existing State and Federal laws.

(c) Each notice shall be written in plain, understandable language. Persons who are unable to read and understand the notice must be provided with appropriate translation and counseling. Each notice shall indicate the name and telephone number of a person who may be contacted for answers to questions or other needed help. (*See* appendix A of this part, *Section 24.5.*)

(d) A property owner may designate a representative to receive offers, correspondence, and information by providing a written request to the Agency (§ 24.2(a)).

§ 24.6 Administration of jointly-funded projects.

Whenever two or more Federal Agencies provide financial assistance to an Agency or Agencies, other than a Federal Agency, to carry out functionally or geographically related activities which will result in the acquisition of property or the displacement of a person, the Federal Agencies may by agreement designate one such Agency as the cognizant Federal Agency. In the unlikely event that agreement among the Agencies cannot be reached as to which Agency shall be the cognizant Federal Agency, then the Lead Agency shall designate one of such Agencies to assume the cognizant role. At a minimum, the agreement shall set forth the federally assisted activities which are subject to its terms and cite any policies and procedures, in addition to this part, that are applicable to the activities under the agreement. Under the agreement, the cognizant Federal Agency shall assure that the project is in compliance with the provisions of the Uniform Act and this part. All federally assisted activities under the agreement shall be deemed a project for the purposes of this part.

§ 24.7 Federal Agency waiver of regulations in this part.

The Federal Agency funding the project may waive any requirement in this part not required by law if it determines that the waiver does not reduce any assistance or protection provided to an owner or displaced person under this part. Any request for a waiver shall be justified on a case-by-case basis.

§ 24.8 Compliance with other laws and regulations.

The implementation of this part must be in compliance with other applicable Federal laws and implementing regulations, including, but not limited to, the following:

(a) Section I of the Civil Rights Act of 1866 (42 U.S.C. 1982 *et seq.*).

(b) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(c) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), as amended.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

(e) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*).

(f) The Flood Disaster Protection Act of 1973 (Pub. L. 93–234).

(g) The Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.).*

(h) Executive Order 11063—Equal Opportunity and Housing, as amended by Executive Order 12892.

(i) Executive Order 11246—Equal Employment Opportunity, as amended.

(j) Executive Order 11625—Minority Business Enterprise.

(k) Executive Orders 11988—Floodplain Management, and 11990—Protection of Wetlands.

(l) Executive Order 12250—Leadership and Coordination of Non-Discrimination Laws.

(m) Executive Order 12630—Governmental Actions and Interference

with Constitutionally Protected Property Rights.

(n) Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 *et seq.*).

(o) Executive Order 12892—Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing (January 17, 1994).

§ 24.9 Recordkeeping and reports.

(a) *Records.* The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) *Confidentiality of records.* Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

(c) *Reports.* Each Federal Agency that has programs or projects requiring the acquisition of real property or causing a displacement from real property subject to the provisions of the Act shall provide to the Lead Agency an annual summary report by November 15 that describes the real property acquisitions, displacements, and related activities conducted by the Federal Agency for the calendar year. (*See* appendix A of this part, *Section 24.9(c).*)

§ 24.10 Appeals.

(a) *General.* The Agency shall promptly review appeals in accordance with the requirements of applicable law and this part.

(b) *Actions which may be appealed.* Any aggrieved person may file a written appeal with the Agency in any case in which the person believes that the Agency has failed to properly consider the person's application for assistance under this part. Such assistance may include, but is not limited to, the person's eligibility for, or the amount of, a payment required under § 24.106 or § 24.107, or a relocation payment required under this part. The Agency shall consider a written appeal regardless of form.

(c) *Time limit for initiating appeal.* The Agency may set a reasonable time limit for a person to file an appeal. The time limit shall not be less than 60 days after the person receives written notification of the Agency's determination on the person's claim.

(d) *Right to representation.* A person has a right to be represented by legal counsel or other representative in connection with his or her appeal, but solely at the person's own expense.

(e) *Review of files by person making appeal.* The Agency shall permit a person to inspect and copy all materials pertinent to his or her appeal, except materials which are classified as confidential by the Agency. The Agency may, however, impose reasonable conditions on the person's right to inspect, consistent with applicable laws.

(f) *Scope of review of appeal.* In deciding an appeal, the Agency shall consider all pertinent justification and other material submitted by the person, and all other available information that is needed to ensure a fair and full review of the appeal.

(g) *Determination and notification after appeal.* Promptly after receipt of all information submitted by a person in support of an appeal, the Agency shall make a written determination on the appeal, including an explanation of the basis on which the decision was made, and furnish the person a copy. If the full relief requested is not granted, the Agency shall inform the person that the determination is the Agency's final decision and that the person may seek judicial review of the Agency's determination.

(h) *Agency official to review appeal.* The Agency official conducting the review of the appeal shall be either the head of the Agency or his or her authorized designee. However, the official shall not have been directly involved in the action appealed.

§ 24.11 Adjustments of relocation benefits.

(a) The Lead Agency may adjust the amounts of relocation benefits provided under this part at §§ 24.304, 24.305, 24.401, and 24.402.

(b) No more frequently than every 5 years the head of the Lead Agency will evaluate whether the cost of living, inflation, or other factors indicate that relocation benefits provided in the sections in paragraph (a) of this section should be adjusted to meet the policy objectives of the Uniform Act. The Lead Agency will divide the Consumer Price Index for All Urban Consumers (CPI–U) index for the year of the assessment (base year index), by the CPI–U index for the year of assessment to determine the effect of inflation over the assessment period. If adjustments are determined to be necessary, the head of the Lead Agency will publish the new maximum benefits eligible for Federal participation in the **Federal Register**. (*See* appendix A of this part, *Section 24.11.*)

Subpart B—Real Property Acquisition

§ 24.101 Applicability of acquisition requirements.

(a) *Direct Federal program or project.* (1) The requirements of this subpart apply to any acquisition of real property for a direct Federal program or project, except acquisition for a program or project that is undertaken by the Tennessee Valley Authority or the Rural Utilities Service. (*See* appendix A of this part, *Section 24.101(a).*)

(2) If a Federal Agency (except for the Tennessee Valley Authority or the Rural Utilities Service) will not acquire a property because negotiations fail to result in an agreement, the owner of the property or the owner's designated representative shall be so informed in writing. Owners of such properties are not displaced persons, as such, are not entitled to relocation assistance benefits. However, tenants on such properties may be eligible for relocation assistance benefits. (*See* § 24.2(a).)

(b) *Programs and projects receiving Federal financial assistance.* The requirements of this subpart apply to any acquisition of real property for programs and projects where there is Federal financial assistance in any part of project costs except for the acquisitions described in paragraphs (b)(1) through (5) of this section. The relocation assistance provisions in this part are applicable to any tenants that must move as a result of an acquisition described in paragraphs (b)(1) through (5) of this section. Such tenants are considered displaced persons. (*See* § 24.2(a).)

(1) The requirements of this subpart do not apply to acquisitions that meet all of the conditions in paragraphs (b)(1)(i) through (iv) of this section:

(i) No specific property needs to be acquired, although the Agency may limit its search for alternative properties to a general geographic area. Where an Agency wishes to purchase more than one property within a general geographic area on this basis, all owners are to be treated similarly. (*See* appendix A of this part, *Section 24.101(b)(1)(i).*)

(ii) The property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits.

(iii) No later than the time of the offer the Agency shall inform the owner of the property or the owner's designated representative in writing that it will not acquire the property if negotiations fail to result in an amicable agreement.

(iv) No later than the time of the offer the Agency shall inform the owner of the property or the owner's designated representative in writing of what it believes to be the fair market value of the property.

(2) Acquisitions for programs or projects undertaken by an Agency that receives Federal financial assistance and will not use eminent domain to acquire the property. (*See* appendix A of this part, *Section 24.101(b)(2).*) When making an offer to acquire such Agency or person shall:

(i) No later than the time of the offer clearly advise the owner of the property or the owner's designated representative that the Agency will not acquire the property if negotiations fail to result in an amicable agreement.

(ii) No later than the time of the offer inform the owner of the property, or the owner's designated representative, in writing of what it believes to be the fair market value of the property. (*See* appendix A of this part, *Section 24.101(b)(1)(iv) and (b)(2)(ii).*)

(iii) Not use eminent domain to acquire properties for that project should the negotiations for purchase fail to result in an agreement to sell the real property. In extraordinary situations in which an unanticipated and unplanned need arises after carrying out voluntary acquisition activities, the Agency may request a waiver of regulation under § 24.7 to pursue acquisition by eminent domain for a specific parcel or parcels while remaining in compliance with the Uniform Act's prohibition on coercive actions. Such request must identify the specific parcels that would be acquired by eminent domain, the reason for the need, and the steps the Agency will take to ensure that property owner's assistance and protection are not reduced.

(3) The acquisition of real property from a Federal Agency, State, or State Agency, if the Agency desiring to make the purchase does not have authority to acquire the property through condemnation.

(4) The acquisition of real property by a cooperative from a person who, as a condition of membership in the cooperative, has agreed to provide without charge any real property that is needed by the cooperative.

(5) Acquisition for a program or project that receives Federal financial assistance from the Tennessee Valley Authority or the Rural Utilities Service.

(c) *Less-than-full-fee interest in real property.* (1) The provisions of this subpart apply when acquiring fee title subject to retention of a life estate or a life use; to acquisition by leasing where the lease term, including option(s) for extension, is 50 years or more; and, to the acquisition of permanent and/or temporary easements necessary for the project. However, the Agency may apply the regulations in this subpart to any less-than-full-fee acquisition that, in its judgment, should be covered.

(2) The provisions of this subpart do not apply to temporary easements or permits needed solely to perform work intended exclusively for the benefit of the property owner, which work may not be done if agreement cannot be reached.

(d) *Federally assisted projects.* (1) For projects receiving Federal financial assistance, the provisions of §§ 24.102, 24.103, 24.104, and 24.105 apply to the greatest extent practicable under State law. (*See* § 24.4(a).)

(2) For real property acquired which may later be incorporated into an anticipated, designated, or planned federally-funded or assisted project or program the provisions of §§ 24.102, 24.103, 24.104, and 24.105 apply to the greatest extent practicable under State law. (*See* § 24.4(a).)

(3) The Relocation assistance provisions included in this part are applicable to any property owner or tenants who must move as a result of an acquisition described in paragraph (d)(2) of this section. Such owners and tenants are to be considered displaced persons. (*See* § 24.2(a).)

§ 24.102 Basic acquisition policies.

(a) *Expeditious acquisition.* The Agency shall make every reasonable effort to acquire the real property expeditiously by negotiation.

(b) *Notice to owner.* As soon as feasible, the Agency shall notify the owner in writing of the Agency's interest in acquiring the real property and the basic protections provided to the owner by law and this part. (*See* §§ 24.203 and 24.5(d) and appendix A of this part, *Section 24.102(b).*)

(c) *Appraisal, waiver thereof, and invitation to owner.* (1) Before the initiation of negotiations, the real property to be acquired shall be appraised, except as provided in paragraph (c)(2) of this section, and the owner, or the owner's designated representative, shall be given an opportunity to accompany the appraiser during the appraiser's inspection of the property.

(2) An appraisal is not required if:

(i) The owner is donating the property and releases the Agency from its obligation to appraise the property; or

(ii) The Agency determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the proposed acquisition is estimated at $10,000 or less, based on a review of available data. The Agency employee or contractor making the determination to use the waiver valuation option must understand valuation principles, techniques, and use of appraisals in order to be able to determine whether the proposed acquisition is uncomplicated. (*See* appendix A of this part, *Section 24.102(c)(2).*)

(A) When an appraisal is determined to be unnecessary, the Agency shall prepare a waiver valuation. Licensed or certified appraisers preparing, or reviewing a waiver valuation are precluded from complying with standards rules 1, 2, 3, and 4 of the ''Uniform Standards of Professional Appraisal Practice'' (USPAP), as promulgated by the Appraisal Standards Board of The Appraisal Foundation.[1] (*See* appendix A of this part, *Section 24.103(a).*)

(B) The person performing the waiver valuation must have sufficient understanding of the local real estate market to be qualified to make the waiver valuation.

(C) The Federal Agency funding the project may approve exceeding the $10,000 threshold, up to an amount of $25,000, if the Agency acquiring the real property offers the property owner the option of having the Agency appraise the property. (D) If the Agency determines that the proposed acquisition is uncomplicated, and if the Agency acquiring the real property offers the property owner the option of having the Agency appraise the property, the Agency may request approval from the Federal funding Agency to use a waiver valuation of up to $50,000. The use of waiver valuations between $25,000 and $50,000 is limited to the Federal funding Agencies and recipients and shall not be further delegated. Approval for utilizing a waiver valuation of more than $25,000, but up to $50,000, may only be requested on a project-by-project basis and the request for doing so shall be made in writing to the Federal funding Agency setting forth:

(*1*) The anticipated benefits of, and reasons for, raising the waiver valuation ceiling above $25,000;

(*2*) The administrative/managerial oversight mechanisms used to assure proper use and review;

(*3*) The names/credentials of individuals who will be performing the waiver valuations;

[1] Uniform Standards of Professional Appraisal Practice (USPAP). Published by The Appraisal Foundation, a nonprofit educational organization. Copies may be ordered from The Appraisal Foundation.

(*4*) The quality control procedures to be utilized;

(*5*) Performance/results metrics with quarterly reports provided to the Federal funding Agency; and

(*6*) Within 6 months of completion of acquisition activities a close-out report measuring cost/time benefits, lessons learned, best practices, etc., shall be submitted to the Federal funding Agency.

(E) If the property owner elects to have the Agency appraise the property, the Agency must obtain an appraisal and shall not use the waiver valuation procedures described above. (*See* appendix A of this part, *Section 24.102(c)(2).*)

(d) *Establishment and offer of just compensation.* Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property. The amount shall not be less than the approved appraisal or waiver valuation of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property. An Agency official must establish the amount believed to be just compensation. (*See* § 24.104.) Promptly thereafter, the Agency shall make a written offer to the owner or the designated owner's representative to acquire the property for the full amount believed to be just compensation. (*See* appendix A of this part, *Section 24.102(d).*)

(e) *Summary statement.* Along with the initial written purchase offer, the owner or the designated owner's representative shall be given a written statement of the basis for the offer of just compensation, which shall include:

(1) A statement of the amount offered as just compensation. In the case of a partial acquisition, the compensation for the real property to be acquired and the compensation for damages, if any, to the remaining real property shall be separately stated.

(2) A description and location identification of the real property and the interest in the real property to be acquired.

(3) An identification of the buildings, structures, and other improvements (including removable building equipment and trade fixtures) which are included as part of the offer of just compensation. Where appropriate, the statement shall identify any other separately held ownership interest in the property, *e.g.* a tenant-owned improvement, and indicate that such interest is not covered by this offer.

(f) *Basic negotiation procedures.* The Agency shall make all reasonable efforts to contact the owner or the owner's designated representative and discuss its offer to purchase the property, including the basis for the offer of just compensation and explain its acquisition policies and procedures, including its payment of incidental expenses in accordance with § 24.106. The owner shall be given reasonable opportunity to consider the offer and present material which the owner believes is relevant to determining the value of the property and to suggest modification in the proposed terms and conditions of the purchase. The Agency shall consider the owner's or the designated owner's representative's presentation. (*See* appendix A of this part, *Section 24.102(f).*)

(g) *Updating offer of just compensation.* If the information presented by the owner, or a material change in the character or condition of the property, indicates the need for new waiver valuation or appraisal information, or if a significant delay has occurred since the time of the appraisal(s) or waiver valuation of the property, the Agency shall have the appraisal(s) or waiver valuation updated or obtain a new appraisal(s) or waiver valuation. If the latest appraisal or waiver valuation information indicates that a change in the purchase offer is warranted, the Agency shall promptly reestablish just compensation and offer that amount to the owner in writing.

(h) *Coercive action.* The Agency shall not advance the time of condemnation, or defer negotiations or condemnation or the deposit of funds with the court, or take any other coercive action in order to induce an agreement on the price to be paid for the property.

(i) *Administrative settlement.* The purchase price for the property may exceed the amount offered as just compensation when reasonable efforts to negotiate an agreement at that amount have failed and an authorized Agency official approves such administrative settlement as being reasonable, prudent, and in the public interest. When Federal funds pay for or participate in acquisition costs, a written justification shall be prepared, which states what available information, including trial risks, supports such a settlement. (*See* appendix A of this part, *Section 24.102(i).*)

(j) *Payment before taking possession.* Before requiring the owner to surrender possession of the real property, the Agency shall pay the agreed purchase price to the owner, or in the case of a condemnation, deposit with the court, for the benefit of the owner, an amount not less than the Agency's approved appraisal of the fair market value of such property, or the court award of compensation in the condemnation proceeding for the property. In exceptional circumstances, with the prior approval of the owner or the owner's designated representative, the Agency may obtain a right-of-entry for construction purposes before making payment available to an owner. (*See* appendix A of this part, *Section 24.102(j).*)

(k) *Uneconomic remnant.* If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the Agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. (*See* § 24.2(a).)

(l) *Inverse condemnation.* If the Agency intends to acquire any interest in real property by exercise of the power of eminent domain, it shall institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

(m) *Fair rental.* If the Agency permits a former owner or tenant to occupy the real property after acquisition for a short term, or a period subject to termination by the Agency on short notice, the rent shall not exceed the fair market rent for such occupancy. (*See* appendix A of this part, *Section 24.102(m).*)

(n) *Conflict of interest.* (1) The appraiser, review appraiser, or person performing the waiver valuation shall not have any interest, direct or indirect, in the real property being valued for the Agency. Compensation for developing an appraisal or waiver valuation shall not be based on the amount of the valuation estimate.

(2) No person shall attempt to unduly influence or coerce an appraiser, review appraiser, or waiver valuation preparer regarding any valuation aspect of an appraisal, waiver valuation, or review of appraisals or waiver valuations. Persons functioning as negotiators may not supervise or formally evaluate the performance of any appraiser or review appraiser performing appraisal or appraisal review work, except that, for a program or project receiving Federal financial assistance, the Federal funding Agency may waive this requirement if it determines it would create a hardship for the Agency.

(3) An appraiser, review appraiser, or waiver valuation preparer may be authorized by the Agency to act as a negotiator for the acquisition of real property for which that person has made an appraisal, appraisal review or waiver valuation only if the offer to acquire the property is $10,000, or less. If the valuer will also act as the

negotiator on a valuation greater than $10,000, and up to $25,000, an appraisal must be prepared and reviewed. Agencies desiring to exercise this option must request approval in writing from the Federal funding Agency. The requesting Agency shall have a separate and distinct quality control process in place and set forth in the written procedures approved by the Federal funding agency. Agencies wishing to extend their Federal funding Agency approval for conflict of interest waivers of more than $10,000 to their subrecipients must determine and document that the subrecipient has a separate and distinct quality control process in place and set forth in written procedures approved by the Federal funding agency or in approved subrecipient written procedures. (*See* appendix A of this part, *Section 24.102(n).*)

§ 24.103 Criteria for appraisals.

(a) *Appraisal requirements.* This section sets forth the requirements for real property acquisition appraisals for Federal and federally assisted programs. Appraisals are to be prepared according to this section, which is intended to be consistent with the USPAP. (*See* appendix A of this part, *Section 24.103(a).*) The Agency may have appraisal requirements that supplement this section, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA), also commonly referred to as the ''Yellow Book''.) The USPAP is published by The Appraisal Foundation. The USFLA is published by the Appraisal Foundation in partnership with the Department of Justice on behalf of the Interagency Land Acquisition Conference. The USFLA is a compendium of Federal eminent domain appraisal law, both case and statute, regulations and practices.[2] Copies of the USPAP and the UASFLA may be ordered from The Appraisal Foundation in print and electronic forms.[3] The USPAP may be viewed on The Appraisal Foundation's website.[4] A free electronic version of the UASFLA is available for download on the U.S. Department of Justice website.[5]

(1) The Agency acquiring real property has a legitimate role in contributing to the appraisal process, especially in developing the scope of work and defining the appraisal problem. The scope of work and development of an appraisal under this section depends on the complexity of the appraisal problem.

(2) The Agency has the responsibility to assure that the appraisals it obtains are relevant to its program needs, reflect established and commonly accepted Federal and federally assisted program appraisal practice, and at a minimum, comply with the definition of appraisal in § 24.2(a) and the requirements in paragraphs (a)(2)(i) through (v) of this section (*see* appendix A of this part, *Section 24.103* and *Section 24.103(a)*):

(i) An adequate description of the physical characteristics of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), including items identified as personal property, a statement of the known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property. (*See* appendix A of this part, *Section 24.103(a)(1).*)

(ii) All relevant and reliable approaches to value consistent with established Federal and federally assisted program appraisal practices. If the appraiser uses more than one approach, there shall be an analysis and reconciliation of approaches to value used that is sufficient to support the appraiser's opinion of value. (*See* appendix A of this part, *Section 24.103(a).*)

(iii) A description of comparable sales, including a description of all relevant physical, legal, and economic factors such as parties to the transaction, source and method of financing, and verification by a party involved in the transaction.

(iv) A statement of the value of the real property to be acquired and, for a partial acquisition, a statement of the value of the damages and benefits, if any, to the remaining real property, where appropriate.

(v) The effective date of valuation, date of appraisal, signature, and certification of the appraiser.

(b) *Influence of the project on just compensation.* The appraiser shall disregard any decrease or increase in the fair market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than that due to physical deterioration within the reasonable control of the owner. (*See* appendix A of this part, *Section 24.103(b).*)

(c) *Owner retention of improvements.* If the owner of a real property improvement is permitted to retain it for removal from the project site, the amount to be offered for the interest in the real property to be acquired shall not be less than the difference between the amount determined to be just compensation for the owner's interest in the real property and the salvage value (defined at § 24.2(a)) of the retained improvement.

(d) *Qualifications of appraisers and review appraisers.* (1) The Agency shall establish criteria for determining the minimum qualifications and competency of appraisers and review appraisers. Qualifications shall be consistent with the scope of work for the assignment. The Agency shall review the experience, education, training, certification/licensing, designation(s), and other qualifications of appraisers, and review appraisers, and use only those determined by the Agency to be qualified. (*See* appendix A of this part, *Section 24.103(d)(1).*)

(2) If the Agency uses a contract (fee) appraiser to perform the appraisal, such appraiser shall be State licensed or certified in accordance with title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 *et seq.*).

§ 24.104 Review of appraisals.

The Agency shall have an appraisal review process and, at a minimum:

(a) A qualified review appraiser (*see* § 24.103(d)(1) and appendix A of this part, *Section 24.104*) shall examine the presentation and analysis of market information in all appraisals to assure that they meet the definition of appraisal found in § 24.2(a), appraisal requirements found in 49 CFR 24.103, and other applicable requirements, including, to the extent appropriate, the UASFLA, and support the appraiser's opinion of value. The level of review analysis depends on the complexity of the appraisal problem. As needed, the review appraiser shall, prior to acceptance, seek necessary corrections or revisions. The review appraiser shall identify each appraisal report as recommended (as the basis for the establishment of the amount believed to be just compensation), accepted (meets all requirements, but not selected as recommended or approved), or not accepted. If authorized by the Agency to do so, the staff review appraiser shall also approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), and, if also authorized to do so, develop and report the amount believed to be just compensation. (*See* appendix A of this part, *Section 24.104(a).*)

(b) If the review appraiser is unable to recommend (or approve) an appraisal as

[2] *www.justice.gov/file/408306/download.*

[3] *http://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/TAF/Standards.aspx.*

[4] *http://www.uspap.org.*

[5] *http://www.justice.gov/file/408306/download.*

an adequate basis for the establishment of the offer of just compensation, and it is determined by the Agency that it is not practical to obtain an additional appraisal, the review appraiser may, as part of the review, present and analyze market information in conformance with § 24.103 to support a recommended (or approved) value. (*See* appendix A of this part, *Section 24.104(b).*)

(c) The review appraiser shall prepare a written report that identifies the appraisal reports reviewed and documents the findings and conclusions arrived at during the review of the appraisal(s). Any damages or benefits to any remaining property shall be identified in the review appraiser's report. The review appraiser shall also prepare a signed certification that states the parameters of the review. The certification shall state the approved value and, if the review appraiser is authorized to do so, the amount believed to be just compensation for the acquisition. (*See* appendix A of this part, *Section 24.104(c).*)

§ 24.105 Acquisition of tenant-owned improvements.

(a) *Acquisition of improvements.* When acquiring any interest in real property, the Agency shall offer to acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property to be acquired, which it requires to be removed or which it determines will be adversely affected by the use to which such real property will be put. This shall include any improvement of a tenant-owner who has the right or obligation to remove the improvement at the expiration of the lease term.

(b) *Improvements considered to be real property.* Any building, structure, or other improvement, which would be considered real property if owned by the owner of the real property on which it is located, shall be considered to be real property for purposes of this subpart.

(c) *Appraisal and establishment of just compensation for a tenant-owned improvement.* Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the fair market value of the whole property, or its salvage value, whichever is greater. (Salvage value is defined at § 24.2(a).)

(d) *Special conditions for tenant-owned improvements.* No payment shall be made to a tenant-owner for any real property improvement unless:

(1) The tenant-owner, in consideration for the payment, assigns, transfers, and releases to the Agency all of the tenant-owner's right, title, and interest in the improvement;

(2) The owner of the real property on which the improvement is located disclaims all interest in the improvement; and

(3) The payment does not result in the duplication of any compensation otherwise authorized by law.

(e) *Alternative compensation.* Nothing in this subpart shall be construed to deprive the tenant-owner of any right to reject payment under this subpart and to obtain payment for such property interests in accordance with other applicable law.

§ 24.106 Expenses incidental to transfer of title to the Agency.

(a) The owner of the real property shall be reimbursed for all reasonable expenses the owner necessarily incurred for:

(1) Recording fees, transfer taxes, documentary stamps, evidence of title, boundary surveys, legal descriptions of the real property, and similar expenses incidental to conveying the real property to the Agency. However, the Agency is not required to pay costs solely required to perfect the owner's title to the real property;

(2) Penalty costs and other charges for prepayment of any preexisting recorded mortgage entered into in good faith encumbering the real property; and

(3) The pro rata portion of any prepaid real property taxes which are allocable to the period after the Agency obtains title to the property or effective possession of it, whichever is earlier.

(b) Whenever feasible, the Agency shall pay these costs directly to the billing agent so that the owner will not have to pay such costs and then seek reimbursement from the Agency.

§ 24.107 Certain litigation expenses.

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

(a) The final judgment of the court is that the Agency cannot acquire the real property by condemnation;

(b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement; or

(c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

§ 24.108 Donations.

An owner whose real property is being acquired may, after being fully informed by the Agency of the right to receive just compensation for such property, donate such property or any part thereof, any interest therein, or any compensation paid therefore, to the Agency as such owner shall determine. The Agency is responsible for ensuring that an appraisal of the real property is obtained unless the owner releases the Agency from such obligation, except as provided in § 24.102(c)(2).

Subpart C—General Relocation Requirements

§ 24.201 Purpose.

This subpart prescribes general requirements governing the provision of relocation payments and other relocation assistance in this part.

§ 24.202 Applicability.

The requirements in this subpart apply to the relocation of any displaced person as defined at § 24.2(a). Any person who qualifies as a displaced person must be fully informed of his or her rights and entitlements to relocation assistance and payments provided by the Uniform Act and this part. (*See* appendix A of this part, *Section 24.202.*)

(a) *Persons temporarily displaced.* (1) Appropriate advisory services must be provided;

(2) For persons occupying a dwelling, at least one DSS dwelling is made available prior to requiring a person to move, except in the case of an emergency move as described in § 24.204(b)(1), (2), or (3);

(3) Similarly, if a person's business will be shut-down due to rehabilitation of a site, it may be temporarily relocated and reimbursed for all reasonable out of pocket expenses or must be determined to be displaced at the Agency's option;

(4) Payment is provided for all out-of-pocket expenses incurred in connection with the temporary relocation as the Agency determines to be reasonable and necessary;

(5) A person's temporary relocation from their dwelling or business for the project may not exceed 12 months. The Agency must contact any person who has been temporarily relocated for a period beyond 12 months because that person is a displaced person. The Agency shall offer all required relocation assistance benefits and services. An Agency may not deduct any temporary relocation assistance benefits previously provided from these benefits;

(6) A person who is not lawfully present in the United States and who has been determined to be ineligible for relocation assistance in accordance with § 24.208 is not eligible for temporary

relocation assistance. Unless such denial of benefits would create an extremely unusual hardship to a designated family member in accordance with § 24.208(g).

(b) [Reserved]

§ 24.203 Relocation notices.

(a) *General information notice.* As soon as feasible, a person who may be displaced shall be furnished with a general written description of the Agency's relocation program which does at least the following:

(1) Informs the person that he or she may be displaced for the project and generally describes the relocation payment(s) for which the person may be eligible, the basic conditions of eligibility, and the procedures for obtaining the payment(s);

(2) Informs the displaced person that he or she will be given reasonable relocation advisory services, including referrals to replacement properties, help in filing payment claims, and other necessary assistance to help the displaced person successfully relocate;

(3) Informs the displaced person that he or she will not be required to move without at least 90 days advance written notice (see paragraph (c) of this section), and informs any person to be displaced from a dwelling that he or she cannot be required to move permanently unless at least one comparable replacement dwelling has been made available;

(4) Informs the displaced person that any person who is an alien not lawfully present in the United States is ineligible for relocation advisory services and relocation payments, unless such ineligibility would result in exceptional and extremely unusual hardship to a qualifying spouse, parent, or child, pursuant to § 24.208(h); and

(5) Describes the displaced person's right to appeal the Agency's determination as to a person's application for assistance for which a person may be eligible under this part.

(b) *Notice of relocation eligibility.* Eligibility for relocation assistance shall begin on the earliest of: The date of a notice of intent to acquire, rehabilitate, and/or demolish (described in paragraph (d) of this section); the initiation of negotiations (defined in § 24.2(a)); or actual acquisition. When this occurs, the Agency shall promptly notify all occupants in writing of their eligibility for applicable relocation assistance.

(c) *Ninety-day notice*—(1) *General.* No lawful occupant shall be required to move unless he or she has received at least 90 days advance written notice of the earliest date by which he or she may be required to move.

(2) *Timing of notice.* The Agency may issue the notice 90 days or earlier before it expects the person to be displaced.

(3) *Content of notice.* The 90-day notice shall either state a specific date as the earliest date by which the occupant may be required to move, or state that the occupant will receive a further notice indicating, at least 30 days in advance, the specific date by which he or she must move. If the 90-day notice is issued before a comparable replacement dwelling is made available, the notice must state clearly that the occupant will not have to move earlier than 90 days after such a dwelling is made available. (*See* § 24.204(a).)

(4) *Urgent need.* In unusual circumstances, an occupant may be required to vacate the property on less than 90 days advance written notice if the Agency determines that a 90-day notice is impracticable, such as when the person's continued occupancy of the property would constitute a substantial danger to health or safety. A copy of the Agency's determination shall be included in the applicable case file.

(d) *Notice of intent to acquire, rehabilitate, and/or demolish.* A notice of intent to acquire, rehabilitate, and/or demolish is an Agency's written communication that is provided to a person to be displaced, including those to be displaced by rehabilitation and/or demolition activities from property prior to the commitment of Federal financial assistance to the activity, which clearly sets forth that the Agency intends to acquire, rehabilitate, and/or demolish the property. A notice of intent to acquire, rehabilitate, and/or demolish establishes eligibility for relocation assistance prior to the initiation of negotiations and/or prior to the commitment of Federal financial assistance. (*See* § 24.2 (a).)

§ 24.204 Availability of comparable replacement dwelling before displacement.

(a) *General.* No person to be displaced shall be required to move from his or her dwelling unless at least one comparable replacement dwelling (defined at § 24.2) has been made available to the person. Information on comparable replacement dwellings that were used in the determination process must be provided to displaced persons. When possible, three or more comparable replacement dwellings shall be made available. A comparable replacement dwelling will be considered to have been made available to a person, if:

(1) The person is informed in writing of its location;

(2) The person has sufficient time to negotiate and enter into a purchase agreement or lease for the property; and

(3) Subject to reasonable safeguards, the person is assured of receiving the relocation assistance and acquisition payment to which the person is entitled in sufficient time to complete the purchase or lease of the property.

(b) *Circumstances permitting waiver.* The Federal Agency funding the project may grant a waiver of the policy in paragraph (a) of this section in any case where it is demonstrated that a person must move because of:

(1) A major disaster as defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5122);

(2) A presidentially declared national emergency; or

(3) Another emergency which requires immediate vacation of the real property, such as when continued occupancy of the displacement dwelling constitutes a substantial danger to the health or safety of the occupants or the public.

(c) *Basic conditions of emergency move.* Whenever a person to be displaced is required to relocate from the displacement dwelling for a temporary period because of an emergency as described in paragraph (b) of this section, the Agency shall:

(1) Take whatever steps are necessary to assure that the person is temporarily relocated to a DSS dwelling;

(2) Pay the actual reasonable out-of-pocket moving expenses and any reasonable increase in rent and utility costs incurred in connection with the temporary relocation; and

(3) Make available to the displaced person as soon as feasible, at least one comparable replacement dwelling. (For purposes of filing a claim and meeting the eligibility requirements for a relocation payment, the date of displacement is the date the person moves from the temporarily occupied dwelling.)

§ 24.205 Relocation planning, advisory services, and coordination.

(a) *Relocation planning.* During the early stages of development, an Agency shall plan Federal and federally assisted programs or projects in such a manner that recognizes the problems associated with the displacement of individuals, families, businesses, farms, and nonprofit organizations and develop solutions to minimize the adverse impacts of displacement. Such planning, where appropriate, shall precede any action by an Agency which will cause displacement, and should be scoped to the complexity and nature of

the anticipated displacing activity including an evaluation of program resources available to carry out timely and orderly relocations. Planning may involve a relocation survey or study, which may include the following:

(1) An estimate of the number of households to be displaced including information such as owner/tenant status, estimated value and rental rates of properties to be acquired, family characteristics, and special consideration of the impacts on minorities, the elderly, large families, and persons with disabilities when applicable.

(2) An estimate of the number of comparable replacement dwellings in the area (including price ranges and rental rates) that are expected to be available to fulfill the needs of those households displaced. When an adequate supply of comparable housing is not expected to be available, the Agency should consider housing of last resort actions.

(3) An estimate of the number, type, and size of the businesses, farms, and nonprofit organizations to be displaced and the approximate number of employees that may be affected.

(4) An estimate of the availability of replacement business sites. When an adequate supply of replacement business sites is not expected to be available, the impacts of displacing the businesses should be considered and addressed. Planning for displaced businesses which are reasonably expected to involve complex or lengthy moving processes or small businesses with limited financial resources and/or few alternative relocation sites should include an analysis of business moving problems.

(5) Consideration of any special relocation advisory services that may be necessary from the Agency displacing a person and other cooperating Agencies.

(b) *Loans for planning and preliminary expenses.* In the event that an Agency elects to consider using the duplicative provision in section 215 of the Uniform Act which permits the use of project funds for loans to cover planning and other preliminary expenses for the development of additional housing, the Lead Agency will establish criteria and procedures for such use upon the request of the Federal Agency funding the program or project.

(c) *Relocation assistance advisory services*—(1) *General.* The Agency shall carry out a relocation assistance advisory program which satisfies the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), and Executive Order 11063 (3 CFR, 1959–1963 Comp., p. 652), and offer the services described in paragraph (c)(2) of this section. If the Agency determines that a person occupying property adjacent to the real property acquired for the project is caused substantial economic injury because of such acquisition, it may offer advisory services to such person.

(2) *Services to be provided.* The advisory program shall include such measures, facilities, and services as may be necessary or appropriate in order to:

(i) Determine, for nonresidential (businesses, farm and nonprofit organizations) displacements, the relocation needs and preferences of each business (farm and nonprofit organization) to be displaced and explain the relocation payments and other assistance for which the business may be eligible, the related eligibility requirements, and the procedures for obtaining such assistance. This shall include a personal interview with each business. At a minimum, interviews with displaced business owners and operators should include the following items:

(A) The business's replacement site requirements, current lease terms and other contractual obligations and the financial capacity of the business to accomplish the move.

(B) Determination of the need for outside specialists in accordance with § 24.301(g)(12) that will be required to assist in planning the move, assistance in the actual move, and in the reinstallation of machinery and/or other personal property.

(C) For businesses, an identification and resolution of personalty and/or realty issues. Every effort must be made to identify and resolve personalty and/or realty issues prior to, or at the time of, the appraisal of the property.

(D) An estimate of the time required for the business to vacate the site.

(E) An estimate of the anticipated difficulty in locating a replacement property.

(F) An identification of any advance relocation payments required for the move, and the Agency's legal capacity to provide them.

(ii) Determine, for residential displacements, the relocation needs and preferences of each person to be displaced and explain the relocation payments and other assistance for which the person may be eligible, the related eligibility requirements, and the procedures for obtaining such assistance. This shall include a personal interview with each residential displaced person.

(A) Provide current and continuing information on the availability, purchase prices, and rental costs of comparable replacement dwellings, and explain that the person cannot be required to move unless at least one comparable replacement dwelling is made available as set forth in § 24.204(a).

(B) As soon as feasible, the Agency shall inform the person in writing of the specific comparable replacement dwelling and the price or rent used for establishing the upper limit of the replacement housing payment (*see* § 24.403(a) and (b)) and the basis for the determination, so that the person is aware of the maximum replacement housing payment for which he or she may qualify.

(C) Where feasible, comparable housing shall be inspected prior to being made available to assure that it meets applicable standards (*see* § 24.2(a).) If such an inspection is not made, the Agency shall notify the person to be displaced in writing of the reason that an inspection of the comparable was not made and, that if the comparable is purchased or rented by the displaced person, a replacement housing payment may not be made unless the replacement dwelling is subsequently inspected and determined to be decent, safe, and sanitary. (*See* appendix A of this part, *Section 24.205(c)(2)(ii)(C).*)

(D) Whenever possible, minority persons shall be given reasonable opportunities to relocate to decent, safe, and sanitary replacement dwellings, not located in an area of minority concentration, that are within their financial means. This paragraph (c)(2)(ii)(D), however, does not require an Agency to provide a person a larger payment than is necessary to enable a person to relocate to a comparable replacement dwelling. (*See* appendix A of this part, *Section 24.205(c)(2)(ii)(D).*)

(E) The Agency shall offer all persons transportation to inspect housing to which they are referred.

(F) Any displaced person that may be eligible for government housing assistance at the replacement dwelling shall be advised of any requirements of such government housing assistance program that would limit the size of the replacement dwelling (*see* § 24.2(a)), as well as of the long-term nature of such rent subsidy, and the limited (42 month) duration of the relocation rental assistance payment.

(iii) Provide, for nonresidential moves, current and continuing information on the availability, purchase prices, and rental costs of suitable commercial and farm properties

and locations. Assist any person displaced from a business or farm operation to obtain and become established in a suitable replacement location.

(iv) Minimize hardships to persons in adjusting to relocation by providing counseling, advice as to other sources of assistance that may be available, and such other help as may be appropriate.

(v) Supply persons to be displaced with appropriate information concerning Federal and State housing programs, disaster loan and other programs administered by the Small Business Administration, and other Federal and State programs offering assistance to displaced persons, and technical help to persons applying for such assistance.

(d) *Coordination of relocation activities.* Relocation activities shall be coordinated with project work and other displacement-causing activities to ensure that, to the extent feasible, persons displaced receive consistent treatment and the duplication of functions is minimized. (*See* § 24.6.)

(e) *Subsequent occupants.* Any person who occupies property acquired by an Agency, when such occupancy began subsequent to the acquisition of the property, and the occupancy is permitted by a short-term rental agreement or an agreement subject to termination when the property is needed for a program or project, shall be eligible for advisory services, as determined by the Agency.

§ 24.206 Eviction for cause.

(a) Eviction for cause must conform to applicable State and local law. Any person who occupies the real property and is in lawful occupancy on the date of the initiation of negotiations is presumed to be entitled to relocation payments and other assistance set forth in this part unless the Agency determines that:

(1) The person received an eviction notice prior to the initiation of negotiations and as a result of that notice is later evicted; or

(2) The person is evicted after the initiation of negotiations for serious or repeated violation of material terms of the lease or occupancy agreement; and

(3) In either case the eviction was not undertaken for the purpose of evading the obligation to make available the payments and other assistance set forth in this part.

(b) For purposes of determining eligibility for relocation payments, the date of displacement is the date the person moves, or if later, the date a comparable replacement dwelling is made available. This section applies only to persons who would otherwise have been displaced by the project. (*See* appendix A of this part, *Section 24.206.*)

§ 24.207 General requirements—claims for relocation payments.

(a) *Documentation.* Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as bills, certified prices, appraisals, or other evidence of such expenses. A displaced person must be provided reasonable assistance necessary to complete and file any required claim for payment.

(b) *Expeditious payments.* The Agency shall review claims in an expeditious manner. The claimant shall be promptly notified as to any additional documentation that is required to support the claim. Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim.

(c) *Advanced payments.* If a person demonstrates the need for an advanced relocation payment in order to avoid or reduce a hardship, the Agency shall issue the payment, subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished.

(d) *Time for filing.* (1) All claims for a relocation payment shall be filed with the Agency no later than 18 months after:

(i) For tenants, the date of displacement.

(ii) For owners, the date of displacement or the date of the final payment for the acquisition of the real property, whichever is later.

(2) The Agency shall waive this time period for good cause.

(e) *Notice of denial of claim.* If the Agency disapproves all or part of a payment claimed or refuses to consider the claim on its merits because of untimely filing or other grounds, it shall promptly notify the claimant in writing of its determination, the basis for its determination, and the procedures for appealing that determination.

(f) *No waiver of relocation assistance.* An Agency shall not propose or request that a displaced person waive his or her rights or entitlements to relocation assistance and benefits provided by the Uniform Act and this part. (*See* appendix A of this part, *Section 24.207(f).*)

(g) *Expenditure of payments.* Payments, provided pursuant to this part, shall not be considered to constitute Federal financial assistance. Accordingly, this part does not apply to the expenditure of such payments by, or for, a displaced person.

(h) *Deductions from relocation payments.* An Agency shall deduct the amount of any advance relocation payment from the relocation payment(s) to which a displaced person is otherwise entitled. The Agency shall not withhold any part of a relocation payment to a displaced person to satisfy any other obligation.

§ 24.208 Aliens not lawfully present in the United States.

(a) Each person seeking relocation payments or relocation advisory assistance shall, as a condition of eligibility, certify:

(1) In the case of an individual, that they are a citizen, or an alien who is lawfully present in the United States.

(2) In the case of a family, that each family member is a citizen or an alien who is lawfully present in the United States. The certification may be made by the head of the household on behalf of other family members.

(3) In the case of an unincorporated business, farm, or nonprofit organization, that each owner is a citizen or an alien who is lawfully present in the United States. The certification may be made by the principal owner, manager, or operating officer on behalf of other persons with an ownership interest.

(4) In the case of an incorporated business, farm, or nonprofit organization, that the corporation is authorized to conduct business within the United States.

(b) The certification provided pursuant to paragraphs (a)(1), (2), and (3) of this section shall specify the person's status as a citizen or an alien who is lawfully present in the United States. Requirements concerning the certification in addition to those contained in this section shall be within the discretion of the Federal funding Agency and, within those parameters, that of the Agency carrying out such displacements.

(c) In computing relocation payments under the Uniform Act, if any member(s) of a household or owner(s) of an unincorporated business, farm, or nonprofit organization is (are) determined to be ineligible because of a failure to be lawfully present in the United States, no relocation payments may be made to him or her. Any payment(s) for which such household, unincorporated business, farm, or nonprofit organization would otherwise be eligible shall be computed for the household, based on the number of eligible household members and for the unincorporated business, farm, or nonprofit organization, based on the ratio of ownership between eligible and

ineligible owners. (*See* appendix A of this part, *Section 24.208(c).*)

(d) The Agency shall consider the certification provided pursuant to paragraph (a) of this section to be valid, unless the Agency determines in accordance with paragraph (f) of this section that it is invalid based on a review of documentation or other information that the Agency considers reliable and appropriate.

(e) Any review by the Agency of the certifications provided pursuant to paragraph (a) of this section shall be conducted in a nondiscriminatory fashion. Each Agency will apply the same standard of review to all such certifications it receives, except that such standard may be revised periodically.

(f) If, based on a review of a person's documentation or other credible evidence, an Agency has reason to believe that a person's certification is invalid (for example a document reviewed does not on its face reasonably appear to be genuine), and that, as a result, such person may be an alien not lawfully present in the United States, it shall obtain the following information before making a final determination:

(1) For a person who has certified that they are an alien lawfully present in the United States, the Agency shall obtain verification of the person's status by using the Systematic Alien Verification for Entitlements (SAVE) program administered by U.S. Citizenship and Immigration Services (USCIS) to verify immigration status.

(2) For a person who has certified that they are a citizen or national, if the Agency has reason to believe that the certification is invalid, the Agency shall request evidence of United States citizenship or nationality and, if considered necessary, verify the accuracy of such evidence with the issuer or other appropriate source.

(g) No relocation payments or relocation advisory assistance shall be provided to a person who has not provided the certification described in this section or who has been determined to be not lawfully present in the United States, unless such person can demonstrate to the Agency's satisfaction that the denial of relocation assistance will result in an exceptional and extremely unusual hardship to such person's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States.

(h) For purposes of paragraph (g) of this section, ''exceptional and extremely unusual hardship'' to such spouse, parent, or child of the person not lawfully present in the United States means that the denial of relocation payments and advisory assistance to such person will directly result in (*see* appendix A of this part, *Section 24.208(h)*):

(1) A significant and demonstrable adverse impact on the health or safety of such spouse, parent, or child;

(2) A significant and demonstrable adverse impact on the continued existence of the family unit of which such spouse, parent, or child is a member; or

(3) Any other impact that the Agency determines will have a significant and demonstrable adverse impact on such spouse, parent, or child.

(i) The certification referred to in paragraph (a) of this section may be included as part of the claim for relocation payments described in § 24.207.

(Approved by the Office of Management and Budget under control number 2105–0508)

§ 24.209 Relocation payments not considered as income.

No relocation payment received by a displaced person under this part shall be considered as income for the purpose of the Internal Revenue Code of 1954, which has been redesignated as the Internal Revenue Code of 1986 (Title 26, U.S. Code), or for the purpose of determining the eligibility or the extent of eligibility of any person for assistance under the Social Security Act (42 U.S. Code 301 *et seq.*) or any other Federal law, except for any Federal law providing low-income housing assistance.

Subpart D—Payments for Moving and Related Expenses

§ 24.301 Payment for actual reasonable moving and related expenses.

(a) *General.* (1) Any owner-occupant or tenant who qualifies as a displaced person (defined at § 24.2(a)) and who moves from a dwelling (including a mobile home) or who moves from a business, farm, or nonprofit organization is entitled to payment of his or her actual moving and related expenses, as the Agency determines to be reasonable and necessary.

(2) A non-occupant owner of a rented mobile home is eligible for actual cost reimbursement under this section to relocate the mobile home. If the mobile home is not acquired as real estate, but the homeowner-occupant obtains a replacement housing payment under one of the circumstances described at § 24.502(a)(3), the home-owner occupant is not eligible for payment for moving the mobile home, but may be eligible for a payment for moving personal property from the mobile home.

(b) *Moves from a dwelling.* A displaced person's actual, reasonable, and necessary moving expenses for moving personal property from a dwelling may be determined based on the cost of one, or a combination of the methods in paragraphs (b)(1) and (2) of this section (eligible expenses for moves from a dwelling include the expenses described in paragraphs (g)(1) through (7) of this section):

(1) *Commercial move.* Moves performed by a professional mover.

(2) *Self-move.* Moves that may be performed by the displaced person in one or a combination of the following methods:

(i) *Fixed Residential Moving Cost Schedule.* The Fixed Residential Moving Cost Schedule described in § 24.302.

(ii) *Actual cost move.* Supported by receipted bills for labor and equipment. Hourly labor rates should not exceed the cost paid by a commercial mover. Equipment rental fees should be based on the actual cost of renting the equipment but not exceed the cost paid by a commercial mover.

(c) *Moves from a mobile home.* Eligible expenses for moves from a mobile home include those expenses described in paragraphs (g)(1) through (7) of this section. In addition to the items in paragraph (a) of this section, the owner-occupant of a mobile home that is moved as personal property and used as the person's replacement dwelling, is also eligible for the moving expenses described in paragraphs (g)(8) through (10) of this section. A displaced person's actual, reasonable, and necessary moving expenses for moving personal property from a mobile home may be determined based on the cost of one, or a combination of the following methods:

(1) *Commercial move.* Moves performed by a professional mover.

(2) *Self-move.* Moves that may be performed by the displaced person in one or a combination of the following methods:

(i) *Fixed Residential Moving Cost Schedule.* The Fixed Residential Moving Cost Schedule described in § 24.302.

(ii) *Actual cost move.* Supported by receipted bills for labor and equipment. Hourly labor rates should not exceed the cost paid by a commercial mover. Equipment rental fees should be based on the actual cost of renting the equipment but not exceed the cost paid by a commercial mover.

(d) *Moves from a business, farm, or nonprofit organization.* Eligible

expenses for moves from a business, farm, or nonprofit organization include those expenses described in paragraphs (g)(1) through (7) and (11) through (18) of this section and § 24.303. Personal property as determined by an inventory from a business, farm, or nonprofit organization may be moved by one or a combination of the following methods:

(1) *Commercial move.* Based on the lower of two bids or estimates prepared by a commercial mover. At the Agency's discretion, payment for a low cost or uncomplicated move may be based on a single bid or estimate.

(2) *Self-move.* A self-move payment may be based on one or a combination of the following:

(i) The lower of two bids or estimates prepared by a commercial mover or qualified Agency staff person. At the Agency's discretion, payment for a low cost or uncomplicated move may be based on a single bid or estimate; or

(ii) Supported by receipted bills for labor and equipment. Hourly labor rates should not exceed the rates paid by a commercial mover to employees performing the same activity and, equipment rental fees should be based on the actual rental cost of the equipment but not to exceed the cost paid by a commercial mover.

(e) *Personal property only.* Eligible expenses for a person who is required to move personal property from real property but is not required to move from a dwelling (including a mobile home), business, farm, or nonprofit organization include those expenses described in paragraphs (g)(1) through (7) and (18) of this section. (*See* appendix A of this part, *Section 24.301(e).*)

(f) *Advertising signs.* The amount of a payment for direct loss of an advertising sign, which is personal property shall be the lesser of:

(1) The depreciated reproduction cost of the sign, as determined by the Agency, less the proceeds from its sale; or

(2) The estimated cost of moving the sign, but with no allowance for storage.

(g) *Eligible actual moving expenses.* (1) Transportation of the displaced person and personal property. Transportation costs for a distance beyond 50 miles are not eligible, unless the Agency determines that relocation beyond 50 miles is justified.

(2) Packing, crating, unpacking, and uncrating of the personal property.

(3) Disconnecting, dismantling, removing, reassembling, and reinstalling relocated household appliances and other personal property. For businesses, farms, or nonprofit organizations this includes machinery, equipment, substitute personal property, and connections to utilities available within the building; it also includes modifications to the personal property, including those mandated by Federal, State, or local law, code, or ordinance, necessary to adapt it to the replacement structure, the replacement site, or the utilities at the replacement site, and modifications necessary to adapt the utilities at the replacement site to the personal property.

(4) Storage of the personal property for a period not to exceed 12 months, unless the Agency determines that a longer period is necessary.

(5) Insurance for the replacement value of the property in connection with the move and necessary storage.

(6) The replacement value of property lost, stolen, or damaged in the process of moving (not through the fault or negligence of the displaced person, his or her agent, or employee) where insurance covering such loss, theft, or damage is not reasonably available.

(7) Other moving-related expenses that are not listed as ineligible under paragraph (h) of this section, as the Agency determines to be reasonable and necessary.

(8) The reasonable cost of disassembling, moving, and reassembling any appurtenances attached to a mobile home, such as porches, decks, skirting, and awnings, which were not acquired, anchoring of the unit, and utility ''hookup'' charges.

(9) The reasonable cost of repairs and/or modifications so that a mobile home can be moved and/or made decent, safe, and sanitary.

(10) The cost of a nonrefundable mobile home park entrance fee, to the extent it does not exceed the fee at a comparable mobile home park, if the person is displaced from a mobile home park or the Agency determines that payment of the fee is necessary to effect relocation.

(11) Any actual, reasonable, or necessary costs of a license, permit, fee, or certification required of the displaced person to operate a business, farm, or non-profit at the replacement location. However, the payment may be based on the remaining useful life of the existing license, permit, fees, or certification.

(12) Professional services as the Agency determines to be actual, reasonable, and necessary for:

(i) Planning the move of the personal property;

(ii) Moving the personal property; and

(iii) Installing the relocated personal property at the replacement location.

(13) Relettering signs, replacing stationery on hand at the time of displacement, and making reasonable and necessary updates to other media that are made obsolete as a result of the move. (*See* appendix A of this part, *Section 24.301(g)(13).*)

(14) Actual direct loss of tangible personal property incurred as a result of moving or discontinuing the business or farm operation. The payment shall consist of:

(i) If the item is currently in use, the lesser of:

(A) The estimated cost to move and reinstall (to be eligible for payment, the claimant must make a good faith effort to sell the personal property, unless the Agency determines that such effort is not necessary); or

(B) The fair market value in place of the item, as is for continued use, less the proceeds from its sale.

(ii) If the item is not currently in use: The estimated cost of moving the item as is but not including any allowance for storage.

(iii) When payment for property loss is claimed for goods held for sale, the fair market value shall be based on the cost of the goods to the business, not the potential selling prices. (*See* appendix A of this part, *Section 24.301(g)(14).*)

(15) The reasonable cost incurred in attempting to sell an item that is not to be relocated.

(16) If an item of personal property, which is used as part of a business or farm operation is not moved but is promptly replaced with a substitute item that performs a comparable function at the replacement site, the displaced person is entitled to payment of the lesser of:

(i) The cost of the substitute item, including installation costs of the replacement site, minus any proceeds from the sale or trade-in of the replaced item; or

(ii) The estimated cost of moving and reinstalling the replaced item but with no allowance for storage. At the Agency's discretion, the estimated cost for a low cost or uncomplicated move may be based on a single bid or estimate.

(17) Searching for a replacement location.

(i) A business or farm operation is entitled to reimbursement for actual expenses, not to exceed $5,000, as the Agency determines to be reasonable, which are incurred in searching for a replacement location, including:

(A) Transportation;

(B) Meals and lodging away from home;

(C) Time spent searching, based on reasonable salary or earnings;

(D) Fees paid to a real estate agent or broker to locate a replacement site, exclusive of any fees or commissions related to the purchase of such sites;

(E) Time spent in obtaining permits and attending zoning hearings; and

(F) Expenses negotiating the purchase of a replacement site based on a reasonable salary or fee, including actual, reasonable, and necessary attorney's fees.

(ii) The Federal funding Agency may, on a program wide or project basis, allow a one-time payment of up to $1,000 for search expenses with little or no documentation as an alternative payment method to paragraph (g)(17)(i) of this section. (*See* appendix A of this part, *Section 24.301(g)(17).*)

(18) When the personal property to be moved is of low value and high bulk, and the cost of moving the property would be disproportionate to its value in the judgment of the Agency, the allowable moving cost payment shall not exceed the lesser of: The amount which would be received if the property were sold at the site; or the replacement cost of a comparable quantity delivered to the new business location. Examples of personal property covered by this paragraph (g)(18) include, but are not limited to, stockpiled sand, gravel, minerals, metals, and other similar items of personal property as determined by the Agency.

(h) *Ineligible moving and related expenses.* A displaced person is not entitled to payment for:

(1) The cost of moving any structure or other real property improvement in which the displaced person reserved ownership. (However, this part does not preclude the computation under § 24.401(c)(2)(iii));

(2) Interest on a loan to cover moving expenses;

(3) Loss of goodwill;

(4) Loss of profits;

(5) Loss of trained employees;

(6) Any additional operating expenses of a business or farm operation incurred because of operating in a new location except as provided in § 24.304(a)(6);

(7) Personal injury;

(8) Any legal fee or other cost for preparing a claim for a relocation payment or for representing the claimant before the Agency;

(9) Expenses for searching for a replacement dwelling;

(10) Physical changes to the real property at the replacement location of a business or farm operation except as provided in paragraph (g)(3) of this section and § 24.304(a);

(11) Costs for storage of personal property on real property already owned or leased by the displaced person;

(12) Refundable security and utility deposits; and

(13) Cosmetic changes to a replacement dwelling such as painting, draperies, or replacement carpet or flooring.

(i) *Notification and inspection (nonresidential).* The Agency shall inform the displaced person, in writing, of the requirements of this section as soon as possible after the initiation of negotiations. This information may be included in the relocation information provided the displaced person as set forth in § 24.203. To be eligible for payments under this section the displaced person must:

(1) Provide the Agency reasonable advance notice of the approximate date of the start of the move or disposition of the personal property and an inventory of the items to be moved. However, the Agency may waive this notice requirement after documenting its file accordingly.

(2) Permit the Agency to make reasonable and timely inspections of the personal property at both the displacement and replacement sites and to monitor the move.

(j) *Transfer of ownership (nonresidential).* Upon request and in accordance with applicable law, the claimant shall transfer to the Agency ownership of any personal property that has not been moved, sold, or traded in.

§ 24.302 Fixed payment for moving expenses—residential moves.

Any person displaced from a dwelling or a seasonal residence or a dormitory style room is entitled to receive a fixed moving cost payment as an alternative to a payment for actual moving and related expenses under § 24.301. This payment shall be determined according to the Fixed Residential Moving Cost Schedule approved by the Federal Highway Administration and published in the **Federal Register** on a periodic basis. The payment to a person with minimal personal possessions who is in occupancy of a dormitory style room or a person whose residential move is performed by an Agency at no cost to the person shall be limited to the amount stated in the most recent edition of the Fixed Residential Moving Cost Schedule.

(a) An Agency may determine that the storage of personal property is a reasonable and necessary moving expense for a displaced person under this part. The determination shall be based on the needs of the displaced person; the nature of the move; the plans for permanent relocation; the amount of time available for the relocation process; and, whether storage will facilitate relocation. If the Agency determines that storage is reasonable and necessary in conjunction with this payment, the Agency shall pay the actual, reasonable, and necessary storage expenses in accordance with § 24.301(g)(4). However, regardless of whether storage is approved, the Fixed Residential Move Cost Schedule provides a one-time payment for one move from the displacement dwelling to the replacement dwelling, dwelling, or storage facility. Consequently, displaced persons must be fully informed that reimbursement of costs to move the personal property to storage and the cost of approved storage represent a full reimbursement of their eligibility for moving costs under this part. (*See* appendix A of this part, *Section 24.302.*)

(b) [Reserved]

(c) The Fixed Residential Moving Cost Schedule is available at the following URL: *http://www.fhwa.dot.gov/real_estate/practitioners/uniform_act/relocation/moving_cost_schedule.cfm.*

§ 24.303 Related nonresidential eligible expenses.

The following expenses, in addition to those provided by § 24.301 for moving personal property, shall be provided if the Agency determines that they are actual, reasonable, and necessary:

(a) Connection to available utilities from the replacement site's property line to improvements at the replacement site. (*See* appendix A of this part, *Section 24.303(a).*)

(b) Professional services performed prior to the purchase or lease of a replacement site to determine its suitability for the displaced person's business operation including but not limited to soil testing or feasibility and marketing studies (excluding any fees or commissions directly related to the purchase or lease of such site). At the discretion of the Agency a reasonable pre-approved hourly rate may be established. (*See* appendix A of this part, *Section 24.303(b).*)

(c) Impact fees and one-time assessments for anticipated heavy utility usage, as determined necessary by the Agency. (*See* appendix A of this part, *Section 24.303(c).*)

§ 24.304 Reestablishment expenses—nonresidential moves.

In addition to the payments available under §§ 24.301 and 24.303, a small business, farm, or nonprofit organization is entitled to receive a payment, not to exceed $25,000, for expenses actually incurred in relocating and reestablishing such small business, farm, or nonprofit organization at a replacement site.

(a) *Eligible expenses.* Reestablishment expenses must be reasonable and necessary, as determined by the Agency.

They include, but are not limited to, the following:

(1) Repairs or improvements to the replacement real property as required by Federal, State, or local law, code, or ordinance.

(2) Modifications to the replacement property to accommodate the business operation or make replacement structures suitable for conducting the business.

(3) Construction and installation costs for exterior signing to advertise the business.

(4) Redecoration or replacement of soiled or worn surfaces at the replacement site, such as paint, paneling, or carpeting.

(5) Advertisement of replacement location.

(6) Estimated increased costs of operation during the first 2 years at the replacement site for such items as:

(i) Lease or rental charges;

(ii) Personal or real property taxes;

(iii) Insurance premiums; and

(iv) Utility charges, excluding impact fees.

(7) Other items that the Agency considers essential to the reestablishment of the business.

(b) *Ineligible expenses.* The following is a nonexclusive listing of reestablishment expenditures not considered to be reasonable, necessary, or otherwise eligible:

(1) Purchase of capital assets, such as office furniture, filing cabinets, machinery, or trade fixtures.

(2) Purchase of manufacturing materials, production supplies, product inventory, or other items used in the normal course of the business operation.

(3) Interest on money borrowed to make the move or purchase the replacement property.

(4) Payment to a part-time business in the home which does not contribute materially, defined at § 24.2(a), to the household income.

(5) Construction costs for a new building at the business replacement site, or costs to build out a shell, or costs to substantially reconstruct a building. (*See* appendix A of this part, *Section 24.304(b)(5).*)

§ 24.305 Fixed payment for moving expenses—nonresidential moves.

(a) *Business.* A displaced business may be eligible to choose a fixed payment in lieu of the payments for both actual moving and related expenses, as well as actual reasonable reestablishment expenses provided by §§ 24.301, 24.303, and 24.304. Such fixed payment, except for payment to a nonprofit organization, shall equal the average annual net earnings of the business, as computed in accordance with paragraph (e) of this section, but not less than $1,000 nor more than $40,000. The displaced business is eligible for the payment if the Agency determines that:

(1) The business owns or rents personal property which must be moved in connection with such displacement and for which an expense would be incurred in such move and the business vacates or relocates from its displacement site;

(2) The business cannot be relocated without a substantial loss of its existing patronage (clientele or net earnings). A business is assumed to meet this test unless the Agency determines that it will not suffer a substantial loss of its existing patronage;

(3) The business is not part of a commercial enterprise having more than three other entities which are not being acquired by the Agency, and which are under the same ownership and engaged in the same or similar business activities;

(4) The business is not operated at a displacement dwelling solely for the purpose of renting such dwelling to others;

(5) The business is not operated at the displacement site solely for the purpose of renting the site to others; and

(6) The business contributed materially to the income of the displaced person during the 2 taxable years prior to displacement. (*See* § 24.2(a).)

(b) *Determining the number of businesses.* In determining whether two or more displaced legal entities constitute a single business, which is entitled to only one fixed payment, all pertinent factors shall be considered, including the extent to which:

(1) The same premises and equipment are shared;

(2) Substantially identical or interrelated business functions are carried out and business and financial affairs are commingled;

(3) The entities are held out to the public, and to those customarily dealing with them, as one business; and

(4) The same person or closely related persons own, control, or manage the affairs of the entities.

(c) *Farm operation.* A displaced farm operation (defined at § 24.2(a)) may choose a fixed payment, in lieu of the payments for both actual moving as well as related expenses and actual reasonable reestablishment expenses, in an amount equal to its average annual net earnings as computed in accordance with paragraph (e) of this section, but not less than $1,000 nor more than $40,000. In the case of a partial acquisition of land, which was a farm operation before the acquisition, the fixed payment shall be made only if the Agency determines that:

(1) The acquisition of part of the land caused the operator to be displaced from the farm operation on the remaining land; or

(2) The partial acquisition caused a substantial change in the nature of the farm operation.

(d) *Nonprofit organization.* A displaced nonprofit organization may choose a fixed payment of $1,000 to $40,000, in lieu of the payments for both actual moving as well as related expenses and actual reasonable reestablishment expenses, if the Agency determines that it cannot be relocated without a substantial loss of existing patronage (membership or clientele). A nonprofit organization is assumed to meet this test, unless the Agency demonstrates otherwise. Any payment in excess of $1,000 must be supported with financial statements for the two 12-month periods prior to the acquisition. The amount to be used for the payment is the average of 2 years annual gross revenues less administrative expenses. (*See* appendix A of this part, *Section 24.305(d).*)

(e) *Average annual net earnings of a business or farm operation.* The average annual net earnings of a business or farm operation are one-half of its net earnings before Federal, State, and local income taxes during the 2 taxable years immediately prior to the taxable year in which it was displaced. If the business or farm was not in operation for the full 2 taxable years prior to displacement, net earnings shall be based on the actual period of operation at the displacement site during the 2 taxable years prior to displacement, projected to an annual rate. (*See* appendix A of this part, *Section 24.305(e)* for sample calculations.) Average annual net earnings may be based upon a different period of time when the Agency determines it to be more equitable. Net earnings include any compensation obtained from the business or farm operation by its owner, the owner's spouse, and dependents. The displaced person shall furnish the Agency proof of net earnings through income tax returns, certified financial statements, or other reasonable evidence, which the Agency determines is satisfactory. (*See* appendix A of this part, *Section 24.305(e).*)

§ 24.306 Discretionary utility relocation payments.

(a) Whenever a program or project undertaken by an Agency causes the relocation of a utility facility (defined at

§ 24.2(a)) and the relocation of the facility creates extraordinary expenses for its owner, the Agency may, at its option, make a relocation payment to the owner for all or part of such expenses, if the following criteria are met:

(1) The utility facility legally occupies State or local government property, or property over which the State or local government has an easement or right-of-way;

(2) The utility facility's right of occupancy thereon is pursuant to State law or local ordinance specifically authorizing such use, or where such use and occupancy has been granted through a franchise, use and occupancy permit, or other similar agreement;

(3) Relocation of the utility facility is required by and is incidental to the primary purpose of the project or program undertaken by the Agency;

(4) There is no Federal law, other than the Uniform Act, which clearly establishes a policy for the payment of utility moving costs that is applicable to the Agency's program or project; and

(5) State or local government reimbursement for utility moving costs or payment of such costs by the Agency is in accordance with State law.

(b) For the purposes of this section, the term extraordinary expenses mean those expenses which, in the opinion of the Agency, are not routine or predictable expenses relating to the utility's occupancy of rights-of-way, and are not ordinarily budgeted as operating expenses, unless the owner of the utility facility has explicitly and knowingly agreed to bear such expenses as a condition for use of the property, or has voluntarily agreed to be responsible for such expenses.

(c) A relocation payment to a utility facility owner for moving costs under this section may not exceed the cost to functionally restore the service disrupted by the federally assisted program or project, less any increase in value of the new facility and salvage value of the old facility. The Agency and the utility facility owner shall reach prior agreement on the nature of the utility relocation work to be accomplished, the eligibility of the work for reimbursement, the responsibilities for financing and accomplishing the work, and the method of accumulating costs and making payment. (*See* appendix A of this part, *Section 24.306.*)

Subpart E—Replacement Housing Payments

§ 24.401 Replacement housing payment for 90-day homeowner-occupants.

(a) *Eligibility.* A displaced person is eligible for the replacement housing payment for a 90-day homeowner-occupant if the person:

(1) Has actually owned and occupied the displacement dwelling for not less than 90 days immediately prior to the initiation of negotiations; and

(2) Purchases and occupies a decent, safe, and sanitary replacement dwelling within 1 year after the later of the following dates (except that the Agency may extend such 1 year period for good cause):

(i) The date the displaced person receives final payment for the displacement dwelling or, in the case of condemnation, the date the full amount of the estimate of just compensation is deposited in the court; or

(ii) The date the Agency's obligation under § 24.204 is met.

(b) *Amount of payment.* The replacement housing payment for an eligible 90-day homeowner-occupant may not exceed $31,000. (*See also* § 24.404.) The payment under this subpart is limited to the amount necessary to relocate to a comparable replacement dwelling within 1 year from the date the displaced homeowner-occupant is paid for the displacement dwelling, or the date a comparable replacement dwelling is made available to such person, whichever is later. The payment shall be the sum of:

(1) The amount by which the cost of a replacement dwelling exceeds the acquisition cost of the displacement dwelling, as determined in accordance with paragraph (c) of this section;

(2) The increased interest costs and other debt service costs which are incurred in connection with the mortgage(s) on the replacement dwelling, as determined in accordance with paragraph (d) of this section; and

(3) The reasonable expenses incidental to the purchase of the replacement dwelling, as determined in accordance with paragraph (f) of this section.

(c) *Price differential*—(1) *Basic computation.* The price differential to be paid under paragraph (b)(1) of this section is the amount which must be added to the acquisition cost of the displacement dwelling and site (*see* § 24.2(a)) to provide a total amount equal to the lesser of:

(i) The reasonable cost of a comparable replacement dwelling as determined in accordance with § 24.403(a); or

(ii) The purchase price of the DSS replacement dwelling actually purchased and occupied by the displaced person.

(2) *Owner retention of displacement dwelling.* If the owner retains ownership of his or her dwelling, moves it from the displacement site, and reoccupies it on a replacement site, the purchase price of the replacement dwelling shall be the sum of:

(i) The cost of moving and restoring the dwelling to a condition comparable to that prior to the move;

(ii) The cost of making the unit a DSS replacement dwelling (*see* § 24.2(a)); and

(iii) The current fair market value for residential use of the replacement dwelling site (*see* appendix A of this part, *Section 24.401(c)(2)(iii)*), unless the claimant rented the displacement site and there is a reasonable opportunity for the claimant to rent a suitable replacement site; and

(iv) The retention value of the dwelling, if such retention value is reflected in the ''acquisition cost'' used when computing the replacement housing payment.

(d) *Increased mortgage interest costs.* The Agency shall determine the factors to be used in computing the amount to be paid to a displaced person under paragraph (b)(2) of this section. The payment for increased mortgage interest cost shall be the amount which will reduce the mortgage balance on a new mortgage to an amount which could be amortized with the same monthly payment for principal and interest as that for the mortgage(s) on the displacement dwelling. In addition, payments shall include other debt service costs, if not paid as incidental costs, and shall be based only on bona fide mortgages that were valid liens on the displacement dwelling for at least 180 days prior to the initiation of negotiations. Paragraphs (d)(1) through (5) of this section shall apply to the computation of the increased mortgage interest costs payment, which payment shall be contingent upon a mortgage being placed on the replacement dwelling.

(1) The payment shall be based on the unpaid mortgage balance(s) on the displacement dwelling; however, in the event the displaced person obtains a smaller mortgage than the mortgage balance(s) computed in the buydown determination, the payment will be prorated and reduced accordingly. (*See* appendix A of this part, *Section 24.401(d).*) In the case of a home equity loan the unpaid balance shall be that balance which existed 180 days prior to the initiation of negotiations or the

balance on the date of acquisition, whichever is less.

(2) The payment shall be based on the remaining term of the mortgage(s) on the displacement dwelling or the term of the new mortgage, whichever is shorter.

(3) The interest rate on the new mortgage used in determining the amount of the payment shall not exceed the prevailing fixed interest rate for conventional mortgages currently charged by mortgage lending institutions in the area in which the replacement dwelling is located.

(4) Purchaser's points and loan origination or assumption fees, but not seller's points, shall be paid to the extent:

(i) They are not paid as incidental expenses;

(ii) They do not exceed rates normal to similar real estate transactions in the area;

(iii) The Agency determines them to be necessary; and

(iv) The computation of such points and fees shall be based on the unpaid mortgage balance on the displacement dwelling, less the amount determined for the reduction of the mortgage balance under this section.

(5) The displaced person shall be advised of the approximate amount of this payment and the conditions that must be met to receive the payment as soon as the facts relative to the person's current mortgage(s) are known and the payment shall be made available at or near the time of closing on the replacement dwelling in order to reduce the new mortgage as intended.

(e) *Home equity conversion mortgage.* The payment for replacing a HECM shall be the difference between the existing HECM balance and the minimum dollar amount necessary to purchase a replacement HECM which will provide the same or similar terms as that for the HECM on the displacement dwelling. In addition, payments shall include other debt service costs, if not paid as incidental costs, and shall be based only on HECMs that were valid liens on the displacement dwelling for at least 180 days prior to the initiation of negotiations. Paragraphs (e)(1) through (4) of this section shall apply to the computation of the mortgage interest differential payment (MIDP) required, which payment shall be contingent upon a new HECM mortgage being purchased for the replacement dwelling.

(1) The payment shall be based on the difference between the HECM balance and the minimum amount needed to qualify for a HECM with the similar terms as the HECM mortgage on the displacement dwelling; however, in the event the displaced person obtains a smaller HECM than the HECM balance(s) computed in the buydown determination, the payment will be prorated and reduced accordingly. (*See* appendix A of this part, *Section 24.401(e).*) The HECM balance shall be that balance which existed 180 days prior to the initiation of negotiations or the HECM balance on the date of acquisition, whichever is less.

(2) The interest rate on the new HECM used in determining the amount of the eligibility shall not exceed the prevailing rate for HECMs currently charged by mortgage lending institutions for owners with similar amounts of equity in their units in the area in which the replacement dwelling is located.

(3) Purchaser's points and loan origination, but not seller's points, shall be paid to the extent:

(i) They are not paid as incidental expenses;

(ii) They do not exceed rates normal to similar real estate transactions in the area;

(iii) The Agency determines them to be necessary; and

(iv) The computation of such points and fees shall be based on the HECM balance on the displacement dwelling plus any amount necessary to purchase the new HECM.

(4) The displaced person or their representative shall be advised of the approximate amount of this eligibility and the conditions that must be met to receive the reimbursement as soon as the facts relative to the person's current HECM are known; the payment shall be made available at or near the time of closing on the replacement dwelling in order to purchase the new HECM as intended.

(f) *Incidental expenses.* The incidental expenses to be paid under paragraph (b)(3) of this section or § 24.402(c)(1) are those necessary and reasonable costs actually incurred by the displaced person incident to the purchase of a replacement dwelling, and customarily paid by the buyer, including:

(1) Legal, closing, and related costs, including those for title search, preparing conveyance instruments, notary fees, preparing surveys and plats, and recording fees.

(2) Lender, FHA, or VA application and appraisal fees.

(3) Loan origination or assumption fees that do not represent prepaid interest.

(4) Professional home inspection, certification of structural soundness, and termite inspection.

(5) Credit report.

(6) Owner's and mortgagee's evidence of title, *e.g.,* title insurance, not to exceed the costs for a comparable replacement dwelling.

(7) Escrow agent's fee.

(8) State revenue or documentary stamps, sales or transfer taxes (not to exceed the costs for a comparable replacement dwelling).

(9) Such other costs as the Agency determine to be incidental to the purchase.

(g) *Rental assistance payment for 90-day homeowner.* A 90-day homeowner-occupant, who could be eligible for a replacement housing payment under paragraph (a) of this section but elects to rent a replacement dwelling, is eligible for a rental assistance payment. The amount of the rental assistance payment is based on a determination of market rent for the acquired dwelling compared to a comparable rental dwelling available on the market. The difference, if any, is computed in accordance with § 24.402(b)(1), except that the limit of $7,200 does not apply, and disbursed in accordance with § 24.402(b)(3). Under no circumstances would the rental assistance payment exceed the amount that could have been received under paragraph (b)(1) of this section had the 90-day homeowner elected to purchase and occupy a comparable replacement dwelling.

§ 24.402 Replacement housing payment for 90-day tenants and certain others.

(a) *Eligibility.* A tenant displaced from a dwelling is entitled to a payment not to exceed $7,200 for rental assistance, as computed in accordance with paragraph (b) of this section, or down payment assistance, as computed in accordance with paragraph (c) of this section, if such displaced person:

(1) Has actually and lawfully occupied the displacement dwelling for at least 90 days immediately prior to the initiation of negotiations; and

(2) Has rented or purchased and occupied a DSS replacement dwelling within 1 year (unless the Agency extends this period for good cause) after the date he or she moves from the displacement dwelling.

(b) *Rental assistance payment*—(1) *Amount of payment.* An eligible displaced person who rents a replacement dwelling is entitled to a payment not to exceed $7,200 for rental assistance. (*See* § 24.404.) Such payment shall be 42 times the amount obtained by subtracting the base monthly rental for the displacement dwelling from the lesser of:

(i) The monthly rent and estimated average monthly cost of utilities for a comparable replacement dwelling; or

(ii) The monthly rent and estimated average monthly cost of utilities for the DSS replacement dwelling actually occupied by the displaced person.

(2) *Base monthly rental for displacement dwelling.* The base monthly rental for the displacement dwelling is the lesser of:

(i) The average monthly cost for rent and utilities at the displacement dwelling for a reasonable period prior to displacement, as determined by the Agency (for an owner-occupant, use the fair market rent for the displacement dwelling; for a tenant who paid little or no rent for the displacement dwelling, use the fair market rent, unless its use would result in a hardship because of the person's income or other circumstances); or

(ii)(A) Thirty (30) percent of the displaced person's average monthly gross household income if the amount is classified as ''low income'' by the U.S. Department of Housing and Urban Development's Uniform Relocation Act Income (''Survey''). The base monthly rental shall be established solely on the criteria in paragraph (b)(2)(i) of this section for persons with income exceeding the Survey's ''low income'' limits, for persons refusing to provide appropriate evidence of income, and for persons who are dependents. A full-time student or resident of an institution may be assumed to be a dependent, unless the person demonstrates otherwise; or,

(B) The Surveys U.S. Department of Housing and Urban Development's Public Housing Uniform Relocation Act Income Limits are updated annually and are available on FHWA's website.[6]

(iii) The total of the amounts designated for shelter and utilities if the displaced person is receiving a welfare assistance payment from a program that designates the amounts for shelter and utilities.

(3) *Manner of disbursement.* A rental assistance payment may, at the Agency's discretion, be disbursed in either a lump sum or in installments. However, except as limited by § 24.403(f), the full amount vests immediately, whether or not there is any later change in the person's income or rent, or in the condition or location of the person's replacement housing.

(c) *Down payment assistance payment*—(1) *Amount of payment.* An eligible displaced person who purchases a replacement dwelling is entitled to a down payment assistance payment in the amount the person would receive under paragraph (b) of this section if the person rented a comparable replacement dwelling. At the Agency's discretion, a down payment assistance payment that is less than $7,200 may be increased to any amount not to exceed $7,200. However, the payment to a displaced homeowner shall not exceed the amount the owner would receive under § 24.401(b) if he or she met the 90-day occupancy requirement. If the Agency elects to provide the maximum payment of $7,200 as a down payment, the Agency shall apply this discretion in a uniform and consistent manner, so that eligible displaced persons in like circumstances are treated equally. A displaced person eligible to receive a payment as a 90-day owner-occupant under § 24.401(a) is not eligible for this payment. (*See* appendix A of this part, *Section 24.402(c).*)

(2) *Application of payment.* The full amount of the replacement housing payment for down payment assistance must be applied to the purchase price of the replacement dwelling and related incidental expenses.

§ 24.403 Additional rules governing replacement housing payments.

(a) *Determining cost of comparable replacement dwelling.* The upper limit of a replacement housing payment shall be based on the cost of a comparable replacement dwelling. (*See* § 24.2(a).)

(1) If available, at least three comparable replacement dwellings shall be considered and the payment computed on the basis of the dwelling most nearly representative of, and equal to or better than, the displacement dwelling. (*See* appendix A of this part, *Section 24.403(a)(1).*)

(2) If the site of the comparable replacement dwelling lacks a major exterior attribute of the displacement dwelling site (*e.g.,* the site is significantly smaller or does not contain a swimming pool), the value of such attribute shall be subtracted from the acquisition cost of the displacement dwelling for purposes of computing the payment.

(3) If the acquisition of a portion of a typical residential property causes the displacement of the owner from the dwelling and the Agency determines that the remainder has economic value to the owner, the Agency may offer to purchase the entire property. If the owner refuses to sell the remainder to the Agency, the fair market value of the remainder may be added to the acquisition cost of the displacement dwelling for purposes of computing the replacement housing payment. (*See* appendix A of this part, *Section 24.403(a)(3).*)

(4) To the extent feasible, comparable replacement dwellings shall be selected from the neighborhood in which the displacement dwelling was located or, if that is not possible, in nearby or similar neighborhoods where housing costs are generally the same or higher.

(5) If two or more occupants of the displacement dwelling move to separate replacement dwellings, each occupant is entitled to a reasonable prorated share, as determined by the Agency, of any relocation payments that would have been made if the occupants moved together to a comparable replacement dwelling. However, if the Agency determines that two or more occupants maintained separate households within the same dwelling, such occupants have separate entitlements to relocation payments.

(6) An Agency shall deduct the amount of any advance relocation payment from the relocation payment(s) to which a displaced person is otherwise entitled. The Agency shall not withhold any part of a relocation payment to a displaced person to satisfy an obligation to any other creditor.

(7) If the displacement dwelling was part of a property that contained another dwelling unit and/or space used for nonresidential purposes, and/or is located on a lot larger than typical for residential purposes, only that portion of the acquisition payment which is actually attributable to the displacement dwelling shall be considered the acquisition cost when computing the replacement housing payment.

(b) *Inspection of replacement dwelling.* Before making a replacement housing payment or releasing the initial payment from escrow, the Agency or its designated representative shall inspect the replacement dwelling and determine whether it is a DSS dwelling as defined at § 24.2(a).

(c) *Purchase of replacement dwelling.* A displaced person is considered to have met the requirement to purchase a replacement dwelling, if the person:

(1) Purchases a dwelling;

(2) Purchases and rehabilitates a substandard dwelling;

(3) Relocates to a dwelling which he or she owns or purchases;

(4) Constructs a dwelling on a site he or she owns or purchases;

(5) Contracts for the purchase or construction of a dwelling on a site provided by a builder or on a site the person owns or purchases; or

(6) Currently owns a previously purchased dwelling and site, valuation of which shall be on the basis of current fair market value.

(d) *Occupancy requirements for displacement or replacement dwelling.*

[6] *http://www.fhwa.dot.gov/real_estate/practitioners/uniform_act/policy_and_guidance/low_income_calculations/index.cfm.*

No person shall be denied eligibility for a replacement housing payment solely because the person is unable to meet the occupancy requirements set forth in this part for a reason beyond his or her control, including:

(1) A disaster, an emergency, or an imminent threat to the public health or welfare, as determined by the President, the Federal Agency funding the project, or the Agency; or

(2) Another reason, such as a delay in the construction of the replacement dwelling, military duty, or hospital stay, as determined by the Agency.

(e) *Conversion of payment.* A displaced person who initially rents a replacement dwelling and receives a rental assistance payment under § 24.402(b) is eligible to receive a payment under § 24.401 or § 24.402(c) if he or she meets the eligibility criteria for such payments, including purchase and occupancy within the prescribed 1-year period. Any portion of the rental assistance payment that has been disbursed shall be deducted from the payment computed under § 24.401 or § 24.402(c).

(f) *Payment after death.* A replacement housing payment is personal to the displaced person and upon his or her death the undisbursed portion of any such payment shall not be paid to the heirs or assigns, except that:

(1) The amount attributable to the displaced person's period of actual occupancy of the replacement housing shall be paid.

(2) Any remaining payment shall be disbursed to the remaining family members of the displaced household in any case in which a member of a displaced family dies.

(3) Any portion of a replacement housing payment necessary to satisfy the legal obligation of an estate in connection with the selection of a replacement dwelling by or on behalf of a deceased person shall be disbursed to the estate.

(g) *Insurance proceeds.* To the extent necessary to avoid duplicate compensation, the amount of any insurance proceeds received by a person in connection with a loss to the displacement dwelling due to a catastrophic occurrence (fire, flood, etc.) shall be included in the acquisition cost of the displacement dwelling when computing the price differential. (*See* § 24.3.)

§ 24.404 Replacement housing of last resort.

(a) *Determination to provide replacement housing of last resort.* Whenever a program or project cannot proceed on a timely basis because comparable replacement dwellings are not available within the monetary limits for owners or tenants, as specified in § 24.401 or § 24.402, as appropriate, the Agency shall provide additional or alternative assistance under the provisions of this subpart. Any decision to provide last resort housing assistance must be adequately justified either:

(1) On a case-by-case basis, for good cause, which means that appropriate consideration has been given to:

(i) The availability of comparable replacement housing in the program or project area;

(ii) The resources available to provide comparable replacement housing; and

(iii) The individual circumstances of the displaced person; or

(2) By a determination that:

(i) There is little, if any, comparable replacement housing available to displaced persons within an entire program or project area; and, therefore, last resort housing assistance is necessary for the area as a whole;

(ii) A program or project cannot be advanced to completion in a timely manner without last resort housing assistance; and

(iii) The method selected for providing last resort housing assistance is cost effective, considering all elements, which contribute to total program or project costs.

(b) *Basic rights of persons to be displaced.* Notwithstanding any provision of this subpart, no person shall be required to move from a displacement dwelling unless comparable replacement housing is available to such person. No person may be deprived of any rights the person may have under the Uniform Act or this part. The Agency shall not require any displaced person to accept a dwelling provided by the Agency under the procedures in this part (unless the Agency and the displaced person have entered into a contract to do so) in lieu of any acquisition payment or any relocation payment for which the person may otherwise be eligible.

(c) *Methods of providing comparable replacement housing.* Agencies shall have broad latitude in implementing this subpart, but implementation shall be for reasonable cost, on a case-by-case basis unless an exception to case-by-case analysis is justified for an entire project.

(1) The methods of providing replacement housing of last resort include, but are not limited to:

(i) A replacement housing payment in excess of the limits set forth in § 24.401 or § 24.402. A replacement housing payment under this section may be provided in installments or in a lump sum at the Agency's discretion.

(ii) Rehabilitation of and/or additions to an existing replacement dwelling.

(iii) The construction of a new replacement dwelling.

(iv) The provision of a direct loan, which requires regular amortization or deferred repayment. The loan may be unsecured or secured by the real property. The loan may bear interest or be interest-free.

(v) The relocation and, if necessary, rehabilitation of a dwelling.

(vi) The purchase of land and/or a replacement dwelling by the Agency and subsequent sale or lease to, or exchange with a displaced person.

(vii) The removal of barriers for persons with disabilities.

(2) Under special circumstances, consistent with the definition of a comparable replacement dwelling, modified methods of providing replacement housing of last resort permit consideration of replacement housing based on space and physical characteristics different from those in the displacement dwelling (*see* appendix A of this part, *Section 24.404(c)*), including upgraded, but smaller replacement housing that is DSS and adequate to accommodate individuals or families displaced from marginal or substandard housing with probable functional obsolescence. In no event, however, shall a displaced person be required to move into a dwelling that is not functionally equivalent in accordance with § 24.2(a), *comparable replacement dwelling.*

(3) The Agency shall provide assistance under this subpart to a displaced person who is not eligible to receive a replacement housing payment under §§ 24.401 and 24.402 because of failure to meet the length of occupancy requirement when comparable replacement rental housing is not available at rental rates within the displaced person's financial means. (*See* § 24.2(a).) Such assistance shall cover a period of 42 months.

Subpart F—Mobile Homes

§ 24.501 Applicability.

(a) *General.* This subpart describes the requirements governing the provision of replacement housing payments to a person displaced from a mobile home and/or mobile home site who meets the basic eligibility requirements of this part. Except as modified by this subpart, such a displaced person is entitled to:

(1) A moving expense payment in accordance with subpart D of this part; and

(2) A replacement housing payment in accordance with subpart E of this part

to the same extent and subject to the same requirements as persons displaced from conventional dwellings. Moving cost payments to persons occupying mobile homes are covered in § 24.301(g)(1) through (10).

(b) *Partial acquisition of mobile home park.* The acquisition of a portion of a mobile home park property may leave a remaining part of the property that is not adequate to continue the operation of the park. If the Agency determines that a mobile home located in the remaining part of the property must be moved as a direct result of the project, the occupant of the mobile home shall be considered to be a displaced person who is entitled to relocation payments and other assistance under this part.

§ 24.502 Replacement housing payment for a 90-day mobile homeowner displaced from a mobile home.

(a) *Eligibility.* An owner-occupant displaced from a mobile home is entitled to a replacement housing payment, not to exceed $31,000, under § 24.401 if:

(1) The person occupied the mobile home on the displacement site for at least 90 days immediately before:

(i) The initiation of negotiations to acquire the mobile home—if the person owned the mobile home and the mobile home is real property;

(ii) The initiation of negotiations to acquire the mobile home site if the mobile home is personal property, but the person owns the mobile home site; or

(iii) The date of the Agency's written notification to the owner-occupant that the owner is determined to be displaced from the mobile home as described in paragraphs (a)(3)(i) through (iv) of this section;

(2) The person meets the other basic eligibility requirements at § 24.401(a)(2); and

(3) The Agency acquires the mobile home as real estate, or acquires the mobile home site from the displaced owner, or the mobile home is personal property but the owner is displaced from the mobile home because the Agency determines that the mobile home:

(i) Is not, and cannot economically be made decent, safe, and sanitary;

(ii) Cannot be relocated without substantial damage or unreasonable cost;

(iii) Cannot be relocated because there is no available comparable replacement site; or

(iv) Cannot be relocated because it does not meet mobile home park entrance requirements.

(b) *Replacement housing payment computation for a 90-day owner that is displaced from a mobile home.* The replacement housing payment for an eligible displaced 90-day owner is computed as described at § 24.401(b) incorporating the following, as applicable:

(1) If the Agency acquires the mobile home as real estate and/or acquires the owned site, the acquisition cost used to compute the price differential payment is the actual amount paid to the owner as just compensation for the acquisition of the mobile home, and/or site, if owned by the displaced mobile home owner.

(2) If the Agency does not purchase the mobile home as real estate but the owner is determined to be displaced from the mobile home and eligible for a replacement housing payment based on paragraph (a)(1)(iii) of this section, the eligible price differential payment for the purchase of a comparable replacement mobile home, is the lesser of the displaced mobile home owner-occupant's net cost to purchase a replacement mobile home (*i.e.,* purchase price of the replacement mobile home less trade-in or sale proceeds of the displacement mobile home); or, the cost of the Agency's selected comparable mobile home less the Agency's estimate of the salvage or trade-in value for the mobile home from which the person is displaced.

(3) If a comparable replacement mobile home site is not available, the price differential payment shall be computed on the basis of the reasonable cost of a conventional comparable replacement dwelling.

(c) *Replacement housing payment for a 90-day owner-occupant that is displaced from a leased or rented mobile home site.* If the displacement mobile home owner-occupant's site is leased or rented, a 90-day owner-occupant is entitled to a rental assistance payment computed as described in § 24.402(b). This rental assistance replacement housing payment may be used to lease a replacement site, may be applied to the purchase price of a replacement site, or may be applied, with any replacement housing payment attributable to the mobile home, toward the purchase of a replacement mobile home and the purchase or lease of a site or the purchase of a conventional decent, safe, and sanitary dwelling.

(d) *Owner-occupant not displaced from the mobile home.* If the Agency determines that a mobile home is personal property and may be relocated to a comparable replacement site, but the owner-occupant elects not to do so, the owner is not entitled to a replacement housing payment for the purchase of a replacement mobile home. However, the owner is eligible for moving costs described at § 24.301 and any replacement housing payment for the purchase or rental of a comparable site as described in this section as applicable.

§ 24.503 Rental assistance payment for 90-day mobile home tenants and certain others.

A displaced tenant or owner-occupant of a mobile home and/or site is eligible for a replacement housing payment, not to exceed $7,200, under § 24.402 if:

(a) The person actually occupied the displacement mobile home on the displacement site for at least 90 days immediately prior to the initiation of negotiations;

(b) The person meets the other basic eligibility requirements at § 24.402(a); and

(c) The Agency acquires the mobile home and/or mobile home site, or the mobile home is not acquired by the Agency but the Agency determines that the occupant is displaced from the mobile home because of one of the circumstances described at § 24.502(a)(3).

Subpart G—Certification

§ 24.601 Purpose.

This subpart permits a State Agency to fulfill its responsibilities under the Uniform Act by certifying that it shall operate in accordance with State laws and regulations which shall accomplish the purpose and effect of the Uniform Act, in lieu of providing the assurances required by § 24.4.

§ 24.602 Certification application.

An Agency wishing to proceed on the basis of a certification may request an application for certification from the Lead Agency Director, Office of Real Estate Services, HEPR–1, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. The completed application for certification must be approved by the governor of the State, or the governor's designee, and must be coordinated with the Federal funding Agency, in accordance with application procedures.

§ 24.603 Monitoring and corrective action.

(a) The Federal Lead Agency shall, in coordination with other Federal Agencies, monitor from time to time State Agency implementation of programs or projects conducted under the certification process and the State Agency shall make available any information required for this purpose.

(b) The Lead Agency may require periodic information or data from affected Federal or State Agencies.

(c) A Federal Agency may, after consultation with the Lead Agency, and notice to and consultation with the governor, or his or her designee, rescind any previous approval provided under this subpart if the certifying State Agency fails to comply with its certification or with applicable State law and regulations. The Federal Agency shall initiate consultation with the Lead Agency at least 30 days prior to any decision to rescind approval of a certification under this subpart. The Lead Agency will also inform other Federal Agencies, which have accepted a certification under this subpart from the same State Agency, and will take whatever other action that may be appropriate.

(d) Section 103(b)(2) of the Uniform Act, as amended, requires that the head of the Lead Agency report biennially to the Congress on State Agency implementation of section 103. To enable adequate preparation of the prescribed biennial report, the Lead Agency may require periodic information or data from affected Federal or State Agencies.

Appendix A to Part 24—Additional Information

This appendix provides additional information to explain the intent of certain provisions of this part.

Subpart A—General

Section 24.2 Definitions and Acronyms

Section 24.2(a) Comparable replacement dwelling, (ii). The requirement that a comparable replacement dwelling be ''functionally equivalent'' to the displacement dwelling, means that it must perform the same function and provide the same utility. The section states that it need not possess every feature of the displacement dwelling. However, the principal features must be present.

For example, if the displacement dwelling contains a pantry and a similar dwelling is not available, a replacement dwelling with ample kitchen cupboards may be acceptable. Insulated and heated space in a garage might prove an adequate substitute for basement workshop space. A dining area may substitute for a separate dining room. Under some circumstances, attic space could substitute for basement space for storage purposes, and vice versa.

Only in unusual circumstances may a comparable replacement dwelling contain fewer rooms or, consequentially, less living space than the displacement dwelling. Such may be the case when a decent, safe, and sanitary replacement dwelling (which by definition is ''adequate to accommodate'' the displaced person) may be found to be ''functionally equivalent'' to a larger but very run-down substandard displacement dwelling. Another example is when a displaced person accepts an offer of government housing assistance and the applicable requirements of such housing assistance program require that the displaced person occupy a dwelling that has fewer rooms or less living space than the displacement dwelling.

Section 24.2(a) Comparable replacement dwelling, (vii). The definition of comparable replacement dwelling requires that a comparable replacement dwelling for a person, who is not receiving assistance under any government housing program before displacement, must be currently available on the private market without any subsidy under a government housing program.

Section 24.2(a) Comparable replacement dwelling, (ix). If a person accepts assistance under a government housing assistance program, the rules of that program governing the size of the dwelling apply, and the rental assistance payment under § 24.402 would be computed on the basis of the person's actual out-of-pocket cost for the replacement housing and associated utilities after the applicable government assistance has been applied.

Section 24.2(a) Decent, safe, and sanitary, (i)(A). Even where local law does not mandate adherence to such standards, it is strongly recommended that they be considered as a matter of public policy.

Section 24.2(a) Decent, safe, and sanitary, (v). Some local code standards for occupancy do not require kitchens. However, selection of comparables that provide a kitchen is recommended. The FHWA believes this is good practice and in most cases should be easily achievable. If the displacement dwelling had a kitchen, the comparable dwelling must have a kitchen. If the displacement dwelling did not have a kitchen but local code standards for occupancy require one, the comparable dwelling must contain a kitchen. If the displacement dwelling did not have a kitchen and local code standards for occupancy do not require one, an Agency does not have to provide a kitchen in the comparable dwelling. If a kitchen is provided in the comparable dwelling, at a minimum it must contain a fully usable sink, properly connected to potable hot and cold water and to a sewage drainage system, and adequate space and utility service connections for a stove and refrigerator.

Section 24.2(a) DSS-Persons with a disability, (vii). Reasonable accommodation of a displaced person with a disability at the replacement dwelling means the Agency is required to address persons with a physical impairment that substantially limits one or more of the major life activities. In these situations, reasonable accommodation should include the following at a minimum: Doors of adequate width; ramps or other assistance devices to traverse stairs and access bathtubs, shower stalls, toilets and sinks; storage cabinets, vanities, sink and mirrors at appropriate heights. Kitchen accommodations will include sinks and storage cabinets built at appropriate heights for access. The Agency shall also consider other items that may be necessary, such as physical modification to a unit, based on the displaced person's needs.

Section 24.2(a) Displaced person—Occupants of a temporary, daily, or emergency shelter, (iii)(M). Shelters can serve many purposes and each will have specific rules and requirements as to who can occupy or use the shelter and whether prolonged and continuous occupancy is allowed. Persons who are occupying a shelter that only allows overnight stays and requires the occupants to remove their personal property and themselves from the premises on a daily basis and that offers no guarantee of reentry in the evening typically would not meet the definition of displaced persons as used in this part, nor would the shelter meet the definition of dwelling as used in this part. Persons who live at the shelter on a continuous, prolonged, or permanent basis for reasons including that they are employed there or because they work to pay their rent there may be considered displaced. Providing advisory assistance to shelter occupants may be a challenge due to their transient nature. Agencies should make reasonable effort to provide information about proposed vacation date or other plans for the shelter to relocate.

Section 24.2(a) Dwelling site. This definition ensures that the computation of replacement housing payments are accurate and realistic (a) when the dwelling is located on a larger than normal site, (b) when mixed-use properties are acquired, (c) when more than one dwelling is located on the acquired property, or (d) when the replacement dwelling is retained by an owner and moved to another site.

Section 24.2(a) Federal down payment assistance. In some instances, a person may have Federal down payment assistance funds provided for the purpose of purchasing and occupying a dwelling. These funds are not Uniform Act benefits and are not used in combination with Uniform Act benefits. The FHWA believes that the purchase of a dwelling using Federal down payment assistance, standing alone, does not constitute an acquisition as contemplated by the Uniform Act. However, Federal down payment assistance provided to a private individual to purchase a residence is Federal financial assistance, as defined by the Uniform Act. It results in an acquisition-based displacement under the Uniform Act, however, only when the purpose of the acquisition is to advance a Federal project or program designed to benefit the public as a whole, such as highways, hospitals, and other public works projects. Therefore, those who may relocate as a result of an acquisition funded in part with down payment assistance are not displaced persons within the meaning of the Uniform Act. Furthermore, in the vast majority of instances where Federal down payment assistance is provided, the Federal Government does not have an interest in whether a specific property is acquired. The Federal Government's interest is only that the property would serve as the purchaser's dwelling and that it meets general criteria including those related to habitability. The lack of a conscious governmental decision requiring that a selected or specific property be acquired to advance a program or project demonstrates that the nature of the acquisition utilizing down payment

assistance funds is nothing more than a person purchasing a dwelling with limited Federal financial assistance. For instance, a person using Federal down payment assistance to purchase a home that a tenant occupies would not be an Agency causing a displacement, and the tenant who would have to move as a result of the acquisition of the home would not be a displaced person.

Section 24.2(a) Household income (exclusions). Household income for purposes of this part does not include program benefits that are not considered income by Federal law such as food stamps and the Women Infants and Children program. For a more detailed list of income exclusions see Federal Highway Administration, Office of Real Estate Services website.[1] Contact the Federal Agency administering the program, if there is a question on whether to include income from a specific program.

Section 24.2(a) Initiation of negotiations. This section provides a special definition for acquisition and displacements under Public Law 96–510 or Superfund. The order of activities under Superfund may differ slightly in that temporary relocation may precede acquisition. Superfund is a program designed to clean up hazardous waste sites. When such a site is discovered, it may be necessary, in certain limited circumstances, to alert individual owners and tenants to potential health or safety threats and to offer to temporarily relocate them while additional information is gathered. If a decision is later made to permanently relocate such persons, those who had been temporarily relocated under Superfund authority would no longer be on site when a formal, written offer to acquire the property was made, and thus would lose their eligibility for a replacement housing payment. In order to prevent this unfair outcome, we have provided a definition of initiation of negotiation, which is based on the date the Federal Government offers to temporarily relocate an owner or tenant from the subject property.

Section 24.2(a) Initiation of negotiations, Tenants, (iv). Tenants who occupy property that may be voluntarily acquired amicably, without recourse to the use of the power of eminent domain, must be fully informed as to their potential eligibility for relocation assistance when negotiations are initiated. An option to purchase property, or similar instrument, is not a binding agreement because it gives the Agency a right, but not an obligation, to elect to purchase the property necessary for the project. A binding agreement as used in this appendix is a legally enforceable document in which the property owner agrees to sell certain property rights necessary for a project and the Agency agrees, without further election, to make that purchase.

If negotiations fail to result in a binding agreement the Agency should notify tenants that negotiations have failed to result in a binding agreement and that the Agency has concluded its efforts to acquire the property. If a tenant is not readily accessible, as the result of a disaster or emergency, the Agency must make a good faith effort to provide these notifications and document its efforts in writing. For example, as used in this part, an option to purchase property is not a binding agreement because it gives the Agency a right to choose whether or not to purchase the property necessary for the project. A binding agreement as used in this appendix is a legally enforceable document in which the property owner agrees to sell certain property rights necessary for a project and the Agency agrees to that purchase for a specified consideration.

Section 24.2(a) Mobile home. The following examples provide additional guidance on the types of mobile homes and manufactured housing that can be found acceptable as comparable replacement dwellings for persons displaced from mobile homes. A recreational vehicle that is capable of providing living accommodations may be considered a replacement dwelling if the following criteria are met: The recreational vehicle is purchased and occupied as the ''primary'' place of residence; it is located on a purchased or leased site and connected to or has available all necessary utilities for functioning as a housing unit on the date of the Agency's inspection; and, the dwelling, as sited, meets all local, State, and Federal requirements for a decent, safe, and sanitary dwelling. (The regulations of some local jurisdictions will not permit the consideration of these vehicles as DSS dwellings. In those cases, the recreational vehicle will not qualify as a replacement dwelling.)

Title 24 CFR 3280.2 defines mobile home. In 1979 the term ''mobile home'' was changed to ''manufactured home.'' For purposes of this part, the terms mobile home and manufactured home are synonymous.

When assembled, manufactured homes built after 1976 contain no less than 320 square feet. They may be single or multi-sectioned units when installed. Their designation as personalty or realty will be determined by State law. When determined to be realty, most are eligible for conventional mortgage financing.

The 1976 HUD standards distinguish manufactured homes from factory-built ''modular homes'' as well as conventional or ''stick-built'' homes. Both of these types of housing are required to meet State and local construction codes.

Section 24.3 No duplication of payments. This section prohibits an Agency from making a payment to a person under this part that would duplicate another payment the person receives under Federal, State, or local law. The Agency is not required to conduct an exhaustive search for such other payments; it is only required to avoid creating a duplication based on the Agency's knowledge at the time a payment is computed.

Section 24.5 Manner of notices. Property owners or occupants must voluntarily elect to receive notices via electronic methods. Alternatively, property owners or occupants may request delivery of notices via certified or registered first class mail, return receipt requested, instead of electronic means. Agencies must accommodate the property owner's or occupant's preference. The FHWA continues to believe that providing notices by either first class mail or electronic means should not to be used as a substitute for face-to-face meetings, but rather as a supplemental means of communication that accommodates an owner's or occupant's preference. The FHWA understands that certain documents that are essential to the conveyance of the real property interests may not allow for electronic signature(s).

In order to use electronic delivery notices, an Agency must be able to demonstrate the ability to securely document the notice delivery and receipt confirmation. Additional minimum safeguards that the Agency must put in place prior to delivering notices by electronic means are included in the regulation at § 24.5. Prior to the use of electronic delivery, there must be a process or procedure outlined in written procedures approved by the Federal funding Agency that details the requirements and rules the State will follow when using electronic means for delivery of notices.

Agencies must determine and document instances when electronic deliveries of notices are appropriate. An example of an appropriate use of electronic delivery of notices might be to notify a property owner of his or her right to accompany an appraiser as required at § 24.102(c). Other appropriate uses may be to secure a release of mortgage or to confirm a property owners' receipt of the acquisition and relocation brochures.

An example of when the use of electronic delivery of notices may not be appropriate is when the document being signed requires notarization or other similar verification. Electronic delivery of notices may not always be a good option for relocation assistance where many actions are conducted in person at the displacement or replacement dwelling or business and require advisory services to be provided as part of the process.

These examples are not intended to be all-inclusive, nor are they exclusive of other opportunities to use this tool. For additional information, the specific Federal regulations that set out the format and examples for an electronic signature can be found at 37 CFR 1.4(d)(2). The regulations in 37 CFR 1.4(d)(2) fall under the purview of the United States Patent and Trademark Office, which provides examples of what is considered to be proper format in a variety of electronically signed documents.

Section 24.9(c) Reports. The Moving Ahead for Progress in the 21st Century Act (MAP–21) amended 42 U.S.C. 4633(b)(4) to require that each Federal Agency subject to the Uniform Act submit an annual report describing activities conducted by the Agency. The FHWA believes that such a report that details activity provides a good indication of program health and scope.

The FHWA realizes that not all Agencies subject to this reporting requirement currently have the ability to collect all information requested on the reporting form. However, Federal Agencies may elect to provide a narrative report that focuses on their respective efforts to improve and enhance delivery of Uniform Act benefits and services. Narrative report information would include information on training offered, reviews conducted, or technical assistance provided to recipients.

Section 24.11 Adjustment of relocation benefits. No more frequently than every 5

[1] *http://www.fhwa.dot.gov/realestate/.*

years, FHWA will use the Consumer Price Index for All Urban Consumers (CPI–U) Seasonally Adjusted to determine if inflation, cost of living, or other factors indicate that an adjustment to relocation benefits is warranted.

Sample calculation:

Assume CPI–U is 110.0 as of [EFFECTIVE DATE OF FINAL RULE]. The fixed payment for non-residential moving expenses has a ceiling of $40,000. Five years after [EFFECTIVE DATE OF FINAL RULE], or during a subsequent 5th year evaluation, the CPI–U is calculated to be 115.5.

Divide the new index by the base year index = 115.5/110.0 = 1.050 or 5 percent. This means there has been a 5 percent increase in prices and the fixed payment for non-residential moving expenses ceiling should be increased 5 percent.

Calculate fixed payment benefit ceiling = $40,000 × 1.05 = $42,000.

Subpart B—Real Property Acquisition

For Federal eminent domain purposes, the terms ''fair market value'' (as used throughout this subpart) and ''market value,'' which may be the more typical term in private transactions, are synonymous.

Section 24.101(a) Direct Federal program or project. All the requirements in subpart B of this part (real property acquisition) apply to all direct acquisitions for Federal programs and projects by Federal Agencies, except for acquisitions undertaken by the Tennessee Valley Authority or the Rural Utilities Service. There are no exceptions for ''voluntary transactions.''

Section 24.101(b)(1)(i). The term ''general geographic area'' is used to clarify that an Agency carrying out a project or program can achieve the purpose of the project or program by purchasing any of several properties that are not necessarily contiguous or are not limited to a specific group of properties.

Section 24.101(b)(1)(iv) and (b)(2)(ii). Section 24.101(b)(1)(iv) and (b)(2)(ii) provide that, for programs and projects receiving Federal financial assistance described in § 24.101(b)(1) and (2), Agencies are to inform the owner(s) or their designated representative(s) in writing of the Agency's estimate of the fair market value for the property to be acquired.

While this part does not require an appraisal for these transactions, Agencies may still decide that an appraisal is necessary to support their determination of the fair market value of these properties, and, in any event, persons developing a waiver valuation must have some reasonable basis for their determination of fair market value. In addition, some of the concepts inherent in Federal Program appraisal practice are appropriate for these estimates. It would be appropriate for Agencies to adhere to project influence restrictions, as well as guard against discredited ''public interest value'' valuation concepts.

After an Agency has established an amount it believes to be the fair market value of the property and has notified the owner of this amount in writing, an Agency may negotiate freely with the owner in order to reach agreement. Since these transactions are voluntary, accomplished by a willing buyer and a willing seller, negotiations may result in agreement for the amount of the original estimate, an amount exceeding it, or for a lesser amount. Although not required by this part, it would be entirely appropriate for Agencies to apply the administrative settlement concept and procedures in § 24.102(i) to negotiate amounts that exceed the original estimate of fair market value. Agencies shall not take any coercive action in order to reach agreement on the price to be paid for the property.

Section 24.101(b)(2)(iii). The intent of this section is to ensure that a property owner or their designated representative is clearly informed that an Agency will not utilize its eminent domain authority to acquire the property if negotiations fail to result in an amicable agreement. In instances where an unanticipated or unplanned need arises which may require use of eminent domain authority to acquire a property on which the Agency has made a voluntary acquisition offer, the Agency must request permission to waive the requirements of the applicable parts of the regulations in this part. Because the purpose of this section is to allow for voluntary acquisitions, the subsequent use of eminent domain authority must only be in exceptional circumstances which must be infrequent and well documented as to the reason for needing to use eminent domain authority to acquire a property after failing to acquire it voluntarily.

Section 24.101(c) Less-than-full-fee interest in real property. Section 24.101(c) provides a benchmark beyond which the requirements of the subpart clearly apply to leases.

Section 24.102(b) Notice to owner. In the case of condominiums and other types of housing with common or community areas, notification should be given to the appropriate parties. The appropriate parties could be a condo or homeowner's board, a designated representative, or all individual owners when common or community property is being acquired for the project.

Section 24.102(c)(2) Appraisal, waiver thereof, and invitation to owner. The purpose of the appraisal waiver provision is to provide Agencies a technique to avoid the costs and time delay associated with appraisal requirements for uncomplicated acquisitions. In most cases, uncomplicated acquisitions are considered to be those involving unimproved strips of land. Acquisitions involving improvements, damages, changes of highest and best use, or significant costs to cure are considered to be complicated and, as such, are beyond the application of waiver valuations as contemplated in this part. The intent is that non-appraisers make the waiver valuations, freeing appraisers to do more complex work.

The Agency employee or contractor making the determination to use the waiver valuation option must have enough understanding of appraisal principles, techniques, and use of appraisals to be able to determine whether the proposed acquisition is uncomplicated.

Waiver valuations are not appraisals as defined by the Uniform Act and this part; therefore, appraisal performance requirements or standards, regardless of their source, are not required for waiver valuations by this part. Since waiver valuations are not appraisals, neither is there a requirement for an appraisal review. Agencies should put procedures in place to ensure that waiver valuations are accurate and that they are consistent with the unit values on the project as determined by appraisals and appraisal reviews. The Agency must have a reasonable basis for the waiver valuation and an Agency official must still establish an amount believed to be just compensation to offer the property owner(s).

The definition of ''appraisal'' in the Uniform Act and waiver valuation provisions of the Uniform Act and this part are Federal law and public policy and should be considered as such when determining the impact of appraisal requirements levied by others.

Section 24.102(d) Establishment of offer of just compensation. The initial offer to the property owner may not be less than the amount of the Agency's approved appraisal, but may exceed that amount if the Agency determines that a greater amount reflects just compensation for the property.

Section 24.102(f) Basic negotiation procedures. An offer should be adequately presented to an owner, and the owner should be properly informed. Personal, face-to-face contact should take place, if feasible, but this section does not require such contact in all cases.

This section also provides that the property owner be given a reasonable opportunity to consider the Agency's offer and to present relevant material to the Agency. In order to satisfy the requirement in § 24.102(f), Agencies must allow owners time for analysis, research and development, and compilation of a response, including perhaps getting an appraisal. The needed time can vary significantly, depending on the circumstances, but thirty (30) days would seem to be the minimum time these actions can be reasonably expected to require. Regardless of project time pressures, property owners must be afforded this opportunity.

In some jurisdictions, there is pressure to initiate formal eminent domain procedures at the earliest opportunity because completing the eminent domain process, including gaining possession of the needed real property, is very time consuming. The provisions of § 24.102(f) are not intended to restrict this practice, so long as it does not interfere with the reasonable time that must be provided for negotiations, described in the preceding paragraph, and the Agencies adhere to the Uniform Act ban on coercive action (section 301(7) of the Uniform Act).

If the owner expresses intent to provide an appraisal report, Agencies are encouraged to provide the owner and/or their appraiser a copy of Agency appraisal requirements and inform them that their appraisal should be based on those requirements.

Section 24.102(i) Administrative settlement. This section provides guidance on administrative settlement as an alternative to judicial resolution of a difference of opinion on the value of a property in order to avoid unnecessary litigation and congestion in the courts.

All relevant facts and circumstances should be considered by an Agency official

delegated this authority. Appraisers, including review appraisers, must not be pressured to adjust their estimate of value for the purpose of justifying such settlements. Such action would invalidate the appraisal process.

Section 24.102(j) Payment before taking possession. It is intended that a right-of-entry for construction purposes be obtained only in the exceptional case, such as an emergency project, when there is no time to make an appraisal and purchase offer and the property owner is agreeable to the process.

Section 24.102(m) Fair rental. Section 301(6) of the Uniform Act limits what an Agency may charge when a former owner or previous occupant of a property is permitted to rent the property for a short term or when occupancy is subject to termination by the Agency on short notice. Such rent may not exceed ''the fair rental value of the property to a short-term occupier.'' Generally, the Agency's right to terminate occupancy on short notice (whether or not the renter also has that right) supports the establishment of a lesser rental than might be found in a longer, fixed-term situation.

Section 24.102(n) Conflict of interest. The overall objective is to minimize the risk of fraud, waste, and abuse while allowing Agencies to operate as efficiently as possible. There are three parts to the provision in § 24.102(n).

The first provision is the prohibition against having any interest in the real property being valued by the appraiser (for an appraisal), the valuer (for a waiver valuation), or the review appraiser (for an appraisal review).

The second provision is that no person functioning as a negotiator for a project or program can supervise or formally evaluate the performance of any appraiser, valuer, or review appraiser performing appraisal, waiver valuation, or appraisal review work for that project or program. The intent of this provision is to ensure appraisal and/or valuation independence and to prevent inappropriate influence. It is not intended to prevent Agencies or recipients from providing appraiser and/or valuers with appropriate project information or participating in determining the scope of work for the appraisal or valuation. For a program or project receiving Federal financial assistance, the Federal funding Agency may waive this requirement if it would create a hardship for the Agency or recipient. The intent is to accommodate Federal financial aid recipients that have a small staff where this provision would be unworkable.

The third provision is to minimize situations where administrative costs exceed acquisition costs. Section 24.102(n) provides that the same person may prepare a valuation estimate (including an appraisal) and negotiate that acquisition, if the valuation estimate amount is $10,000 or less. Agencies or recipients are not required to use those who prepare a waiver valuation or appraisal of $10,000 or less to negotiate the acquisition. All appraisals must be reviewed in accordance with § 24.104. This includes appraisals of real property valued at $10,000, or less.

The third provision has been expanded to allow Federal Agencies to permit use of a single agent for values of more than $10,000, but less than $25,000, but, as a safeguard, requires that an appraisal and appraisal review be done to allow the appraiser to also act as the negotiator. Agencies or recipients desiring to exercise this option must request approval in writing from the Federal funding Agency. The Agency request to exercise single agent option for properties with a value of between $10,000 and $25,000 must include the anticipated benefits of, and reasons for, raising the ceiling above $10,000, the oversight mechanism used to assure proper use and review, the names and credentials of individuals who will be performing as single agents, and quality control procedures to be utilized. Agencies and recipients may allow a subrecipient to use their approved authority if the subrecipient has an Agency or recipient approved oversight mechanism to assure proper use and review of the authority. This mechanism must include documentation of, the names and credentials of individuals who will be performing as single agents, and quality control procedures to be utilized.

Section 24.103 Criteria for Appraisals. The term ''requirements'' is used throughout this section to avoid confusion with The Appraisal Foundation's Uniform Standards of Professional Appraisal Practice (USPAP) ''standards.'' Although this section discusses appraisal requirements, the definition of ''appraisal'' itself at § 24.2(a) includes appraisal performance requirements that are an inherent part of this section.

The term ''Federal and federally assisted program or project'' is used to better identify the type of appraisal practices that are to be referenced and to differentiate them from the private sector, especially mortgage lending, appraisal practice.

Section 24.103(a) Appraisal requirements. The first sentence instructs readers that requirements for appraisals for Federal and federally assisted programs or projects are located in this part. These are the basic appraisal requirements for Federal and federally assisted programs or projects. However, Agencies may enhance and expand on them, and there may be specific project or program legislation that references other appraisal requirements.

The appraisal requirements in § 24.103(a) are necessarily designed to comply with the Uniform Act and other Federal eminent domain based appraisal requirements. They are also considered to be consistent with Standards 1, 2, 3, and 4 of the USPAP. Consistency with USPAP has been a feature of these appraisal requirements since the beginning of USPAP. This ''consistent'' relationship was more formally recognized in OMB Bulletin 92–06. While these requirements are considered consistent with USPAP, neither can supplant the other; their provisions are neither identical, nor interchangeable. Appraisals performed for Federal and federally assisted real property acquisition must follow the requirements in this part. Compliance with any other appraisal requirements is not the purview of this part. An appraiser who is committed to working within the bounds of USPAP should recognize that compliance with both USPAP and these requirements may be achieved by using the Scope of Work Rule and the Jurisdictional Exception Rule of USPAP, where applicable.

The term ''scope of work'' defines the general parameters of the appraisal. It reflects the needs of the Agency and the requirements of Federal and federally assisted program appraisal practice. It should be developed cooperatively by the assigned appraiser and an Agency official who is competent to both represent the Agency's needs and respect valid appraisal practice. The scope of work statement should include the purpose and/or function of the appraisal, a definition of the estate being appraised, whether it is fair market value, its applicable definition, and the assumptions and limiting conditions affecting the appraisal. It may include parameters for the data search and identification of the technology, including approaches to value, to be used to analyze the data. The scope of work should consider the specific requirements in § 24.103(a)(2)(i) through (v) and address them as appropriate.

Section 24.103(a)(1). The appraisal report should identify the items considered in the appraisal to be real property, as well as those identified as personal property.

Section 24.103(a)(2). All relevant and reliable approaches to value are to be used. However, where an Agency determines that the sales comparison approach will be adequate by itself and yield credible appraisal results because of the type of property being appraised and the availability of sales data, it may limit the appraisal assignment to the sales comparison approach. This should be reflected in the scope of work.

Section 24.103(b) Influence of the project on just compensation. As used in this section, the term ''project'' means an undertaking which is planned, designed, and intended to operate as a unit.

When the public is aware of the proposed project, project area property values may be affected. Therefore, property owners should not be penalized because of a decrease in value caused by the proposed project nor reap a windfall at public expense because of increased value created by the proposed project.

Section 24.103(d)(1). The appraiser and review appraiser must each be qualified and competent to perform the appraisal and appraisal review assignments, respectively. Among other qualifications, State licensing or certification and professional society designations can help provide an indication of an appraiser's abilities.

Section 24.104 Review of appraisals. The term ''review appraiser'' is used rather than ''reviewing appraiser,'' to emphasize that ''review appraiser'' is a separate specialty and not just an appraiser who happens to be reviewing an appraisal. Federal Agencies have long held the perspective that appraisal review is a unique skill that, while it certainly builds on appraisal skills, requires more. The review appraiser should possess both appraisal technical abilities and the ability to be the two-way bridge between the Agency's real property valuation needs and the appraiser.

Agency review appraisers typically perform a role greater than technical appraisal review. They are often involved in early project development. Later they may be involved in devising the scope of work statements and participate in making appraisal assignments to fee and/or staff appraisers. They are also mentors and technical advisors, especially on Agency policy and requirements, to appraisers, both staff and fee. In addition, review appraisers are frequently technical advisors to other Agency officials.

Section 24.104(a). Section 24.104(a) states that the review appraiser is to review the appraiser's presentation and analysis of market information and that it is to be reviewed against § 24.103 and other applicable requirements, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition. The appraisal review is to be a technical review by an appropriately qualified review appraiser. The qualifications of the review appraiser and the level of explanation of the basis for the review appraiser's recommended (or approved) value depend on the complexity of the appraisal problem. If the initial appraisal submitted for review is not acceptable, the review appraiser is to communicate and work with the appraiser to the greatest extent possible to facilitate the appraiser's development of an acceptable appraisal.

In doing this, the review appraiser is to remain in an advisory role, not directing the appraisal, and retaining objectivity and options for the appraisal review itself.

If the Agency intends that the staff review appraiser approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), or establish the amount the Agency believes is just compensation, she/he must be specifically authorized by the Agency to do so. If the review appraiser is not specifically authorized to approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), or establish the amount believed to be just compensation, that authority remains with another Agency official.

Section 24.104(b). In developing an independent approved or recommended value, the review appraiser may reference any acceptable resource, including acceptable parts of any appraisal, including an otherwise unacceptable appraisal. When a review appraiser develops an independent value, while retaining the appraisal review, that independent value also becomes the approved appraisal of the fair market value for Uniform Act Section 301(3) purposes. It is within Agency discretion to decide whether a second review is needed if the first review appraiser establishes a value different from that in the appraisal report or reports on the property.

Section 24.104(c). Before acceptance of an appraisal, the review appraiser must determine that the appraiser's documentation, including valuation data and analysis of that data, demonstrates the soundness of the appraiser's opinion of value. For the purposes of this part, an acceptable appraisal is any appraisal that, on its own, meets the requirements of § 24.103. An approved appraisal is the one acceptable appraisal that is determined to best fulfill the requirement to be the basis for the amount believed to be just compensation. Recognizing that appraisal is not an exact science, there may be more than one acceptable appraisal of a property, but for the purposes of this part, there can be only one approved appraisal.

At the Agency's discretion, for a low value property requiring only a simple appraisal process, the review appraiser's recommendation (or approval), endorsing the appraiser's report, may be determined to satisfy the requirement for the review appraiser's signed report and certification.

Section 24.106(b) Expenses incidental to transfer of title to the Agency. Generally, the Agency is able to pay such incidental costs directly and, where feasible, is required to do so. In order to prevent the property owner from making unnecessary out-of-pocket expenditures and to avoid duplication of expenses, the property owner should be informed early in the acquisition process of the Agency's intent to make such arrangements. Such expenses must be reasonable.

Subpart C—General Relocation Requirements

Section 24.202 Applicability and section 205(c) services to be provided. In extraordinary circumstances, when a displaced person is not readily accessible, the Agency must make a good faith effort to comply with § 24.202 and section 205(c) of the Uniform Act and document its efforts in writing.

Section 24.204 Availability of comparable replacement dwelling before displacement.

Section 24.204(a) General. Section 24.204(a) requires that no one may be required to move from a dwelling without a comparable replacement dwelling having been made available. In addition, § 24.204(a) requires that where possible, three or more comparable replacement dwellings shall be made available. Thus, the basic standard for the number of referrals required under this section is three. Only in situations where three comparable replacement dwellings are not available (*e.g.,* when the local housing market does not contain three comparable dwellings) may the Agency make fewer than three referrals.

Section 24.205 Relocation assistance advisory services.

Section 24.205(a). As part of the relocation planning process Agencies should, to the extent practical, identify relocations that may require additional time for advisory services and coordination for their relocations. Such relocations may include the elderly, those with medical needs, and those in public housing. In each of these examples, the relocation requires that the unique needs of the relocated person be determined early and that the relocation agent make full use of available social services and other program support (examples include local transportation services that may be available in certain areas, financial support available from local, Federal, and State Agencies, and community support services that may be available) in considering and developing a relocation plan.

Section 24.205(c)(2)(ii)(C). Whenever possible, comparable replacement housing must be inspected. The selected comparable replacement dwelling should be inspected by a walk through and physical interior and exterior inspection. Reliance on an exterior visual inspection or examination of a multiple listing service (MLS) listing, in most cases, does not constitute a complete DSS inspection. If an inspection is not possible, the relocated person must be informed in writing that an inspection was not possible and be provided an explanation of why the inspection was not possible.

Section 24.205(c)(2)(ii)(D) emphasizes that if the comparable replacement dwellings are located in areas of minority concentration, minority persons should, if possible, also be given opportunities to relocate to replacement dwellings not located in such areas. Agencies should maintain adequate written documentation of compliance with this requirement. Documentation should address efforts made to locate such comparable and replacement housing to the extent practical.

Section 24.206 Eviction for cause. An eviction related to non-compliance with a requirement related to carrying out a project (*e.g.,* failure to move or relocate when instructed, or to cooperate in the relocation process) shall not negate a person's entitlement to relocation payments and other assistance set forth in this part.

Section 24.207 General Requirements—Claims for relocation payments. Section 24.207(a) allows an Agency to make a payment for low cost or uncomplicated nonresidential moves without additional documentation, as long as the payment is limited to the amount of the lowest acceptable bid or estimate, as provided for in § 24.301(d)(1).

While § 24.207(f) prohibits an Agency from proposing or requesting that a displaced person waive his or her rights or entitlements to relocation assistance and payments, an Agency may accept a written statement from the displaced person that states that they have chosen not to accept some or all of the payments or assistance to which they are entitled. Any such written statement must clearly show that the individual knows what they are entitled to receive (a copy of the Notice of Eligibility which was provided may serve as documentation) and their statement must specifically identify which assistance or payments they have chosen not to accept. The statement must be signed and dated and may not be coerced by the Agency.

Section 24.208(c) Aliens not lawfully present in the United States—computing relocation payments if some members of a displaced family are present lawfully but others are present unlawfully.

There are two different methods for computing relocation payments in situations where some members of a displaced family are present lawfully but others are present unlawfully. For moving expenses, the payment is to be based on the proportion of lawfully present occupants to the total number of occupants. For example, if four out of five members of a family to be

displaced are lawfully present, the proportion of lawful occupants is 80 percent and that percentage is to be applied against the moving expenses payment that otherwise would have been received. Similarly, unlawful occupants are not counted as a part of the family for RHP calculations. Thus, a family of five, one of whom is a person not lawfully present in the U.S., would be counted as a family of four. The comparable replacement dwelling for the family would reflect the makeup of the remaining four persons, and the RHP would be computed accordingly.

A ''pro rata'' approach to an RHP calculation is not permitted (consistent with Pub. L. 105–117; codified at 42 U.S.C. 4605). Following such a calculation would require that the Agency disregards alien status for comparability determination, select a comparable and then apply a percentage to the RHP amount. A ''pro rata'' calculation approach for RHP may result in a higher RHP eligibility than the displaced persons would otherwise be eligible to receive.

The ''pro rata'' approach of providing a percentage of the calculated RHP eligibility is contrary to the requirements of the Uniform Act and this part.

A correct example of a calculation would be:

Household of seven (including one alien not lawfully present individually occupying one bedroom.)
Displacement dwelling—4 BR unit, with rent/utilities of $1,200/month
Housing requirements for all lawful occupants (six) is a 3 BR unit
Comparable dwelling
3 BR unit with rent/utilities of $1,300/month
Calculation of RHP under § 24.208(c) (alien not lawfully present excluded)
$1,300 (comparable) − $1,200 (displacement unit) = $100 RHP × 42 months = $4,200 RHP

If a person who is a member of a family being displaced is not eligible for and does not receive Uniform Act benefits because he or she is not lawfully in the United States, that person's income shall not be excluded from the computation of family income. The person's income is counted unless the Agency is certain that the ineligible person will not continue to reside with the family. To exclude the ineligible person's income would result in a windfall by providing a higher relocation payment.

Section 24.208(h). The meaning of the term ''exceptional and extremely unusual hardship'' focuses on significant and demonstrable impacts on health, safety, or family cohesion. This phrase is intended to allow judgment on the part of the Agency and does not lend itself to an absolute standard applicable in all situations.

When considering whether a hardship exemption is appropriate, an Agency may examine only the impact on an alien's spouse, parent, or child who is a citizen or an alien lawfully admitted for permanent residence in the United States. In determining who is a spouse, Agencies should use the definition of that term under State or other applicable law.

A standard of hardship involves more than the loss of relocation payments and/or assistance alone. Also, income alone (for example, measured as a percentage of income spent on housing) would not make the denial of benefits an ''exceptional and extremely unusual hardship'' and qualify for a hardship exemption. In keeping with the principle of allowing Agencies maximum reasonable discretion, FHWA believes the decision regarding what documentation is required to support a claim of hardship is one best left to the Federal funding Agency, as long as the decision is handled in a nondiscriminatory manner.

Subpart D—Payment for Moving and Related Expenses

Section 24.301 Payment for Actual Reasonable Moving and Related Expenses.

Section 24.301(e) Personal property only. Examples of personal property only moves might be: Personal property that is located on a portion of property that is being acquired, but the business or residence will not be acquired and can still operate after the acquisition; personal property that is located in a mini-storage facility that will be acquired or relocated; or, personal property that is stored on vacant land that is to be acquired. For such a residential personal property move, there may be situations in which the costs of obtaining moving bids may exceed the cost to move. In those situations, the Agency may allow an eligibility determination and payment based upon the use of the ''additional room'' category of the Fixed Residential Move Cost Schedule at *www.fhwa.dot.gov/real_estate/practitioners/uniform_act/relocation/moving_cost_schedule.cfm.*

For a nonresidential personal property only move, the owner of the personal property has the options of moving the personal property by using a commercial mover or a self-move. If a question arises concerning the reasonableness of an actual cost move, the Agency may obtain estimates from qualified movers to use as the standard in determining the payment.

Section 24.301(g)(3) through (5). Construction costs for a new building at the business replacement site, costs to build out a shell, or costs substantially reconstruct a building are generally ineligible for reimbursement of expenses for disconnecting, dismantling, removing, reassembling, and reinstalling relocated household appliances and other personal property. (See *Section 24.304(b)(5)* of this appendix for further discussion of ineligible capital expenses).

Section 24.301(g)(13) Relettering signs and replacing stationery. This may include the content of other media that need correcting such as DVDs and CDs. This may also include modifications to websites that would modify and edit contact and new location information made necessary because of the move. Agencies will need to determine whether these costs are actual, reasonable, and necessary.

Section 24.301(g)(14)(i) through (iii). If the piece of equipment is operational at the acquired site, the estimated cost to reconnect the equipment shall be based on the cost to install the equipment as it currently exists, and shall not include the cost of code-required betterments or upgrades that may apply at the replacement site. As prescribed in the part, the allowable in-place value estimate (§ 24.301(g)(14)(ii)) and moving cost estimate (§ 24.301(g)(14)(iii)) must reflect only the ''as is'' condition and installation of the item at the displacement site. The in-place value estimate may not include costs that reflect code or other requirements that were not in effect at the displacement site. The in-place value estimate may also not include installation costs for machinery or equipment that is not operable or not installed at the displacement site. Value in place can be obtained by hiring a machinery and equipment (M&E) appraiser or value can be estimated via websites available for M&E valuations. An example of one resource is The Association of Machinery and Equipment Appraisers (AMEA) website.[2] The AMEA is a nonprofit professional association whose mission is to accredit certified equipment appraisers. Another example of available resources can be found on the website of The American Society of Appraisers; a multi-discipline, non-profit, international organization of professional appraisers. They maintain a separate web page for machinery and equipment appraisers.[3] Should an Agency find itself in need of a machinery and equipment appraisal a web search for either ''machinery and equipment appraisers'' or ''machinery and equipment appraisers organizations'' will provide a number of resources which can be used to find the necessary services and resources. It is important to note that FHWA does not endorse or recommend any organization, society or professional group. The information provided in this appendix is strictly informational.

Section 24.301(g)(17) Searching expenses. In special cases where the Agency determines it to be reasonable and necessary, certain additional categories of searching costs may be considered for reimbursement. These include those costs involved in investigating potential replacement sites and the time of the business owner, based on salary or earnings, required to apply for licenses or permits, zoning changes, and attendance at zoning hearings. Necessary attorney's fees required to obtain such licenses or permits are also reimbursable. Time spent in negotiating the purchase of a replacement business site is also reimbursable based on a reasonable salary or earnings rate. In those instances when such additional costs to investigate and acquire the site exceed $5,000, the Agency may consider requesting a waiver of the cost limitation under the § 24.7, waiver provision. Such a waiver should be subject to the approval of the Federal-funding Agency in accordance with existing delegation of authority. As an alternative to the preceding sentences in this section, Federal funding Agencies may determine that it is appropriate to allow for payment of searching expenses of up to $1,000 with little or no documentation under this part. It is expected that each Federal funding Agency will

[2] *http://www.amea.org/.*

[3] *http://www.appraisers.org/Disciplines/Machinery-Technical-Specialties.*

consider and address the potential for waste, fraud, or abuse and may develop additional requirements to implement this provision. Such requirements may include development of policy or procedure or by requiring specific changes or inclusions in the written procedures approved by the Federal funding agency.

Search expenses may be incurred anytime the business anticipates it may be displaced, including prior to project authorization or the initiation of negotiations. However, such expenses cannot be reimbursed until the business has received the notice in § 24.203(b) and only after the Agency has determined such costs to be actual, reasonable, and necessary.

Section 24.302. The occupant of a seasonal residence could receive a payment based upon the Fixed Residential Move Cost Schedule or actual moving expenses in accordance with § 24.301. Persons owning or renting seasonal residences are generally not eligible for any relocation payments other than personal property moving expenses.

Section 24.303(a). Actual, reasonable, and necessary reimbursement for connection to available utilities are for the necessary improvements to utility services currently available at the replacement property. Examples include (a) a Laundromat business that requires a larger service tap than the typical business service tap already on the property, and (b) a business that requires an upgrade or enhancement of the existing single phase electrical service to provide 3-phase electrical service.

Section 24.303(b) Professional services. If a question should arise as to what is a ''reasonable hourly rate,'' the Agency should compare the rates of other similar professional providers in that area.

Section 24.303(c) Impact fees and one-time assessments for anticipated heavy utility usage.

Section 24.303(c) limits impact fees or one-time assessments to those for anticipated heavy utility usage to utilities, *i.e.,* water, sewer, gas, and electric. Impact fees and one time assessments that may be levied on a non-residential relocated person in their replacement location for other major infrastructure construction or use such as roads, fire stations, regional drainage improvements, and parks are not eligible. Providing information on the potential eligibility of impact fees for anticipated heavy utility usage is an important advisory service.

Section 24.304(b)(5) Ineligible expenses. The cost of constructing a replacement structure, building out of a shell, or substantially reconstructing a building is a capital expenditure and is generally ineligible for reimbursement as a reestablishment expense. In those rare instances when a business cannot relocate without construction of a replacement structure, an Agency or recipient may request a waiver of § 24.304(b)(1) under the provisions of § 24.7. An example of such an instance would be in a rural area where there are no suitable buildings available and the new construction, reconstruction, or build out of a shell as a replacement structure is the only option that will enable the business to remain a viable commercial operation. If a waiver is granted, the cost of new construction, reconstruction, or build out of a shell as a replacement structure will be considered an eligible reestablishment expense subject to the $25,000 statutory limit on such payment.

In markets where existing and new buildings are available for rental (and sometimes for purchase), the buildings or the various units available within the buildings often have only the basic amenities such as heat, light, and water, and sewer available. These buildings or units are shells. The cost of the building (shell) is not an eligible expense because the shell is considered a capital real estate improvement (a capital asset). A certain degree of construction costs are generally expected by the market because shells are designed to be customized by the tenant. However, a shell which is dilapidated or is in disrepair and which requires major reconstruction or rehabilitation would not be eligible for reimbursement under this part. However, this determination does not preclude the consideration by an Agency of certain modifications to an existing replacement business building. Eligible improvements or modifications up to the amount of $25,000 may include the addition of necessary facilities such as bathrooms, room partitions, built-in display cases, and similar items, if required by Federal, State, or local codes, ordinances, or simply considered reasonable and necessary for the operation of the business.

Section 24.305 Fixed payment for moving expenses—nonresidential moves.

Section 24.305(a) Business. If a business elects the fixed payment for moving expenses (in lieu of payment) option, the payment represents its full and final payment for all relocation expenses. Should the business elect to receive this payment, it would not be eligible for any other relocation assistance payments including actual moving or related expenses, or reestablishment expenses.

Section 24.305(c) Farm operation. If a farm operation elects the fixed payment for moving expenses (in lieu of payment) option, the payment represents its full and final payment for all relocation expenses. Should the farm elect to receive this payment, it would not be eligible for any other relocation assistance payments including actual moving or related expenses, and reestablishment expenses.

Section 24.305(d) Nonprofit organization. Gross revenues may include membership fees, class fees, cash donations, tithes, receipts from sales, or other forms of fund collection that enables the nonprofit organization to operate. Administrative expenses are those for administrative support such as rent, utilities, salaries, advertising, and other like items, as well as fundraising expenses. Operating expenses for carrying out the purposes of the nonprofit organization are not included in administrative expenses. The monetary receipts and expense amounts may be verified with certified financial statements or financial documents required by public Agencies.

If a nonprofit organization elects the fixed payment for moving expenses (in lieu of payment) option, the payment represents its full and final payment for all relocation expenses. Should the nonprofit organization elect to receive this payment, it would not be eligible for any other relocation assistance payments including actual moving or related expenses, or reestablishment expenses.

Section 24.305(e) Average annual net earnings of a business or farm operation. Section 24.305(a)(6) requires that the business contribute materially to the income of the displaced person during the 2 taxable years prior to displacement. This does not mean that the business needed to be in existence for a minimum of 2 years prior to displacement to be eligible for this payment.

If a business has been in operation for only a short period of time (*i.e.,* 6 months) prior to displacement, the fixed payment would be based on the net earnings of the business at the displacement site for the actual period of operation projected to an annual rate. If a business was not in operation for a full 2 years, the existing net earnings income data should be used to project what the net earnings could be if the business were in operation for a full 2 years. If the business is seasonal, the business' operating season net income represents the full annual income for the purposes of calculating this benefit.

For Example:

(1) Business in operation for only 6 months earned $10,000.

Computation: ($10,000 / 6) × 12 = $20,000 annual net earnings × 2 years = $40,000 divided by 2 = $20,000; Eligibility = $20,000. (Average annual net earnings.)

(2) Business in operation 18 months earned $20,000.

Computation: $20,000 divided by 18 months = $1,111 per month × 24 months = $26,664 divided by 2 years = $13,332; Eligibility = $13,332 (Average annual net earnings)

(3) Business is seasonal—open summer only for 4 months and earns $5,000.

Computation: $5,000 was the seasonal net earnings 1 year and $6,000 was the seasonal net earnings a second year. $11,000 divided by 2 = $5,500; Eligibility = $5,500. (Average annual net earnings)

If the average annual net earnings of the displaced business, farm, or nonprofit organization are determined to be less than $1,000, even $0 or a negative amount, the minimum payment of $1,000 shall be provided.

Section 24.306 Discretionary utility relocation payments. Section 24.306(c) describes the issues that the Agency and the utility facility owner must agree to in determining the amount of the relocation payment. To facilitate and aid in reaching such agreement, the practices in the Federal Highway Administration regulation, 23 CFR part 645, subpart A, Utility Relocations, Adjustments and Reimbursement, should be followed.

Subpart E—Replacement Housing Payments

Section 24.401 Replacement housing payment for 90-day homeowner-occupants.

Section 24.401(a)(2). An extension of eligibility may be granted if some event beyond the control of the displaced person

such as acute or life threatening illness, bad weather preventing the completion of construction, or physical modifications required for reasonable accommodation of a replacement dwelling, or other like circumstances causes a delay in occupying a decent, safe, and sanitary replacement dwelling.

Section 24.401(c)(2)(iii) Price differential. The provision in § 24.401(c)(2)(iii) to use the current fair market value for residential use does not mean the Agency must have the property appraised. Any reasonable method for arriving at the fair market value may be used.

Section 24.401(d) Increased mortgage interest costs. The provision in § 24.401(d) sets forth the factors to be used in computing the payment that will be required to reduce a person's replacement mortgage (added to the down payment) to an amount which can be amortized at the same monthly payment for principal and interest over the same period of time as the remaining term on the displacement mortgages. This payment is commonly known as the ''buydown.''

The Agency must know the remaining principal balance, the interest rate, and monthly principal and interest payments for the old mortgage as well as the interest rate, points, and term for the new mortgage to compute the increased mortgage interest costs. If the combination of interest and points for the new mortgage exceeds the current prevailing fixed interest rate and points for conventional mortgages and there is no justification for the excessive rate, then the current prevailing fixed interest rate and points shall be used in the computations. Justification may be the unavailability of the current prevailing rate due to the amount of the new mortgage, credit difficulties, or other similar reasons.

SAMPLE COMPUTATION

Old Mortgage:	
Remaining Principal Balance	$50,000
Monthly Payment (principal and interest)	$458.22
Interest rate (percent)	7
New Mortgage:	
Interest rate (percent)	10
Points	3
Term (years)	15

Remaining term of the old mortgage is determined to be 174 months. Determining, or computing, the actual remaining term is more reliable than using the data supplied by the mortgagee. However, if it is shorter, use the term of the new mortgage and compute the needed monthly payment.

Amount to be financed to maintain monthly payments of $458.22 at 10% = $42,010.18.

Calculation:	
Remaining Principal Balance	$50,000.00
Minus Annual Monthly Payment (principal and interest)	−42,010.18
Increased mortgage interest costs	7,989.82
3 points on $42,010.18	1,260.31
Total buydown necessary to maintain payments at $458.22/month	9,250.13

If the new mortgage actually obtained is less than the computed amount for a new mortgage ($42,010.18), the buydown shall be prorated accordingly. If the actual mortgage obtained in our example were $35,000, the buydown payment would be $7,706.57 ($35,000 divided by $42,010.18 = .8331; $9,250.13 multiplied by .83 = $7,706.57).

The Agency is obligated to inform the displaced person of the approximate amount of this payment and to advise the displaced person of the interest rate and points used to calculate the payment.

The FHWA has an online tool to calculate increased mortgage interest costs for fixed, and interest only loans at: *www.fhwa.dot.gov/real_estate/practitioners/uniform_act/relocation/midpcalcs/.*

Section 24.401(e) Home equity conversion mortgage (HECM). The provision in § 24.401(e) sets forth the factors to be considered to estimating an amount, after paying off the existing HECM balance, sufficient to purchase a replacement HECM that provides a tenure or term payment, line of credit, or lump-sum disbursement. The Agency must know the value of the acquired dwelling, existing balance of displacement HECM, remaining equity, and price of the selected comparable or actual replacement dwelling, to compute the estimated HECM supplement payment for a replacement HECM. The FHWA website provides a simple calculator to estimate the HECM supplement payment needed to purchase a replacement HECM at *www.fhwa.dot.gov/realty/.* In cases where there is a tenure or term payment additional information such as the age of the youngest borrower, amounts of the tenure payment, amount and remaining term of term payment and the current interest rate, is needed to calculate the payment and will require the assistance of a HECM mortgage broker.

Below are four scenarios and suggestions for relocation payment eligibilities. As you will note, the eligibility is the same in each case; however, amounts will vary depending on the individual's circumstance and existing HECM terms. This appendix also contains a list of other possible Agency options, should a displaced person elect to use them; however, they are not recommended by FHWA because they do not place the person into a replacement HECM.

Situation 1—Owner has sufficient remaining equity to obtain a replacement HECM for purchase.

Situation 2—Owner's existing HECM has a tenure disbursement payment and there is not sufficient remaining equity to obtain a replacement HECM.

Situation 3—Owner's existing HECM has a term disbursement payment and there is not sufficient remaining equity to obtain a replacement HECM.

Situation 4—Owner's existing HECM is a line of credit and there is not sufficient remaining equity to obtain a replacement HECM.

The displaced homeowner may be eligible for the following relocation payments:

• *A price differential payment in accordance with § 24.401(c).*

The owner would be eligible for a price differential payment (the difference between the comparable replacement dwelling and the acquisition cost of the displacement dwelling).

• *The administrative costs and incidental expenses necessary to establish the new HECM.*

Incidental costs incurred with a replacement HECM are reimbursable and fall into three categories- Mortgage insurance premium (MIP), loan origination fee, and closing costs.

• *A mortgage interest differential payment if the homeowner incurs a higher interest rate on the new HECM.*

The payment would be based on the difference between the displacement adjustable-rate mortgage (ARM) cap rate and the available ARM cap rate and those rates would be used as the components to calculate the MIDP in accordance with the sample calculation provided at *Section 24.401(d)* of this appendix. The Agency must advise the displaced person of the interest rate used to calculate the payment. Note that most HECMs are monthly adjustable rate mortgages, so any interest differential payment would be minimal.

• *If the displaced homeowner elects to relocate into rental housing rather than remain a homeowner, then the Agency will calculate relocation assistance payments in accordance with § 24.401(g).*

For example, the Agency computes a rental assistance payment of $10,000 for the owners based on a comparable replacement rental dwelling. When the owners settle with the Agency they will pay off the balance of the HECM and retain any remaining equity in the property. They are eligible for the rental assistance payment when they rent and occupy the DSS replacement dwelling.

Note: In all situations, if the displaced homeowner elects to relocate into rental housing rather than remain homeowner, then the Agency will calculate relocation assistance payments in accordance with § 24.401(g).

Note: If the existing HECM was a lump-sum or line-of-credit which has been exhausted, then the Agency is not under obligation to replace those amounts, but only to replace the HECM with a HECM with terms and equity similar to the displacement HECM.

Other Agency options (not recommended unless elected by the displaced person, since they do not place the person into the same situation as the displacement HECM provided):

• A direct loan as set forth in § 24.404 under housing of last resort.

• A life estate interest in a comparable replacement dwelling under replacement housing of last resort.

• Agency purchases a comparable replacement dwelling and retains ownership and conveys a leasehold interest to the owner for his/her lifetime.

• Agency offers a comparable replacement rental dwelling to convert the homeowner occupant to tenant status.

Section 24.402 Replacement Housing Payment for 90-day tenants and certain others.

Section 24.402(b)(2) Low income calculation example. The Uniform Act

requires that an eligible displaced person who rents a replacement dwelling is entitled to a rental assistance payment calculated in accordance with § 24.402(b). One factor in this calculation is to determine if a displaced person is ''low income,'' as defined by the U.S. Department of Housing and Urban Development's annual survey of income limits for the Public Housing and Section 8 Programs. To make such a determination, the Agency must: (1) Determine the total number of members in the household (including all adults and children); (2) locate the appropriate table for income limits applicable to the Uniform Act for the State in which the displaced residence is located (found at: *http://www.fhwa.dot.gov/realestate/ua/ualic.htm*); (3) from the list of local jurisdictions shown, identify the appropriate county, Metropolitan Statistical Area (MSA),[4] or Primary Metropolitan Statistical Area (PMSA)[5] in which the displacement property is located; and (4) locate the appropriate income limit in that jurisdiction for the size of this displaced person/family. The income limit must then be compared to the household income (defined at § 24.2(a)) which is the gross annual income received by the displaced family, excluding income from any dependent children and full-time students under the age of 18. If the household income for the eligible displaced person/family is less than or equal to the income limit, the family is considered ''low income.'' For example:

Tom and Mary Smith and their three children are being displaced. The information obtained from the family and verified by the Agency is as follows:

Tom Smith, employed, earns $21,000/yr.
Mary Smith, receives disability payments of $6,000/yr.
Tom Smith, Jr., 21, employed, earns $10,000/yr.
Mary Jane Smith, 17, student, has a paper route, earns $3,000/yr. (Income is not included because she is a dependent child and a full-time student under 18)
Sammie Smith, 10, full-time student, no income.

Total family income for five persons is: $21,000 + $6,000 + $10,000 = $37,000

The displacement residence is located in the State of Maryland, Caroline County. The low income limit for a five person household is: $64,300. (2014 Income Limits)

This household is considered ''low income.''

Section 24.402(c) Down payment assistance. The down payment assistance provisions in § 24.402(c) limit such assistance to the amount of the computed rental assistance payment for a tenant. It does, however, provide the latitude for Agency discretion in offering down payment assistance that exceeds the computed rental assistance payment, up to the $7,200 statutory maximum. This does not mean, however, that such Agency discretion may be exercised in a selective or discriminatory fashion. The Agency should develop a policy that affords equal treatment for displaced persons in like circumstances and this policy should be applied uniformly throughout the Agency's programs or projects.

For the purpose of this section, should the amount of the rental assistance payment, for a displaced homeowner who elects to rent a replacement dwelling may not be more than the eligibility the homeowner would have received as an eligible displaced home owner.

Section 24.403(a)(1) Determining cost of comparable replacement dwelling. In § 24.403(a)(1) the term ''examined'' an MLS listing does not equate to ''inspected'' but rather to ''considered'' for the payment eligibility computation. At a minimum, the selected comparable dwelling should be physically inspected or, if an inspection is not feasible, the displaced person shall be informed in writing that a physical inspection of the interior or exterior was not performed, the reason that the inspection was not performed, and that if the comparable is selected as a replacement dwelling a replacement housing payment may not be made unless the replacement dwelling is subsequently inspected and determined to be decent, safe, and sanitary. Reliance on an exterior visual inspection, or examination of an MLS listing does not in most cases constitute a full DSS inspection.

Each Agency should clearly inform displaced persons that a DSS inspection as required by this part is only a cursory inspection to ensure that certain minimum requirements (*e.g.,* local housing codes) are being met versus doing a full home inspection of all systems similar to that which a home inspector would be hired to do.

Section 24.403(a)(3) Additional rules governing replacement housing payments. The economic value to the owner of a remainder may be as an actual buildable lot for sale to an adjoining property owner, or for some other purpose for which the Agency attributes an economic value to the owner. When allowed for under applicable law, a single offer that includes the value of the remainder property should be made. The purpose of making an offer to purchase the remainder is to allow for an RHP calculation and benefit determination that includes the value of the remainder as part of the compensation offered to the owner for acquisition, whether the property owner sells the remainder or choses to retain it. Should a property owner decide to retain a remainder then he would be responsible for the value of the remainder when he purchases his replacement property. Example B shows the effect that a property owner's decision to retain a remainder or a States inability to make an offer to purchase the remainder would have on the calculation of benefits.

The price differential portion of the replacement housing payment would be the difference between the comparable replacement dwelling and the Agency's highest written acquisition offer. In the examples below, the before value of the typical residential dwelling and lot is $180,000; the remnant is valued at $15,000, and the part needed for the project, including the dwelling, is valued at $165,000 the comparable replacement dwelling is valued at $200,000. The price differential would be calculated as follows in the two scenarios:

(Example A) Agency Offers To Acquire Remainder

Comparable replacement dwelling	.....	$200,000
Before value of parcel	$180,000	.....
Minus: Remainder Value	15,000	.....
Acquisition of Part Needed	165,000	.....
Agency's highest written offer	.....	180,000
Price Differential Payment Eligibility	.....	20,000

(Example B) Agency Does Not Offer To Acquire Remainder

Comparable Replacement Dwelling	.....	$200,000
Before value of parcel	$180,000	.....
Minus: Remainder Value (owner retains)	15,000	.....
Acquisition of Part Needed	165,000	.....
Agency's highest written offer for part needed	.....	165,000
Price Differential Payment Eligibility	.....	35,000

Section 24.404 Replacement housing of last resort.

Section 24.404(b) Basic rights of persons to be displaced. Section 24.404(b) affirms the right of a 90-day homeowner-occupant, who is eligible for a replacement housing payment under § 24.401, to a reasonable opportunity to purchase a comparable replacement dwelling. However, it should be read in conjunction with the definition of ''owner of a dwelling'' at § 24.2(a). The Agency is not required to provide persons owning only a fractional interest in the displacement dwelling a greater level of assistance to purchase a replacement dwelling than the Agency would be required to provide such persons if they owned fee simple title to the displacement dwelling. If such assistance is not sufficient to buy a replacement dwelling, the Agency may provide additional purchase assistance or rental assistance.

Section 24.404(c) Methods of providing comparable replacement housing. Section 24.404(c) emphasizes the use of cost effective means of providing comparable replacement housing. The term ''reasonable cost'' is used to highlight the fact that while innovative means to provide housing are encouraged, they should be cost-effective. Section 24.404(c)(2) permits the use of last resort housing, in special cases, which may involve variations from the usual methods of obtaining comparability. However, such variation should never result in a lowering of housing standards nor should it ever result in a lower quality of living style for the displaced person. The physical characteristics of the comparable replacement dwelling may be dissimilar to those of the displacement dwelling but they may never be inferior.

[4] A complete list of counties and towns included in the identified MSAs and PMSAs can be found under the bulleted item ''Income Limit Area Definition'' posted on the FHWA's website at: *http://www.fhwa.dot.gov/realestate/ua/ualic.htm.*

[5] See footnote 4.

One example might be the use of a new mobile home to replace a very substandard conventional dwelling in an area where comparable conventional dwellings are not available.

Another example could be the use of a superior, but smaller, decent, safe and sanitary dwelling to replace a large, old substandard dwelling, only a portion of which is being used as living quarters by the occupants and no other large comparable dwellings are available in the area.

Appendix B to Part 24—Statistical Report Form

This appendix sets forth the statistical information collected from Agencies in accordance with § 24.9(c).

General

1. *Report coverage.* This report covers all relocation and real property acquisition activities under a Federal or a federally assisted project or program subject to the provisions of the Uniform Act. If the exact numbers are not easily available, an Agency may provide what it believes to be a reasonable estimate.

2. *Report period.* Activities shall be reported on a Federal fiscal year basis, *i.e.* October 1 through September 30.

3. *Where and when to submit report.* Submit a copy of this report to the lead Agency as soon as possible after September 30, but *not later than November 15.* Lead Agency address: Federal Highway Administration, Office of Real Estate Services (HEPR), 1200 New Jersey Avenue SE, Washington, DC 20590.

4. *How to report relocation payments.* The full amount of a relocation payment shall be reported as if disbursed in the year during which the claim was approved, regardless of whether the payment is to be paid in installments.

5. *How to report dollar amounts.* Round off all money entries in Parts of this section A, B, and C to the nearest dollar.

6. *Regulatory references.* The references in Parts A, B, C, and D of this section indicate the subpart of this part pertaining to the requested information.

Part A. Real Property Acquisition Under the Uniform Act

Line 1. Report all parcels acquired during the report year where title or possession was vested in the Agency during the reporting period. The parcel count reported should relate to ownerships and not to the number of parcels of different property interests (such as fee, perpetual easement, temporary easement, etc.) that may have been part of an acquisition from one owner. For example, an acquisition from a property that includes a fee simple parcel, a perpetual easement parcel, and a temporary easement parcel should be reported as 1 parcel not 3 parcels. (Include parcels acquired without Federal financial assistance, if there was or will be Federal financial assistance in other phases of the project or program.)

Line 2. Report the number of parcels reported on Line 1 that were acquired by condemnation. Include those parcels where compensation for the property was paid, deposited in court, or otherwise made available to a property owner pursuant to applicable law in order to vest title or possession in the Agency through condemnation authority.

Line 3. Report the number of parcels in Line 1 acquired through administrative settlement where the purchase price for the property exceeded the amount offered as just compensation and efforts to negotiate an agreement at that amount have failed.

Line 4. Report the total of the amounts paid, deposited in court, or otherwise made available to a property owner pursuant to applicable law in order to vest title or possession in the Agency in Line 1.

Part B. Residential Relocation Under the Uniform Act

Line 5. Report the number of households who were permanently displaced during the fiscal year by project or program activities and moved to their replacement dwelling. The term ''households'' includes all families and individuals. A family shall be reported as ''one'' household, *not* by the number of people in the family unit.

Line 6. Report the total amount paid for residential moving expenses (actual expense and fixed payment).

Line 7. Report the total amount paid for residential replacement housing payments including payments for replacement housing of last resort provided pursuant to § 24.404.

Line 8. Report the number of households in Line 5 who were permanently displaced during the fiscal year by project or program activities and moved to their replacement dwelling as part of last resort housing assistance.

Line 9. Report the number of tenant households in Line 5 who were permanently displaced during the fiscal year by project or program activities, and who purchased and moved to their replacement dwelling using a down payment assistance payment under this part.

Line 10. Report the total sum costs of residential relocation expenses and payments (excluding Agency administrative expenses) in Lines 6 and 7.

Part C. Nonresidential Relocation Under the Uniform Act

Line 11. Report the number of businesses, nonprofit organizations, and farms who were permanently displaced during the fiscal year by project or program activities and moved to their replacement location. This includes businesses, nonprofit organizations, and farms, that upon displacement, discontinued operations.

Line 12. Report the total amount paid for nonresidential moving expenses (actual expense and fixed payment.)

Line 13. Report the total amount paid for nonresidential reestablishment expenses.

Line 14. Report the total sum costs of nonresidential relocation expenses and payments (excluding Agency administrative expenses) in Lines 12 and 13.

Part D. Relocation Appeals

Line 15. Report the total number of relocation appeals filed during the fiscal year by aggrieved persons (residential and nonresidential).

FEDERAL FISCAL YEAR ENDING SEPT. 30, 20____
REPORTING AGENCY: _____
STATE: _____
CITY/COUNTY (For Local Government Agencies): _____
FEDERAL FUNDING AGENCY: _____

PART A. REAL PROPERTY ACQUISITION UNDER THE UNIFORM ACT	
1) Total Number of Parcels Acquired (Ownerships)	
2) Number of Parcels in Line 1 Acquired by Condemnation	
3) Number of Parcels in Line 1 Acquired by Administrative Settlement (Above initial offer –see 24.102(i))	
4) Compensation – Total Costs (Including 24.106; Excluding appraisal costs, negotiator fees and other administrative expenses)	
PART B. RESIDENTIAL RELOCATION UNDER THE UNIFORM ACT	
5) Total Number of Residential Displacements (Households)	
6) Residential Moving Payments – Total Costs	
7) Replacement Housing Payments – Total Costs	
8) Number of Last Resort Housing Displacements in Line 5 (Households)	
9) Number of Tenants converted to Homeowners in Line 5 (Households using 24.402(c))	
10) Total Costs for Residential Relocation Expenses and Payments (Sum of lines 6 and 7; excluding Agency Administrative Costs)	
PART C. NONRESIDENTIAL RELOCATION UNDER THE UNIFORM ACT	
11) Total Number of NonResidential Displacements	
12) NonResidential Moving Payments – Total Costs (Including 24.305)	
13) NonResidential Reestablishment Payments – Total Costs	
14) Total Costs for Nonresidential Relocation Expenses and Payments (Sum of lines 12 and 13; excluding Agency Administrative Costs)	
PART D. RELOCATION APPEALS UNDER THE UNIFORM ACT	
15) Total Number of Relocation Appeals (Residential & NonResidential)	

[FR Doc. 2019–25558 Filed 12–17–19; 8:45 am]
BILLING CODE 4910–22–P

FEDERAL REGISTER

Vol. 84 Wednesday,

No. 243 December 18, 2019

Part III

National Labor Relations Board

29 CFR Part 102

Representation-Case Procedures; Final Rule

NATIONAL LABOR RELTATIONS BOARD

29 CFR Part 102

RIN 3142–AA12

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the provisions of the National Labor Relations Act (the Act) which protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. While retaining the essentials of existing representation case procedures, these amendments modify them to permit parties additional time to comply with various pre-election requirements instituted in 2015, to clarify and reinstate some procedures that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues prior to an election, and to make several other changes the Board deems to be appropriate policy choices that better balance the interest in the expeditious processing of questions of representation with the efficient, fair, and accurate resolution of questions of representation.

DATES: This rule is effective April 16, 2020.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board administers the National Labor Relations Act which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and their employer are unable to agree whether employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board the authority to resolve the question of representation. The Supreme Court has recognized that ''Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.'' *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). ''The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.'' *NLRB* v. *Waterman Steamship Co.,* 309 U.S. 206, 226 (1940).

Representation case procedures are set forth in the statute, in Board regulations, and in Board caselaw.[1] The Board's General Counsel has also prepared a non-binding Casehandling Manual describing representation case procedures in detail.[2]

The Act itself sets forth only the basic steps for resolving a question of representation. First, a petition is filed by an employee, a labor organization, or an employer. Second, the Board investigates a petition and, if it has reasonable cause to believe that a question of representation exists, provides an appropriate hearing upon due notice, unless the parties agree that an election should be conducted and agree concerning election details. Hearing officers may conduct such pre-election hearings, but they may not make any recommendations with respect to them. Third, if, based on the record of the hearing, the Board finds that a question of representation exists, an election by secret ballot is conducted in an appropriate unit. Fourth, the results of the election are certified. The Act permits the Board to delegate its authority to NLRB regional directors. The Act also provides that, upon request, the Board may review any action of the regional director, but such review does not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

Within this general framework, ''the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co.,* 329 U.S. at 331. In promulgating and applying representation rules and regulations, the Board, the General Counsel[3] and the agency's regional directors have, in addition to seeking efficient and prompt resolution of representation cases, sought to guarantee fair and accurate voting, to achieve transparency and uniformity in the Board's procedures, and to update them in light of technological advances. See, *e.g.,* 79 FR 74308 (Dec. 15, 2014).

From time to time, the Board has revised its representation procedures to better effectuate these various purposes. In 2014, the Board promulgated a broad revision to those procedures, making 25 amendments in existing rules that, among other things, imposed a variety of new procedural requirements on the parties, limited the scope of pre-election hearings, and significantly contracted the timeline between the filing of a petition and the election. Certain of these amendments were controversial at the time and have remained subjects of frequent criticism since their implementation. For example, various of the Board's stakeholders have expressed concern that the current default timeframe from the filing of a petition to the pre-election hearing is too short a time in which to meet the various new obligations triggered by the filing of a petition while also adequately preparing for the hearing; that the current procedures' encouragement of deferral of disputes concerning unit scope and voter eligibility results in less fair and informed votes; and that parties may only submit post-hearing briefs when the regional director permits them to do so. Based on these concerns, as well as our independent review of the 2014 amendments, the final rule modifies those amendments in several respects—and makes further refinements that the Board believes will further clarify and improve representation case procedures—as discussed below.

II. List of Amendments

This list provides a concise statement of the ways in which this final rule changes or codifies current practice, and the general reasoning in support. It is not ''an elaborate analysis of [the] rules or of the detailed considerations upon which they are based''; rather, it ''is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.''[4] As this list shows, the amendments constitute discrete

[1] The Board's binding rules of representation procedure are found primarily in 29 CFR part 102, subpart D. Additional rules created by adjudication are found throughout the corpus of Board decisional law. See *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 764, 770, 777, 779 (1969).

[2] NLRB Casehandling Manual (Part Two) Representation Proceedings.

[3] The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

[4] S. Rep. No. 752, at 225 (1945).

modifications responding to particularized problems and concerns.[5] All of these matters are discussed in greater detail below.

1. The pre-election hearing will generally be scheduled to open 14 business days from notice of the hearing, and regional directors will have discretion to postpone the opening of the hearing for good cause. Under the prior rules, pre-election hearings were generally scheduled to open 8 calendar days from the notice of hearing. The additional time will permit parties to more easily manage the obligations imposed on them by the filing of a petition and to better prepare for the hearing, thus promoting orderly litigation. The additional time is also necessary to accommodate changes to the Statement of Position requirement (summarized below); in conjunction with those changes, the additional time will also help facilitate election agreements and further promote orderly litigation.

2. The employer will now be required to post and distribute the Notice of Petition for Election within 5 business days after service of the notice of hearing. The prior rules required posting and distribution within 2 business days. The additional time will permit employers to balance this requirement with the other obligations imposed on them by the filing of a petition, and—in conjunction with the additional time between the notice and opening of the hearing—will guarantee that employees and parties have the benefit of the Notice of Petition for Election for a longer period of time prior to the opening of the hearing than is currently the case.

3. Non-petitioning parties are now required to file and serve the Statement of Position within 8 business days after service of the notice of hearing, and regional directors will have the discretion to permit additional time for filing and service for good cause. Non-petitioning parties were formerly required to file and serve the Statement of Position 1 day before the opening of the pre-election hearing (typically 7 calendar days after service of the notice of hearing). The additional time will permit non-petitioning parties more time to balance this requirement with the other obligations imposed on them by the filing of a petition, and it will also permit them slightly more time to prepare the Statement of Position, which will in turn promote orderly litigation.

4. The petitioner will also be required to file and serve a Statement of Position on the other parties responding to the issues raised by any non-petitioning party in a Statement of Position. The responsive Statement of Position will be due at noon 3 business days before the hearing is scheduled to open (which is also 3 business days after the initial Statement(s) of Position must be received). Timely amendments to the responsive statement may be made on a showing of good cause. The prior rules required the petitioner to respond orally to the Statement(s) of Position at the start of the pre-election hearing. Requiring the response in writing prior to the hearing will facilitate election agreements or result in more orderly litigation by narrowing and focusing the issues to be litigated at the pre-election hearing.

5. Although acknowledging that the primary purpose of the pre-election hearing is to determine whether there is a question of representation, disputes concerning unit scope and voter eligibility—including issues of supervisory status—will now normally be litigated at the pre-election hearing and resolved by the regional director before an election is directed. The parties may, however, agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. The prior rules provided that disputes ''concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.'' The final rule represents a return to the Board's procedures prior to the 2014 amendments, and it will promote fair and accurate voting as well as transparency by better defining the unit in question prior to the election. Further, by encouraging regional directors to resolve issues such as supervisory status prior to directing an election, the final rule will give better guidance to the employees and parties and will help avoid conduct that may give rise to objections or unfair labor practices. At the same time, expressly permitting the parties to agree to defer litigation on such issues continues to honor the Act's fundamental interest in encouraging agreement between parties where possible, which promotes promptness and efficiency. The choice is theirs, not mandated by the Board.

6. The right of parties to file a post-hearing brief with the regional director following pre-election hearings has been restored and extended to post-election hearings as well. Such briefs will be due within 5 business days of the close of the hearing, although hearing officers may grant an extension of up to 10 additional business days for good cause. Under the prior rules, such briefs were permitted only upon special permission of the regional director. Permitting such briefs as a matter of right after all hearings will enable parties more time to craft and narrow their arguments, which will in turn assist the regional director (and the hearing officer, in post-election proceedings) in focusing on the critical facts, issues, and arguments, thereby promoting orderly litigation and more efficient resolution of disputes. Extending the right to file post-hearing briefs to post-election proceedings also promotes uniformity.

7. The regional director's discretion to issue a Notice of Election subsequent to issuing a direction of election is emphasized. The prior rules provided that regional directors ''ordinarily will'' specify election details in the direction of election. Reemphasizing the regional directors' discretion in this area will eliminate confusion that may have led to unnecessary litigation and may facilitate faster issuance of decisions and directions of election in some cases, although the Board anticipates that regional directors will still ''ordinarily'' include the election details in the direction of election.

8. The regional director will continue to schedule the election for the earliest date practicable, but—absent waiver by the parties—normally will not schedule an election before the 20th business day after the date of the direction of election. As explained in item nine below, this period will permit the Board to rule upon certain types of requests for review prior to the election. The prior rules simply provided that the regional director ''shall schedule the election for the earliest date practicable.'' The final rule is largely consistent with Board procedures prior to the 2014 amendments, which provided that the regional director would normally schedule an election 25 to 30 days after the issuance of the direction of election. Permitting the Board to rule on disputes prior to the election will reduce the number of cases in which issues remain unresolved at the time of the election, thereby promoting orderly litigation,

[5] In accordance with the discrete character of the matters addressed by each of the amendments listed, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made, except as expressly noted in the more detailed discussion of the timelines set forth in § 102.63 below. For this reason, the amendments are severable. They are also independent of other representation case procedure amendments addressing election protection issues that have been proposed in a separate Notice of Proposed Rulemaking. See Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 FR 39930 *et seq.* (proposed Aug. 12, 2019).

transparency, and fair and accurate voting.

9. Where a request for review of a direction of election is filed within 10 business days of that direction, if the Board has not ruled on the request, or has granted it, before the conclusion of the election, ballots whose validity might be affected by the Board's ruling on the request or decision on review will be segregated and all ballots will be impounded and remain unopened pending such ruling or decision. A party may still file a request for review of a direction of election more than 10 business days after the direction, but the pendency of such a request for review will not require impoundment of the ballots. This represents a partial return to the Board's procedures prior to the 2014 amendments, which removed the provision for automatic impoundment. By reinstating automatic impoundment in these narrow circumstances, the final rule promotes transparency by removing the possibility for confusion if a tally of ballots issues but is then affected by the Board's subsequent ruling on the pending request for review. Consistent with the 2014 amendments, however, parties remain free to wait to file a request for review until after the election has been conducted and the ballots counted. By preserving this option, which encourages parties to wait to see whether the results of the election moot the issues for which they would otherwise seek review, the final rule also continues to promote efficiency.

10. Formatting and procedural requirements for all types of requests for reviews have been systematized. All requests for review and oppositions thereto are now subject to the same formatting requirements. Oppositions are now explicitly permitted in response to requests for review filed pursuant to § 102.71. And the practice of permitting replies to oppositions and briefs on review only upon special leave of the Board has been codified. All of these provisions are consistent with the Board's longstanding practice and promote transparency and uniformity.

11. A party may not request review of only part of a regional director's action in one request for review and subsequently request review of another part of that same action. The prior rule was not clear whether parties were permitted to proceed in such a fashion. Disallowing such a piecemeal approach promotes orderly litigation, administrative efficiency, and more expeditious resolution of disputes.

12. The employer now has 5 business days to furnish the required voter list following the issuance of the direction of election. Under the prior rule, the employer had only 2 business days to provide the list. Permitting additional time for the voter list will increase the accuracy of such lists, promoting transparency and efficiency at the election and reducing the possibility of litigation over the list.

13. In selecting election observers, whenever possible a party will now select a current member of the voting unit; when no such individual is available, a party should select a current nonsupervisory employee. The prior rules simply provide that parties may be represented by observers. Providing guidance for the selection of observers promotes uniformity and transparency and will reduce litigation over parties' choices of observers and thus promote administrative efficiency.

14. The regional director will no longer certify the results of an election if a request for review is pending or before the time has passed during which a request for review could be filed. Under the prior rules, regional directors were required to certify election results despite the pendency or possibility of a request for review; indeed, in cases where a certification issued, requests for review could be filed up until 14 days after the issuance of the certification. As a result, a certified union would often demand bargaining and file unfair labor practice charges alleging an unlawful refusal to bargain even as the Board considered a request for review that, if granted, could render the certification a nullity. By eliminating the issuance of certifications until after a request for review has been ruled on, or until after the time for filing a request for review has passed, the final rule eliminates confusion among the parties and employees and promotes orderly litigation of both representation and consequent unfair labor practice cases. To promote transparency and uniformity, the final rule also provides a definition of ''final disposition.''

15. The final rule also makes a number of incidental changes in terminology, and updates internal cross-references, consistent with earlier changes that were effective on March 6, 2017. See 82 FR 11748. In addition, for the sake of uniformity and transparency within the representation case procedures, the Board has converted all time periods in subpart D to business days, and it has also updated § 102.2(a) to define how business days are calculated (including clarification that only *federal* holidays are implicated in time period calculations).

III. General Matters

Before explaining the specific provisions of the final rule, the Board addresses several general issues: (a) The Board's rulemaking authority and the need to amend the regulations generally; (b) the decision to implement the final rule without notice and comment; (c) the length of the timeline for processing of contested cases that will result from the final rule; and (d) global changes made in the representation case procedures, including the recasting of all time periods in terms of business days.

A. The Board's Rulemaking Authority and the Desirability of the Final Rule

Congress delegated both general and specific rulemaking authority to the Board. Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board ''shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act . . . such rules and regulations as may be necessary to carry out the provisions of this Act.'' In addition, Section 9(c), 29 U.S.C. 159(c)(1), specifically contemplates rules concerning representation case procedures, stating that elections will be held ''in accordance with such regulations as may be prescribed by the Board.''

The Supreme Court unanimously held in *American Hospital Association* v. *NLRB,* 499 U.S. 606, 609–610 (1991), that the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board's rules are entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984); *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete. See *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 290 n.21 (1974); *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). ''The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.'' *NLRB* v. *Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); see also *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, 142 (1971).

In *A.J. Tower,* 329 U.S. at 330, the Supreme Court noted that ''Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees.'' The Act charges the Board to ''promulgate rules and regulations in order that employees' votes may be

recorded accurately, efficiently and speedily.'' Id. at 331. As the Eleventh Circuit stated:

> We draw two lessons from *A.J. Tower:* (1) The Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower,* the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainteed Corp. v. *NLRB,* 714 F.2d 1042, 1053 (11th Cir. 1983). As the Board stated in a prior rulemaking, the interests to be balanced in effectuating the purposes of the Act include timeliness, efficiency, fair and accurate voting, transparency, uniformity, and adapting to new technology. 79 FR 74315–74316.

Agencies have the authority to reconsider past decisions and rules and to retain, revise, replace, and rescind decisions and rules. See, *e.g., FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–515 (2009); *Motor Vehicle Manufacturers Ass'n of U.S., Inc.* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983); *National Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038–1039, 1043 (D.C. Cir. 2012). As indicated above, the Act expressly contemplates that the Board will, from time to time, amend (or even rescind) its rules and regulations. 29 U.S.C. 156. In keeping with this congressional mandate, the Board has a ''longstanding practice of incrementally evaluating and improving its processes'' and, in keeping with that practice, has repeatedly amended its representation case procedures in a continuing effort to improve them. 79 FR 74310, 74314. ''Past improvements do not and should not preclude the Board's consideration and adoption of further improvements.'' Id. at 74316–74317. Of course, revisions to existing rules should not and cannot be undertaken for arbitrary reasons; an agency must show that procedural changes constitute a rational means for achieving the changes' stated objectives and must fairly account for any benefits that may be lost as a result of the change. See *Citizens Awareness Network, Inc.* v. *U.S.,* 391 F.3d 338, 351–352 (1st Cir. 2004) (citing *State Farm,* 463 U.S. 29, 43–44).

This final rule is therefore being undertaken pursuant to the Board's clear regulatory authority to change its own representation case procedures and is firmly rooted in the Board's longstanding practice of evaluating and improving its representation case procedures. In particular, the final rule seeks to improve upon the most recent amendments to the representation case procedures, which were adopted on December 15, 2014, and became effective April 14, 2015. 79 FR 74308 *et seq.* Beginning with the responses to the 2011 Notice of Proposed Rulemaking, which ultimately led to the adoption of the 2014 amendments,[6] and continuing to the present, certain provisions of the amendments have generated much controversy, spawning tens of thousands of comments (ranging from sharply critical to glowingly positive) and a series of dissenting opinions in both rulemaking and adjudicative proceedings.[7] Among the most controversial aspects of the 2014 amendments were:

- The substantial reduction of time between the filing of a petition and the conduct of the pre-election hearing in contested cases owing to the mandate that hearings usually open 8 days after the issuance of a notice of hearing;
- the requirement that the non-petitioning party or parties file a detailed Statement of Position at noon on the business day before the opening of the pre-election hearing (on pain of waiving any arguments not raised in the Statement of Position);
- the dramatic curtailment of the scope of pre-election hearings occasioned by the provision that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated and resolved before an election;
- the elimination of the right of parties to file post-hearing briefs following pre-election hearings;
- the elimination of the 25 to 30 day period between a decision and direction of election and the conduct of the election, which previously permitted the Board to rule on requests for review of the decision and direction of election prior to the conduct of the election, along with the automatic impoundment of ballots that resulted when the Board had not yet ruled on, or had granted, a request for review before the conduct of the election;
- the reduction of the time for an employer to produce the required voter list from 7 days to 2 business days; and
- the implicit provision that, in virtually all cases, regional directors would issue a certification of results (including, where appropriate, a certification of representative) notwithstanding that a request for review was pending before, or could still be timely filed with, the Board.

As explained in more detail below, the Board has concluded that each of the foregoing provisions should be modified in order to strike a better balance among the competing interests the Board's representation procedures are designed to serve.[8]

It should be stated here, at the outset, that the Board is *not* rescinding the 2014 amendments in their entirety. Indeed, for the most part the final rule leaves many of the 2014 amendments undisturbed, including some that were the subject of considerable debate prior to and after their enactment. Rather, the final rule very much follows in the footsteps of the 2014 amendments by making targeted revisions designed to address specific, identified concerns and problems. Further, although many of the concerns and problems the final rule addresses are inextricably linked to the 2014 amendments, many others are entirely unrelated to the 2014 amendments. In this regard, the final rule also clarifies imprecisions in the wording of the regulations that predate the 2014 amendments, resolves asymmetries between related provisions that prior rulemakings have apparently overlooked, and introduces several

[6] The 2014 amendments were the result of a lengthy deliberative process that commenced with a Notice of Proposed Rulemaking issued on June 22, 2011. 76 FR 36812 *et seq.* Following the 2011 comment period, which included a public hearing and public deliberations by the Board regarding whether to draft and issue a final rule, a final rule was issued on December 22, 2011. 76 FR 80138 *et seq.* A Federal court later held that the Board had lacked a quorum in issuing the 2011 final rule. See *Chamber of Commerce of the U.S.* v. *NLRB,* 879 F.Supp.2d 18, 28–30 (D.D.C. 2012). A properly-constituted Board then issued a proposed rule on February 6, 2014, under the same docket number as the prior NPRM and containing the same proposals. 79 FR 7318 *et seq.* Following another comment period, on December 15, 2014, a final rule issued. 79 FR 74308 *et seq.* The 2014 amendments were upheld in the face of Constitutional and statutory challenges to its facial validity. See *Associated Builders and Contractors of Texas, Inc.* v. *NLRB,* 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the United States of America* v. *NLRB,* 118 F.Supp.3d 171 (D.D.C. 2015). We note that our revisions to some of those amendments do not rely in any way on the arguments rejected by the courts, particularly the due process and First Amendment arguments made by petitioners in those proceedings.

[7] See 76 FR 36829–36833 (dissenting view of Member Brian E. Hayes); 79 FR 7337–7349 (dissenting views of Members Philip A. Miscimarra and Harry I. Johnson III); 79 FR 74430–74460 (dissenting views of Members Philip A. Miscimarra and Harry I. Johnson III); *Brunswick Bowling Products, LLC,* 364 NLRB No. 96 (2016) (then-Member Miscimarra, concurring in part and dissenting in part); *Yale University,* 365 NLRB No. 40 (2017) (then-Acting Chairman Miscimarra, dissenting); *European Imports, Inc.,* 365 NLRB No. 41 (2017) (then-Acting Chairman Miscimarra, dissenting); *UPS Ground Freight, Inc.,* 365 NLRB No. 113 (2017) (Chairman Miscimarra, dissenting in part).

[8] We recognize that the procedural issues addressed here are not the only controversial aspects of the 2014 amendments and that it may be appropriate to address others separately in future proceedings, including the contents of the voter list.

entirely new innovations that the Board believes will facilitate more fairness,[9] accuracy, orderly litigation, and efficiency in case processing.

In sum, this final rule is well within the Board's ''wide degree of discretion[ary]'' [10] authority to set procedural rules for representation elections. The Board has determined that now is the proper time not only to address problems and concerns related to the 2014 amendments, but also to address other issues unrelated to the 2014 amendments. And each change set forth in this document is part of the Board's ongoing process of continually evaluating and improving its procedures to better effectuate the purposes of the Act.

B. The Decision To Implement the Final Rule Without Notice and Comment

The 2014 amendments resulted from a deliberative process that included two Notices of Proposed Rulemaking, that accepted comments on those proposals for a total of 141 days, and that conducted two public hearings over a total of 4 days.[11] This process yielded tens of thousands of comments and more than a thousand transcript pages of oral commentary. Much of the preamble to the 2014 amendments is devoted to summarizing and responding to these comments.

The Board has elected to take a different approach in this proceeding. First, the final rule is procedural as defined in 5 U.S.C. 553(b)(A), and is therefore exempt from notice and comment. Second, although foregoing notice and comment deviates from the process used in 2014, it is consistent with the Board's general approach in this area. As the explanation for the 2014 amendments itself observed, ''the Board has amended its representation case procedures more than three dozen times without prior notice or request for public comment,'' and never before 2011 had the Board engaged in notice and comment rulemaking on representation case procedures. 79 FR 74310–74311. Third, despite having used notice-and-comment rulemaking, the explanation for the 2014 amendments was at pains to emphasize that this process was not required by law. See 79 FR 74310–74313. Fourth, the fact that the final rule modifies certain of the 2014 amendments that were adopted after notice-and-comment rulemaking in no way requires notice-and-comment rulemaking now. The Board observed in 2014 that ''[a]gencies are not bound to use the same procedures in every rulemaking proceeding. Otherwise, agencies could neither learn from experience . . . nor adopt procedures suited to the precise question at stake,'' 79 FR 74313, and the Supreme Court has stated that if ''an agency is not required to use notice-and-comment procedures to issue an initial . . . rule, it is also not required to use those procedures when it amends or repeals that . . . rule.'' *Perez* v. *Mortgage Bankers Association,* 135 S.Ct. 1199, 1206 (2015). As such, the Board finds that notice and public procedure on this final rule are unnecessary.[12]

C. The Lengthened Timeline in Contested Cases

For contested cases, several provisions of the final rule will, both individually and taken together, result in a lengthening of the median time from the filing of a petition to the conduct of an election. As noted above, the Supreme Court has identified speed in recording employees' votes as one interest the Board's representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board's and Congress's emphasis on the need for expedition in representation cases.[13] Promoting prompt elections by reducing unnecessary delay was also among the primary concerns underlying the 2014 amendments, and many of those amendments worked individually and in conjunction with one another to reduce the time between the filing of a petition and the conduct of an election. This is not to suggest, as have some critics of the 2014 amendments, that the 2014 amendments were solely concerned with speed; to the contrary, the Board in 2014 clearly sought to serve and balance many different interests.[14]

It does appear, however, that speed in the electoral process was a very important consideration and has been the main tangible effect of the more controversial 2014 amendments. In this regard, the Board's statistics demonstrate that the median time between the filing of a petition and the election has been significantly reduced since the 2014 amendments became effective. This is true of both contested cases and those in which the parties reach an election agreement.[15] In other respects, however, it appears that the 2014 amendments have not resulted in a significant departure from the pre-2014 status quo. In this regard, the overall rate at which parties reach election agreements remains more or less unchanged.[16] So too the rate at which unions win elections.[17] Based on this state of affairs, it is reasonable to consider whether these gains in speed have come at the expense of other

[9] We emphasize that our references to ''fairness'' throughout this document are not to be confused with the legal concept of minimum ''due process.'' Clearly, the Board's discretion to provide a balanced regulatory scheme for the conduct of representation elections is not limited to assuring only the minimal procedural access that the Constitution requires.

[10] *A.J. Tower,* 329 U.S. at 330.

[11] Of course, the overall length of proceedings and volume of evidence adduced was the unintended consequence of the judicial invalidation of the 2011 Final Rule. See fn. 6 supra.

[12] 5 U.S.C. 553(b)(A). We note here that on December 14, 2017, the Board issued a Request for Information inviting information as to whether the 2014 amendments should be retained without change, retained with modifications, or rescinded. 82 FR 58783 *et seq.* We emphasize here that we are not treating the responses to the 2017 Request for Information as notice-and-comment rulemaking. As the Request for Information itself emphasized, the Board was merely seeking information; it was not engaged in rulemaking. None of the procedural changes that we make today are premised on the responses to the Request for Information; indeed, we would make each of these changes irrespective of the existence of the Request for Information.

[13] See, *e.g., Northeastern University,* 261 NLRB 1001, 1002 (1982), *enforced,* 707 F.2d 15 (1st Cir. 1983); Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).

[14] A cursory inspection of the supplementary information for the 2014 amendments demonstrates that speed was not the sole interest with which the Board was concerned in that proceeding. See, *e.g.,* 79 FR at 74315–74316.

[15] In FY14, the last full fiscal year under the former rules, the median number of days from a petition to an election was 37 days in cases where the parties reached an election agreement, 59 days in contested cases, and 38 days overall; in FY16, the first full fiscal year in which the 2014 amendments were in effect, the median number of days from a petition to an election was 23 days in cases with an election agreement, 36 days in contested cases, and 23 days overall. The FY14 figures are consistent with data going back to FY09; the FY16 figures are consistent with FY17 and FY18. See ''Median Days from Petition to Election,'' *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election.*

[16] 91.3% of all elections were conducted pursuant to an election agreement in FY19. ''Percentage of Elections Conducted Pursuant to Election Agreements in FY19,'' *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election.* According to data the Board supplied to Senator Murray and Representatives Sablan, Scott, and Norcross by letter dated February 15, 2018, prior to the 2014 amendments taking effect the election agreement rate was 93% (7/6/12 to 8/13/13), 91% (4/14/13 to 4/13/14), and 92% (4/14/14 to 4/13/15). After the amendments took effect, the stipulation rate was 92% (4/14/15 to 4/13/16), 93% (4/14/16 to 4/13/17), and 92% (4/15/17 to 12/31/17).

[17] See ''Representation Petitions—RC,'' *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc*; ''Decertification Petitions—RD,'' *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/decertification-petitions-rd*; ''Employer-Filed Petitions—RM,'' *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/employer-filed-petitions-rm.* Analyzing the data posted on these sites, the overall union win rate in FY09 was 63.7%; the overall union win rate in FY18 was a remarkably similar 65.0%. In between, the win rate ranged from a low of 60.5% in FY13 to a high of 68.4% in FY16.

relevant interests. Based on our review of our current representation case procedures, Congressional policy, and concerns that have been previously and repeatedly voiced about the current procedures, we conclude that they have.

Our reasoning for modifying the individual provisions that cumulatively result in more time between the filing of the petition and the conduct of the election in contested cases is set forth in our explanation for each individual change, but we emphasize here that we are not expanding this time period for its own sake. To the contrary, this is simply an incident of our conclusion that other fundamental interests and purposes of the Act can and should be served by modifying these provisions. As previously noted, beyond the interest in speed, the Board's interests include efficiency, fair and accurate voting, and transparency and uniformity, among others. The provisions instituted in this document that will expand the time between petition and election serve each of these interests.

For example, more time will promote fair and accurate voting. As noted earlier, the Eleventh Circuit has interpreted the accurate and efficient recording of employee votes to include ''certainty and finality of election results.'' *Certainteed Corp.,* supra at 1053. By permitting the parties—where they cannot otherwise agree on resolving or deferring such matters—to litigate issues of unit scope and employee eligibility at the pre-election hearing, by expecting the Regional Director to resolve these issues before proceeding to an election, and by providing time for the Board to entertain a timely-filed request for review of the regional director's resolution prior to the election, the final rule promotes fair and accurate voting by ensuring that the employees, at the time they cast their votes, know the contours of the unit in which they are voting. Further, by permtting litigation of these issues prior to the election, instead of deferring them until after the election, the final rule removes the pendency of such issues as a barrier to reaching certainty and finality of election results. Under the 2014 amendments, such issues could linger on after the election for weeks, months, or even years before being resolved. This state of affairs plainly did not promote certainty and finality.

Relaxing the timelines instituted by the 2014 amendments also promotes transparency and uniformity. Providing employees with more detailed knowledge of the contours of the voting unit, as well as resolving eligibility issues, self-evidently promotes transparency; leaving issues of unit scope and employee eligibility unresolved until after an election (absent agreement of the parties to do so) clearly does a disservice to transparency. Relatedly, resolving issues such as supervisory status before the election ensures that the parties know who speaks for management and whose actions during the election campaign could give rise to allegations of objectionable conduct or unfair labor practice charges. Permitting non-petitioning parties slightly more time to submit their Statements of Position, requiring petitioning parties to file a responsive Statement of Position, and providing all parties slightly more time to prepare for the pre-election hearing also promotes a sense of overall fairness in representation proceedings, which also serves the purpose of transparency. And impounding ballots while a pre-election request for review remains pending also promotes transparency by avoiding the confusion that will likely follow the publicization of election results that may be nullified or modified by the Board's ruling on the pending request for review. In addition, the various provisions of the final rule work together to provide parties with a more definite, predictable timeline between the filing of the petition and the conduct of the election. In this regard, the final rule provides that the election will be scheduled sometime after the 20th business day from the direction of election, whereas the 2014 amendments stated only that the election would be scheduled ''as soon as practicable.'' Likewise, the final rule promotes uniformity by guaranteeing the right to file post-hearing briefs, instead of permitting briefing only upon the discretion of the regional director (or the hearing officer in post-election proceedings).

Moreover, despite relaxing the election timeline, the final rule also serves the purpose of efficiency in a variety of ways.[18] As with accuracy, the Eleventh Circuit has indicated that efficiency carries connotations of certainty and finality. *Certainteed Corp.,* supra at 1053. On that note, it is worth emphasizing that the Board is charged with the expeditious *resolution* of questions of representation. The mere fact that elections are taking place quickly does not necessarily mean that this speed is promoting finality or the most efficient *resolution* of the question of representation.[19] Thus, by providing time between the direction and conduct of the election for the Board to resolve disputed election issues, should a party timely seek review during that time period, the final rule in fact promotes efficiency and expeditious *final* resolution of the question of representation, even if the election itself is not conducted as quickly as it may have been under the 2014 amendments. Likewise, although it is true that some pre-election issues need not be resolved in order to determine the *existence* of a question of representation, litigating those issues at the pre-election hearing (in the absence of the parties agreeing to defer them) will nevertheless contribute to a more efficient *resolution* of the question of representation by either resolving those issues prior to the election, leading to faster finality of the result, or at least permitting faster post-election resolution of those issues by creating a record before the election has been conducted.[20] And resolving issues

[18] Efficiency and speed are two distinct interests. See *A.J. Tower,* supra at 331. They are, of course, closely related, and that close relationship is reflected in the Board's longstanding formulation of its duty to provide for ''expeditious'' resolution of questions of representation. ''Expeditious'' is defined as ''[a]cting or done with speed and efficiency.'' *The American Heritage Dictionary of the English Language,* New College Ed. 462 (Houghton Mifflin 1979).

[19] For example, in *The Boeing Co.,* 368 NLRB No. 67 (2019), an election took place on May 31, 2018, but the Board ultimately granted review, reversed the Regional Director's finding that the petitioned-for unit was appropriate, and dismissed the petition on September 9, 2019. Similarly, in *Atlantic City Electric Co.,* Case No. 04–RC–221319, an election took place on June 25, 2018; the Board granted review on December 13, 2018, and affirmed the Regional Director's decision and direction of election on November 18, 2019. And in *Ohio College Preparatory School,* Case No. 08–RC–199371, an election was conducted on June 5, 2017; the Regional Director overruled objections that had been sent to hearing on March 6, 2018, and certified the Petitioner; the Board granted review, reversed the Regional Director, and remanded for a second election on July 30, 2018; and the second election (scheduled for August 23, 2018) was cancelled after the Petitioner withdrew its petition two days before the second election. In all three cases, then, despite their varied procedural conclusions, the questions of representation remained unresolved months after the election was conducted. And this phenomenon is not limited to cases in which the Board has granted review. Thus, in *Bio-Medical Applications of Alabama, Inc.,* Case No. 15–RC–201753, an election was conducted on August 2–3, 2017; timely objections were filed, but the Regional Director did not dismiss them until July 19, 2018, just short of a year after the election (the Board subsequently denied a request for review of the dismissal of objections on October 1, 2018).

[20] Although it is true that in some cases the results of the election may obviate the need to address certain questions of unit scope or voter eligibility, it is impossible to know in advance whether this will be the case, and in many cases the election results are such that these issues, if deferred, will still need to be addressed after the election. In such situations, little efficiency has been gained by the quick conduct of the election, given that certainty and finality must wait until the conclusion of post-election litigation over issues that could have been decided before the election. See, *e.g., Detroit 90/90 and Axios, Inc.,* Case 07–RC–150097 (Regional Director deferred litigation of

Continued

such as supervisory status before the election promises to minimize post-election litigation, given that the pre-election determination of supervisory status gives the parties an opportunity to guard against supervisory behavior that could give rise to objections or unfair labor practice charges.

In addition, there is another dimension of efficiency that the final rule promotes. As the Board has stated in the past, ''the fundamental design of the Act is to encourage agreement between the parties as much as possible.'' 79 FR 74393. Accordingly, when the Board encourages parties to enter into election agreements, it reflects the fundamental design of the Act and promotes efficiency by deferring to the parties' resolution of potential differences. The Board believes that the final rule promotes election agreements through the introduction of the responsive Statement of Position requirement, which will result in greater clarification of the issues in dispute prior to hearing, and by the provision of 3 business days between the filing and service of the responsive Statement of Position and the opening of the hearing, which permits additional time for the parties to negotiate over whatever issues remain in dispute following the filing and service of the responsive Statement of Position. This may lengthen the period of time between the petition and the hearing (and, by extension, between the petition and the election), but the Board believes that any loss of speed will be more than offset by the facilitation of election agreements.[21]

Finally, although the final rule will often result in more time between the petition and the pre-election hearing and between the pre-election hearing and the election, the final rule retains provisions that will ensure the lengthened timelines apply in only a limited number of cases and that will minimize the potential for abuse. First, the time periods instituted by the final rule apply only to contested cases, which have represented a small fraction of all representation proceedings before the Board in any given year.[22] Parties entering into election agreements remain free to schedule the election as they see fit. Second, even where parties are unable to reach an election agreement, they may still, consistent with the Act's bedrock interest in promoting agreement between parties, nevertheless agree to (1) a faster pre-election hearing; (2) waive the default period between the direction and conduct of election; and/or (3) defer any unit scope and eligibility issues until after the election.[23] Third, a party that disagrees with the regional director's resolution of pre-election issues remains free to wait and see whether the results of the election render the issues moot, obviating the need to file any request for review. Fourth, the final rule retains the Statement of Position requirement, the provisions for precluding litigation of issues not properly raised therein, and the requirement that the hearing be continued from day-to-day. Additionally, pre-election hearings remain under the firm control of the regional director and the hearing officer, who will continue to have the authority to prevent introduction of irrelevant evidence and the litigation of improperly-raised issues. Parties accordingly will not be able to use the expanded timeline to engage in improper gamesmanship when negotiating election agreements, nor will they be able to engage in delaying tactics at the hearing. Given these provisions, we are confident that parties will frequently avail themselves of the opportunity to avoid potentially unnecessary litigation, and in any event they will be prevented from engaging in the types of delaying tactics the 2014 amendments sought to prevent.

In sum, the final rules will likely result in some lengthening of the pre-election period, but the sacrifice of some speed will advance fairness, accuracy, transparency, uniformity, efficiency, and finality. This is, in our considered judgment, a more than worthwhile tradeoff.

D. Global Changes

Consistent with the final rule effective March 6, 2017,[24] the representation case Rules have been revised to ensure that terms and capitalization of titles, such as ''Regional Director,'' are consistent throughout the Rules. Where feasible, headings have been added to facilitate finding particular rules. Outdated cross-references have also been updated and corrected.

In addition, all time periods have been explicitly set forth in terms of ''business days,'' and time periods previously phrased as calendar days have been converted to business days. Section 102.2(a) generally provides that time periods of less than 7 days should be calculated as business days, *i.e.,* calculations should omit weekends and holidays, whereas periods of 7 or more days include weekends and holidays (unless the last day falls on a weekend or holiday, in which case the time period in question ends on the next business day). Due to the fact that the representation case Rules have been drafted in such a way that many, even most, provisions are interlocking, the Board has concluded that all representation case time periods should be calculated in the same manner to reduce confusion and promote uniformity and transparency. For the most part, this has simply been a matter of converting due dates previously phrased in multiples of 7 (calendar) days to the same multiple of 5 business days. This conversion leaves the actual time afforded for complying with the relevant requirement undisturbed, except in those relatively rare circumstances where a federal holiday falls within time period being calculated. Any loss of speed or efficiency will accordingly be rare and will be more than offset by the uniformity, transparency, and clarity gained through the conversion to business days.

Relatedly, given that the prior rules did not expressly define ''business day'' (despite using occasionally using the phrase), the final rule updates § 102.2(a) to explicitly state that ''business day'' does not include Saturdays, Sunday, or holidays. Further, as the prior rules used various and undefined

eligibility issues and directed election conducted on May 6, 2015; deferred issues required post-election litigation and Regional Director did not resolve them until September 30, after which she directed a rerun election—based on objectionable conduct—for December 3, in response to which union withdrew petition. We accordingly think it is preferable to place the decision to defer litigation or resolution of pre-election issues in the hands of the parties, rather than to adopt a default position of deferring issues to post-election proceedings in the hope the results of the election will render the issues moot.

[21] Although the rate at which parties enter election agreements is already high—see fn. 16, supra—we observe that there nevertheless is still room for growth in this regard. Given the Act's fundamental interest in promoting agreement between the parties, such continued growth is worth pursuing through this final rule.

[22] See fn. 16, supra.

[23] We recognize that permitting parties to defer such issues until after the election comes at the expense of the benefits of litigation and resolution outlined above, but such tradeoffs are inherent in balancing competing interests. In our view, there is no inconsistency in this approach; rather, from an institutional perspective we find the deferral of such contested issues to be generally undesirable and we would not impose deferral on the parties as an agency rule. In those situations where agreement cannot be reached, and accordingly does not factor in to the balancing of interests, we think the benefits of pre-election litigation and resolution discussed above are sufficiently weighty to take precedence over the additional time that may be involved. However, if the parties to a particular election choose on their own to defer such issues, notwithstanding the potential drawbacks of doing so, we would not prohibit them from doing so. After all, this final rule seeks to encourage and promote agreement between parties (including with respect to deferring issues to post-election proceedings).

[24] 82 FR 11748 *et seq.*

formulations when accounting for holidays in time computations,[25] the final rule updates § 102.2(a) to specify that only federal holidays should be excluded from time computations. These modifications also promote uniformity and transparency.[26]

IV. Explanation of Changes to Particular Sections

Part 102, Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

102.62 Election Agreements; Voter List; Notice of Election

In *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1239–40 (1966), the Board established a requirement that, 7 (calendar) days after approval of an election agreement or issuance of a decision and direction of election, the employer must file an election eligibility list—containing the names and home addresses of all eligible voters[27]—with the regional director, who in turn made the list available to all parties. Failure to comply with the requirement constituted grounds for setting aside the election whenever proper objections were filed. Id. at 1240.

The 2014 amendments codified the requirement that the employer furnish a voter list, but—in addition to a number of other modifications[28]—provided that, absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, the employer was required to file the voter list with the regional director, and serve it on the other parties, within 2 business days of the approval of the election agreement or direction of election. We conclude that the relevant interests will be better balanced by requiring filing and service of the list within 5 business days.

The 2014 amendments provided relatively little explanation for reducing the time for producing and serving the voter list—notwithstanding the accompanying expansion of the required information to be included on the list—aside from stating that ''advances in recordkeeping and retrieval technology as well as advances in record transmission technology . . . warrant reducing the time period'' and that faster production of the list facilitated expeditious resolution of questions of representation given that an election cannot be held before the voter list is provided. 79 FR 74353. In dismissing comments objecting to the reduction in time, the Board commented that employers now are far more likely to have access to computers, spreadsheets, and email than was the case in 1966, that prior experience indicates some employers were already capable of producing the list within 2 days, that employers are free to begin assembling the list before the election agreement is approved or the election is directed, that the median unit is relatively small, and that provision of the voter list simply entails updating the preliminary employee list that must be included with the employer's Statement of Position pursuant to § 102.63. The Board also observed that for elections conducted pursuant to an election agreement, the parties are free to agree to more time, and that for directed elections the regional director can provide more time in light of extraordinary circumstances.

We take a different view. First, as discussed below with respect to § 102.67(b), for directed elections the election will now normally not be scheduled before the 20th business day after the date of the direction of election.[29] Accordingly, the reduction in the time for producing the voter list would no longer facilitates a corresponding reduction in time for scheduling a directed election. Under the final rule, the employer will now have 5 business days from the direction of election to file and serve the voter list, consistent with Board practice prior to the 2014 amendments. Further, the parties entitled to the list will—absent waiver—have additional time to make use of the list to communicate with employees prior to the election.[30] And for election agreement situations, providing for 5 business days to produce the list harmonizes these parallel provisions and promotes uniformity.

Second, independent of the institution of the 20-business-day period in directed elections, we conclude that, as a matter of policy, it is preferable to provide more time for employers to assemble and submit the list, and that the 2014 amendments accorded too little weight to concerns that favor permitting more time. Although there certainly have been technological changes since 1966 that may permit some employers to more quickly compile and transmit the voter list, this is by no means true of all employers. Further, the mere fact that employers may have access to computers, spreadsheets, and email does not mean that the required information is always computerized or kept in one location.[31] If not, gathering the required information for disclosure could prove to be a substantial task, even if the employer has already gathered some of

[25] Thus, the time computation provisions in § 102.2(a) refer to both ''a legal holiday'' and unmodified ''holidays''; certain time computation provisions of the representation case Rules refer to ''federal holidays,'' see § 102.63(a)(1), while others refer to unmodified ''holidays,'' see §§ 102.67(i)(1), (k), 102.69(f); and the time computation provisions Freedom of Information Act Requirements mostly refer to ''legal public holidays,'' see §§ 102.117(c)(2), 102.119(a)(2), (b)(1), (d), (f)(1)(iv), but also refer to ''legal holidays,'' see § 102.117(d)(1)(viii).

[26] As the main focus of the final rule is on the representation case procedures set forth in subpart D, the Board is not taking this opportunity to update references to holidays in other Subparts, particularly as the revisions to § 102.2(a) are adequate to bring clarity and uniformity to this issue.

[27] The Board subsequently clarified the *Excelsior* list requirements to include disclosure of employees' *full* names and addresses. *North Macon Health Care Facility,* 315 NLRB 359 (1994).

[28] The 2014 amendments also modified the voter list requirement to require the employer: (1) To furnish additional information—including available personal email addresses, available home and personal cellular telephone numbers, work locations, shifts, and job classifications—for eligible voters; (2) to provide the same information for individuals permitted to vote subject to challenge (whether by party agreement or direction of the regional director); (3) to submit the list in an electronic format approved by the General Counsel (unless the employer certifies that it does not possess the capacity to produce the list in the required form); (4) to serve the list on the other parties; and (5) to file and serve the list electronically when feasible. The 2014 amendments also state that the parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters. The final rule leaves these provisions unmodified, aside from simplifying the challenged voter information requirement so that it now simply refers to voters who will be permitted to vote subject to challenge, without specifying the manner in which that arrangement may be reached. For further discussion of individuals being permitted to vote subject to challenge, see the discussion of changes to § 102.64, *infra.*

[29] In most cases, the only exception is if the parties agree to waive the 20-business-day period, which is designed to permit the Board to rule on any pre-election request for review that may be filed.

[30] See *The Ridgewood Country Club,* 357 NLRB 2247 (2012); *Mod Interiors, Inc.,* 324 NLRB 164 (1997); CHM 11302.1.

[31] For example, in *RHCG Safety Corp.,* 365 NLRB No. 88, slip op. at 5–6 & n.19–20 (2017), the employer did not maintain its employees' personal telephone numbers in a computer database, yet the Board concluded that this contact information was nevertheless ''available'' because there was evidence that when the employer's supervisors and foremen needed to contact employees about work, they frequently contacted them on the employees' personal cell phones. Id., slip op. at 5–6 & 5 n.19. The Board indicated that under such circumstances, the employer was obligated to ask the supervisors and foremen for the contact information stored on the supervisors' or foremen's phones. Id., slip op. at 6 n.20. As this case illustrates, technological advances and their availability to a given employer do not necessarily mean that the required voter list information is readily at hand, even if it is ''available.''

the required information for the employee list submitted in conjunction with its Statement of Position.[32] Moreover, whatever their technological capabilities, assembling the voter list may prove challenging for large or decentralized employers,[33] and may, as some comments from the 2011 and 2014 rulemakings pointed out, pose special problems for particular types of cases, such as those involving the construction industry [34] or joint or multi-employer arrangements.[35] In addition, the fact that some employers were able to submit the *Excelsior* list within 2 days prior to the 2014 amendments is of questionable relevance, given that *Excelsior* required far less information to be disclosed than did the 2014 amendments, and in any event it simply does not follow that because some employers were able to submit a list of names and addresses within 2 days, all employers should be required to submit a significantly expanded list within that timeframe. Finally, expecting that employers will start assembling the list prior to the approval of an election agreement or the direction of election may well be reasonable in some cases, but citing this as a reason for reducing the time to produce the list in all cases does not promote orderly litigation. The voter list requirement is triggered by the approval of the election agreement or the direction of election; until the regional director takes one of these actions, the requirement has not been activated. Effectively requiring employers to begin complying with requirements that have not yet been triggered—and in some cases may never be triggered—at the very least raises questions of fairness and transparency. It is anything but transparent to state that a procedural requirement attaches at a certain point yet defend a truncated timeline for meeting that requirement by opining that employers have ample time to comply with the requirement before it has even attached to begin with. At any rate, in cases in which the scope of the unit is in dispute, advance preparation will be difficult given that the precise contours of the unit will not be known until a direction of election issues,[36] and even in situations where the parties reach an election agreement, the contours of the unit may not be finalized until shortly before the agreement is signed and approved.

This is not to suggest that it is impossible or unreasonable for employers to produce the voter list within 2 business days; many employers have clearly been able to do so under the 2014 amendments. Unlike the 2014 amendments, however, we are unwilling to convert some employers' admirable speed into a requirement that must be applied to all employers absent ''extraordinary circumstances'' (for directed elections) or party agreement to the contrary. We think that the better practice is to set forth a timeline that is unlikely to present difficulties in the first instance and leave it to the parties to agree upon shorter timeframes, as they may deem appropriate.[37] In this regard, the final rule promotes efficiency by promoting voluntary agreement between the parties in this area.

Finally, providing more time to produce the voter list will reduce the potential for inaccurate lists, as well as the litigation and additional party and Agency expenditures that may result therefrom. Most importantly, if providing the employer with 3 more business days to compile the list can avoid having just a few elections set aside based on noncompliant voter lists, this is a trade we are more than willing to make, given that rerun elections greatly delay the final resolution of a question of representation. The voter list, like its *Excelsior* forerunner, serves an important and crucial dual purpose, and the Board's practice of setting aside elections where the list is not provided or is unacceptably incomplete is designed to vindicate those purposes. But at the same time, this can result in the setting aside of elections where the parties entitled to the list did not suffer any prejudice,[38] or where the omissions warranting setting aside the election were not due to any bad faith on the part of the employer.[39] We are therefore of the view that the Board should, within reason, promulgate procedures that will reduce the possibility of inaccurate voter lists and thus avoid the litigation and rerun elections that may follow. This in turn will promote more expeditious resolution of questions of representation, at least in some cases. Providing the employer with 3 more business days is an easy way to minimize the possibility of inaccurate lists and is generally consistent with the prior 7-calendar-day requirement which—it must be said—the 2014 amendments did not demonstrate was itself causing undue delay in the scheduling or conduct of elections.

In sum, modifying the voter list requirement to provide that the list must be filed and served within 5 business days of the approval of an election agreement or the direction of election will promote efficiency, accuracy, transparency and uniformity, without any significant reduction in the timely resolution of questions of representation under the amendments set forth in this final rule. The parties will also remain free to agree to a shorter time for provision of the list.

[32] This requirement is located at § 102.63(b)(1)(i)(C), (b)(2)(iii), and (b)(3)(i)(D) as amended by this final rule.

[33] See, *e.g., President and Fellows of Harvard College,* Case No. 01–RC–186442, in which the employer had to coordinate between 14 separate constituent schools in order to assemble voter list information for a unit that included over 3,500 eligible voters for the first election and over 5,000 eligible voters for the second election.

[34] The *Daniel/Steiny* formula provides that, in addition to those eligible to vote in Board-conducted elections under the standard criteria (*i.e.,* the bargaining unit employees currently employed), unit employees in the construction industry are eligible to vote if they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election and have not voluntarily quit or been discharged, or have had some employment in those 12 months, have not quit or been discharged, and have been employed for at least 45 days within the 24-month period immediately preceding the eligibility date. See *Steiny & Co. Inc.,* 308 NLRB 1323, 1326–27 (1992), and *Daniel Construction Co., Inc.,* 133 NLRB 264, 267 (1961), *modified,* 167 NLRB 1078, 1081 (1967). Even for small employers, applying the formula to identify eligible voters may itself prove time-consuming, irrespective of any additional time needed to gather the required voter list information.

[35] Such arrangements may involve gathering information from more than one employer. Particularly for elections involving multiemployer associations, this may require coordination among dozens of employers.

[36] We acknowledge that under the Statement of Position requirement (discussed below), a nonpetitioning party who contests the propriety of the petitioned-for unit is required to state the ''classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit,''; an employer is also required to provide information on such employees it contends should be included or excluded. § 102.63(b)(1)(i) and (iii); (b)(2)(i) and (iii); (b)(3)(i) and (iii). Thus, after all initial Statements of Position have been filed, an employer will be on notice of the possible unit configurations proposed by the parties. Even so, when a petitioned-for unit is not appropriate, the Board has the discretion to select an appropriate unit that is different from the alternative units proposed by the parties. See *Bartlett Collins Co.,* 334 NLRB 484, 484 (2001). Accordingly, even though the parties may be aware of each other's positions and alternative proposals, the Board remains free to direct an election in some other unit.

[37] We fully agree with the 2014 amendments that the general rule should not be subject to categorical exemptions for particular industries. 79 FR 74354–74355. But unlike the 2014 amendments, our view is that the potential for greater compliance difficulties in certain types of cases counsels in favor of relaxing the general requirement, rather than placing the burden on a given employer to demonstrate that extraordinary circumstances warrant departing from the general requirement.

[38] See, *e.g., Sonfarrel, Inc.,* 188 NLRB 969, 970 (1971).

[39] *Woodman's Food Markets, Inc.,* 332 NLRB 503, 504 n.9 (2000) (''a finding of bad faith is not a precondition for a finding that an employer has failed to comply substantially with the *Excelsior* rule'').

102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Notice of Petition for Election; Statement of Position; Withdrawal of Notice of Hearing

The final rule makes changes to 3 aspects of § 102.63: (1) For the scheduling of pre-election hearings, the regional director now will set the hearing date 14 business days from the date of service of the notice, and all requests for postponements may be granted upon a showing of good cause; (2) for Statements of Position, the non-petitioning party or parties' Statement(s) of Position will now be due 8 business days following the issuance and service of the notice of hearing, requests for postponement may now be granted upon a showing of good cause, and the petitioner will now be required to file a responsive Statement of Position no later than noon 3 business days before the hearing; and (3) for the required posting of the Notice of Petition for Election, the employer now has 5 business days to comply.[40]

A. Scheduling of Pre-Election Hearing

The 2014 amendments revised § 102.63(a) to provide that, except in cases presenting ''unusually complex'' issues, regional directors ''shall set the hearing for a date 8 days from the date of service of the notice.'' This period excludes federal holidays, and if the 8th day falls on a weekend or federal holiday, the hearing is set for the following business day. The amendments authorized regional directors to postpone the opening of the hearing for 2 business days upon request of a party showing ''special circumstances'' and to postpone it for more than 2 business days upon request of a party showing ''extraordinary circumstances.''

The final rule revises this timeline by providing that the pre-election hearing will now be set to commence 14 business days from the date of service of the notice of hearing.[41] This timeline is essentially dictated by the changes the final rule makes to the Statement of Position requirement, which are discussed in detail in the next section. In addition, for the reasons explained earlier, relaxing the time from the notice of hearing to the hearing itself promotes transparency and fairness by affording the parties more time to deal with necessary preliminary arrangements (such as retaining counsel,[42] identifying and preparing witnesses, gathering information, and providing for any hearing-related travel) and to balance such preparation against their other procedural obligations (including preparation of the Statement of Position).[43] Further, the additional time before the hearing will give the parties more and better opportunity to reach election agreements, and at the very least will result in more efficient hearings. The relaxed pre-hearing timeline accordingly continues to promote efficiency. The 14-business-day timeline may even promote greater administrative efficiency by easing the logistical burdens the expedited 8-day timeline currently imposes on regional personnel[44] and by avoiding hearing-related costs when the parties are able to reach election agreements. And finally, the 14-business-day requirement brings the pre-election hearing schedule into closer alignment with the post-election hearing schedule, which provides for such hearings to open 15 business days from the preparation of the tally of ballots.[45] In sum, the expanded timeline for pre-election hearings promotes multiple interests. Although it represents a departure from the accelerated schedule provided by the 2014 amendments, we think this departure is fully justified by the advantages the expanded timeline will secure.[46]

The final rule also revises the standard for postponing the pre-election hearing: Instead of requiring parties to show ''special'' or ''extraordinary'' circumstances, limiting postponements based on ''special'' circumstances to 2 business days, and providing that postponements based on ''extraordinary'' circumstances may be ''more than 2 business days,'' the final rule now simply permits postponement upon a showing of ''good cause'' and leaves the length of the postponement to the discretion of the regional director. The 2014 amendments offered little explanation for opting to require a showing of ''special'' and ''extraordinary'' circumstances to warrant postponement of the hearing, as opposed to some other standard. As for the 2-day limitation on postponements for ''special circumstances,'' the 2014 amendments state only that this limitation of the regional directors' discretion was designed to ensure that ''the exception will not swallow the rule.'' 79 FR 74371.

Prior to the 2014 amendments, the Board's Rules and Regulations did not articulate any standard for granting postponements. We readily agree that by

[40] The time for scheduling the pre-election hearing and submitting the initial and responsive Statements of Position are all interconnected and therefore are not severable from each other. In addition, we would not adopt the relaxed timeline for posting the Notice of Petition absent the relaxed timelines for the pre-election hearing and the submission of the Statements of Position, but we would adopt the changes to the timeline for the hearing and the Statements of Position absent the change to the timeline for posting the Notice of Petition. Finally, the requirement that the petitioning party file a responsive Statement of Position prior to the hearing is severable, and we would adopt it in the absence of any or all of the timeline changes made to this Section.

[41] The final rule retains the provision that the regional director may set a different hearing date ''in cases presenting unusually complex issues.''

[42] We observe that the 2014 amendments responded to concerns about necessity of retaining counsel by pointing out that labor consultants and other ''advisers'' frequently contact employers to offer their services shortly after a petition has been filed. This may be so, but our experience reflects that, in the vast majority of contested cases that involve appeals to the Board, employers have elected to retain licensed legal counsel who specialize in labor and employment law.

[43] The 14-business-day timeline should also alleviate concerns—expressed in the 2011 and 2014 rulemaking proceedings and in response to the 2017 Request for Information—that the 8-day timeline poses particular difficulty for smaller employers who are less experienced with the Act, larger employers who have other time-sensitive obligations, and those employers who may have been previously unaware of a petitioner's organizing campaign. 79 FR 74367.

[44] In this regard, we take administrative note that, at various times since the 2014 amendments took effect, regional personnel have voiced concerns over the 8-day timeline. For example, the submission of the NLRB Regional Director Committee in response to the 2017 Request for Information commented that some regional directors do not agree with setting of hearings for 8 days from the date of the petition.

[45] See § 102.69(c)(1)(ii). The prior rules provided for post-election hearings to open 21 calendar days from the preparation of the tally of ballots; for the reasons discussed earlier, the final rule has converted this period to 15 business days (which will, absent intervening federal holidays, translate to the historical 21 calendar days). Contrary to our dissenting colleague's assertion, we are not suggesting that the Board could have scheduled post-election hearings to open 8 calendar days following the issuance of a tally of ballots; we are well aware that this would not have been possible given that parties have 5 business days (7 calendar days) to file objections following the issuance of the tally of ballots. We are merely observing that by virtue of this final rule, the time between a petition and pre-election hearing now closely corresponds to the time between the tally of ballots and the post-election hearing, as a result of which there is greater uniformity within the Board's representation case procedures.

[46] The timing of the hearing provided by the final rule is accordingly ''an appropriate accommodation of the interests involved.'' *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975). We recognize that the expanded timeline represents a significant departure from the 2014 amendments, as well as *Croft Metals, Inc.,* 337 NLRB 688, 688 (2002), in which the Board held that 5 business days' notice of a pre-election hearing was sufficient. As already discussed, this departure is ''rational and consistent with the Act'' and therefore justified given other interests served by a longer period, particularly including the need to comply with newly-imposed pre-hearing procedural requirements that were not a concern under the *Croft Metals* timeline. See *NLRB* v. *Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 787 (1990) (''a Board rule is entitled to deference even if it represents a departure from the Board's prior policy'' if it is ''rational and consistent with the Act'').

articulating *some* standard for postponements, the 2014 amendments promoted transparency and uniformity. At the same time, we fail to understand why the 2014 amendments opted for the two-tier ''special'' and ''extraordinary'' standard, rather than incorporating preexisting guidelines that regional directors were to grant a postponement ''only when good cause is shown.'' See Casehandling Manual (Part Two) Representation Proceedings section 11143 (Sep. 2014). As the 2014 amendments acknowledged, several commenters urged retention of the Casehandling Manual's guidance, and yet the 2014 amendments offered no explanation for opting for ''special'' and ''extraordinary circumstances'' standard over the existing ''good cause'' standard. 79 FR 74371–74372. It appears that the Board believed that a more restrictive standard would better serve the purpose of expeditious resolution of questions of representation, but we fail to see how this is self-evident. The 2014 Casehandling Manual specified that under the ''good cause'' standard, postponement requests were ''not routinely granted,'' see section 11143, and the 2014 amendments did not point to any evidence indicating that regional directors had been too liberal in granting postponements under this standard, or that it was otherwise causing unnecessary delay. Moreover, the 2014 amendments offered no guidance on what would constitute ''special'' or ''extraordinary'' circumstances.

Aside from the ill-explained rejection of the ''good cause'' standard for pre-election hearing postponements, the rationale for the 2014 amendments' limitation of postponements to 2 days based on ''special circumstances'' is also elusive. Here too, the 2014 amendments did not reference any evidence, or even really suggest, that regional directors were granting unreasonably long postponements, or that parties were allowed to abuse the ''good cause'' postponement guideline. In any event, this restriction on regional directors' pre-hearing discretion contrasts with the 2014 amendments' expressed emphasis on encouraging regional directors' post-hearing exercise of discretion,[47] as well as with the general axiom that regional directors, who are closer to the facts and realities on the ground, are in better position to judge what is or is not warranted based on the particulars presented. And on a final note, this strict limitation is somewhat puzzling in light of the regional directors' initial discretion to decide, based on the petition alone, that a case presents ''unusually complex issues'' that warrant setting the initial hearing date more than 8 days after the filing of the petition. If regional directors are free to schedule a hearing at whatever remote date they deem necessary in ''unusually complex'' cases, why should they be limited to granting only a 2-day postponement if ''special circumstances'' are established?

For these reasons, we have decided to reinstate and codify the previous ''good cause'' standard for granting postponements and to leave the length of each postponement within the sound discretion of the Regional Director. Once more, we are aware of no evidence suggesting that the ''good cause'' standard or the length of the postponements granted under it were in any way responsible for needless delay prior to the 2014 amendments. Although we acknowledge that limiting the length of postponements may have promoted some degree of national uniformity in terms of regional practices, we think that restoring to regional directors greater discretion to consider the particulars of the cases before them is the preferable course here and will ultimately better serve transparency and fairness. Further, eliminating the ill-defined two-tiered standard in favor of a single, unitary standard for granting postponements will promote a more desirable kind of uniformity. Finally, to the extent that ''good cause'' is a lower threshold than ''special'' or ''extraordinary'' circumstances, we do not think that this standard will prompt regional directors to grant postponements at the drop of a hat, thereby detracting from the expeditious resolution of questions of representation; rather, just as the 2014 Casehandling Manual provided, even under the ''good cause'' standard postponements will not be routinely granted. We accordingly do not believe there is any risk that the exception will swallow the rule.[48]

B. Statements of Position

The 2014 amendments introduced the requirement that the employer (in all types of election cases), the other named parties (in RM cases), and the incumbent union (in RD cases) file a Statement of Position. Although controversial, the Board has decided to retain the Statement of Position requirement in its entirety,[49] with two important modifications. First, in order to give parties more time to comply with the Statement of Position requirements, the non-petitioning party (or parties) will be required to file and serve the Statement of Position at noon 8 business days following service of the notice of hearing, as opposed to the current requirement that the Statement of Position be filed and served at noon the business day before the hearing is scheduled to commence. As with the aforementioned amendment relating to scheduling of a hearing, the regional director will also be permitted to postpone the due date for good cause and will have discretion to determine the length of any postponement. Second, in all election cases, the petitioner will now be required to file and serve a responsive Statement of Position by noon 3 business days before the hearing is scheduled to open; as with the initial Statement of Position, the regional director will also be permitted to postpone the due date for good cause.

As indicated above, these two modifications account for the 14-business-day timeline between the notice of hearing and the start of the pre-election hearing. Thus, the initial Statement of Position is due within 8 business days of the notice of hearing; the responsive Statement of Position is due 3 business days before the start of hearing; and by providing that the hearing will start 14 business days after the notice of hearing, the timeline will always provide 3 business days for the petitioner to prepare the responsive Statement of Position.

Although these modifications will result in a longer period of time between the filing of a petition and the start of the pre-election hearing than was the case under the 2014 amendments, the Board believes that these changes will enable parties to reach election agreements in even more cases than they currently do,[50] thus serving the purposes of efficiency and the voluntary resolution of disputes. Further, even in

[47] Cf. 79 FR 74388 n.372 (''Keeping discretion in the hands of the regional directors is sensible in that it is the directors who are responsible for issuing decisions and directions of election following pre-election hearings'').

[48] Beyond the fact that postponements will not be routinely granted under the ''good cause'' standard, we observe that the expanded pre-hearing timeline will likely reduce requests for postponement to begin with and may mean that fewer parties requesting postponement are able to establish good cause in the first instance. In any event, should our predictions prove wrong and subsequent experience demonstrate that the ''good cause'' standard results in unacceptable delay, we will be willing to revisit it.

[49] The required contents of the Statement of Position can be found in § 102.63(b).

[50] See fn. 16, supra, for statistics regarding the rate of election agreements before and after the 2014 amendments.

those cases where parties are unable to enter into election agreements, the introduction of the responsive Statement of Position will result in more efficient pre-election hearings. And the recasting of the timeframe for filing and serving these documents will promote transparency and uniformity with respect to the pre-hearing timeline.

1. Time for Filing and Service the Initial Statement of Position

The 2014 amendments provided that the initial Statement of Position was due at noon the business day before the opening of the hearing, which meant that in most cases the Statement of Position had to be filed and received within 7 calendar days of the notice of hearing.[51] As with the scheduling of the pre-election hearing, the 2014 amendments provided that regional directors could, upon a showing of ''special circumstances,'' postpone the date for filing and service for up to 2 business days, and could postpone the date for more than 2 business days upon a showing of ''extraordinary circumstances.'' With limited exceptions, a party was precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position. § 102.66(d).

The Board has determined that the Statement of Position requirement has been a highly effective tool in promoting orderly litigation and efficiency. It has been particularly useful in narrowing the issues to be litigated at the pre-election hearing, and we believe that it has facilitated entry into election agreements in some cases. At the same time, the Statement of Position is also a complicated, multi-part requirement that must be completed at the same time the non-petitioning parties—especially employers—are concerned with retaining counsel and engaging in other hearing-related preparation. Further, the preclusive consequences of failing to file a Statement of Position, or of failing to raise an issue therein, are heavy. We have accordingly concluded that parties should be given slightly more time to file and serve the Statement of Position, and under the final rule it will now be due at noon 8 business days following service of the notice of hearing.

This timeline continues to serve the purposes of transparency and uniformity, and perhaps even improves upon the 2014 amendments in this regard, as the due date is now set forth in terms of a set number of business days following the notice of hearing, rather than being linked to the scheduled opening of the hearing. The due date for the Statement of Position will accordingly always be predictable and readily ascertainable.

Further, the additional time will promote efficiency in several ways. Again, the Statement of Position must be prepared against the backdrop of other pre-election hearing preparations, which may involve a number of other time-consuming tasks, including retaining counsel, researching the facts and relevant law, identifying and preparing potential witnesses, making travel arrangements, coordinating with regional personnel, and exploring the possibility of an election agreement. Providing non-petitioning parties with slightly more time to prepare the Statement of Position will allow them to better balance these obligations.[52] Moreover, it is foreseeable that providing the non-petitioning parties with more time will improve the quality of their Statements of Position. For example, allowing more time to complete the Statement of Position should encourage parties to better focus their arguments, thereby avoiding the so-called ''shotgun'' approach some parties have taken to the Statement of Position (*i.e.,* raising every conceivable issue to avoid waiving any arguments). More focused Statements of Position should in turn lead to more focused and efficient hearings, which will result in more focused regional decisions (which, if any appeals are filed, will in turn promote more efficient Board review). And the additional time and potential for more focused Statements of Position—in conjunction with the introduction of the responsive Statement of Position discussed below—will promote entry into election agreements, promoting efficiency within that specific proceeding and conserving the Agency's resources by obviating the need for a hearing.

Weighed against the foreseeable benefits of providing additional time for filing and serving the Statement of Position, the costs of doing so are modest. Generally speaking, extending the typical Statement of Position timeline from 7 calendar to 8 business days will typically result in initial Statements of Position being due 3–4 days later than under the 2014 amendments. This is still within the outer limits of the timeline contemplated by the 2014 amendments, which permitted regional directors to postpone the time for filing the Statement of Position for 2 or more business days upon a proper showing. This is also still a significantly shorter timeline than those proposed by commenters in the past.[53]

In addition to extending the time for filing and serving the initial Statement of Position, the final rule modifies the standard for granting postponements. Rather than requiring a showing of ''special'' and/or ''extraordinary'' circumstances and limiting postponements based on ''special'' circumstances to 2 business days, postponements will now be subject to a showing of good cause, and the length of any postponement will be left to the sound discretion of the regional director. These changes are warranted for many of the same reasons discussed above with respect to postponements to the opening of the pre-election hearing. There is no reason to believe that regional directors have been too generous in finding good cause in other contexts, nor is there any reason to suspect that without limiting their discretion they will begin granting unreasonably lengthy postponements. The better course is, we think, to give regional directors wider discretion to consider the particular circumstances before them when evaluating requests for postponements, and we are also of the view that this approach better serves transparency and efficiency. Further, a uniform ''good cause'' standard is more understandable and desirable than the ill-defined two-tiered ''special'' and ''extraordinary'' circumstances standard, and in this particular context it aligns the standard for postponing the Statement of Position due date with the standard for permitting parties to amend the Statement of Position. See, *e.g.,* § 102.63(b)(1), (2), (b)(3)(i)(A). Finally, as is the case with requests to postpone the opening of the hearing, postponements will not be routinely granted under a good cause standard.

[51] The 2014 amendments also provided that ''in the event the hearing is set to open more than 8 days from service of the'' Notice of Hearing, the regional director could set the due date for the Statement of Position earlier than noon on the business day before the hearing, but guaranteed that in all cases, parties would have 7 (calendar) days' notice of the due date for completion of the Statement of Position. 79 FR 74361.

[52] The additional time should also help alleviate the frequent complaints—stretching back to the comments to the 2011 NPRM and continuing through the responses to the 2017 Request for Information—that the Statement of Position requirements, by themselves or in combination with other obligations, are particularly onerous for certain types of employers or in certain types of cases.

[53] For example, the 2014 amendments noted comments proposing periods ranging from 14 to 30 days. 79 FR 74375.

2. Responsive Statement of Position

The Board has also determined that efficiency, transparency, and uniformity will be served by requiring the petitioner to file a responsive Statement of Position, which will be due at noon no later than 3 business days before the hearing. As indicated earlier, the 14-business-day timeline from the notice of hearing to the opening of the pre-election hearing guarantees that the petitioner will have 3 business days to prepare and file the responsive Statement of Position after receiving the initial Statement(s) of Position. As with the initial Statement of Position, the regional director may permit the responsive Statement of Position to be amended for good cause. And consistent with existing practice, the petitioner will, with limited exceptions, be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the responsive Statement of Position failed to place in dispute in response to another party's Statement of Position.

Under the prior rules, after the opening of the hearing ''all other parties''—including the petitioner—were required to ''respond on the record to each issue raised'' in the Statement of Position. § 102.66(b). The regional director could permit such responses to be amended in a timely manner for good cause. § 102.66(b). And a party was precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the responsive Statement of Position failed to place in dispute in response to another party's Statement of Position. § 102.66(d). Accordingly, the responsive Statement of Position is not a new requirement, nor does the penalty of preclusion go beyond existing practice. Rather, the responsive Statement of Position simply takes an existing requirement and modifies it only to the extent that the response is now due, in writing, 3 business days before the opening of the hearing.[54]

The responsive Statement of Position is not designed to be an onerous requirement. The primary purpose of the responsive Statement is simply to get the petitioner's response to the initial Statement(s) of Position in writing prior to the hearing, thereby putting the parties and the regional director on notice that an issue remains in dispute in advance of the hearing. In addition, it will be an opportunity for the petitioner to clarify any positions taken that may not have been evident from the petition itself. We recognize that there may be times when a petitioner is unable to provide a detailed or meaningful response to issues raised by the initial Statement of Position due to a lack of evidence or knowledge, but in such circumstances it will be sufficient for the responsive Statement of Position to state as much, thus identifying the issue as still potentially in dispute. As is already the case with the initial Statement of Position, the responsive Statement need not be exactingly detailed to avoid preclusion.[55] And again, as is already the case with oral responses at the hearing, regional directors have the discretion to permit the responsive Statement of Position to be amended upon a showing of good cause.

The responsive Statement of Position requirement serves the purpose of uniformity by requiring a written Statement of Position from all parties in advance of the hearing. As noted, RM petitioners are already required to file a responsive Statement of Position; this will now be required of petitioners in all election cases. Although it is true that petitioners were previously required to state positions on certain issues in the petition itself, if the initial Statement(s) of Position placed other issues in dispute, the petitioner was not obligated to state its position on those issues until after the hearing had opened. Given that issues beyond those contemplated in the petition can and will often be raised in the initial Statement of Position, we think that it is a matter of common sense to require the petitioner to state its position on newly-raised issues prior to the hearing.[56]

On a related note, the responsive Statement of Position also serves the purpose of transparency by removing any impression that the Board is imposing an onerous pleading requirement on the non-petitioning parties without extending a similar requirement to the petitioner. To be clear, we are not suggesting that the 2014 amendments engaged in any prejudicial disparate treatment of the parties vis-à-vis the Statement of Position requirement; as already stated, the requirement that the petitioner respond to the Statement(s) of Position already existed, albeit in oral form after the hearing had opened. Nor, as the dissent suggests, are we altering our procedures to mollify prior criticism that the initial Statement of Position requirement is an unfair or arbitrarily one-sided requirement. The revision we make would seem incidentally to address that criticism, but that is not at all the point of requiring a written responsive Statement of Position in advance of the hearing.[57]

[54] Further, the prior rules already required petitioners to file pre-hearing Statements of Position in RM cases, although the prior rules did not require the petitioner-employer's Statement of Position to respond to the issues raised by the Statement(s) of Position filed by the individual(s) or labor organization(s) named in the petition. See § 102.63(b)(2)(iii).

[55] Cf. 79 FR 74369 n.298 (declining request to require employer raising supervisory status to identify in Statement of Position particular indicia of supervisory status on which argument is based).

[56] We do not agree with the dissent's characterization of the petition as equivalent to the Statement of Position, such that the responsive Statement of Position will amount to second written statement of position for petitioners. Aside from contact information for the petitioner, the employer, and the incumbent union (if any), the RC and RD petition forms merely prompt the petitioner to describe the unit involved (and to state whether a substantial number of employees in the unit wish/no longer wish to be represented by the petitioner), to indicate whether a strike is currently in progress, to indicate whether there are other organizations or individuals claiming recognition or an interest in the unit, and to state the petitioner's position on election details (time, place, and type). The RC petition form additionally asks whether the petitioner has made a request for recognition or is currently recognized as the representative but now desires certification, and the RD petition asks for the date the incumbent was certified and for the expiration date of the current or most recent contract (if any). See Form NLRB–502 (RC) and Form NLRB–502 (RD). By contrast, the Statement of Position, in addition to soliciting the nonpetitioning party's position on election details, also requires the party to state its position on the Board's jurisdiction, the propriety of the petitioned-for unit (and the basis for any contention it is not appropriate), whether there is a bar to conducting an election, and what eligibility period (as well as special eligibility formula, if any) should apply; the party is also obligated to list the names of individuals whose eligibility the nonpetitioning party intends to contest at the hearing (and the basis for contesting their eligibility), to describe any other issues the nonpetitioning party intends to raise at the pre-election hearing, and to prepare the initial employee list. See Form NLRB–505. The Statement of Position accordingly requires a great deal more information and detail from the nonpetitioning party than does the petition. It is true that the nonpetitioning party (typically the employer) generally possesses the facts needed to litigate any issue at the hearing, and that it accordingly makes sense for the Statement of Position form to seek more information than the petition form, but this does not detract from the fact that the Statement of Position form expressly prompts the nonpetitioning party to address issues beyond those addressed in the petition, and further assumes that the nonpetitioning party will often raise additional issues even beyond those the Statement of Position form affirmatively prompts that party to address. Thus, at the time it files the petition, the petitioner likely does not and often cannot know the full range of issues the nonpetitioning party intends to raise, let alone the positions that party intends to take on them. In short, requiring a responsive Statement of Position prior to the hearing is not redundant, but instead solicits the petitioner's response—in advance of the hearing—to issues and positions it has had no previous opportunity to address.

[57] We note here that that requiring a responsive Statement of Position is likely to be more productive than requiring that petitioners file a

Most importantly, the responsive Statement of Position will promote greater efficiency. Virtually every reason that the 2014 amendments articulated for the original Statement of Position requirement could be reiterated here, but two considerations are, we think, sufficient to illustrate the advantages of requiring a responsive Statement. First, like the initial Statement, the responsive Statement will make hearings more efficient. As the 2014 amendments observed, ''[i]t clearly . . . helps narrow the scope of the hearing if *all parties* state what they believe the open issues . . . are and what they seek to litigate *in the event of a hearing.*'' 79 FR 74369 (emphasis added). By requiring the petitioner to respond to the issues the employer (and other non-petitioning parties) have placed in dispute before the hearing, all parties and the Board itself will have earlier notice of what issues will require litigation at the hearing, should one prove necessary. The earlier notice of the issues remaining in dispute will in turn facilitate better preparation for the hearing. For example, the responsive Statement will put parties on notice of the possible need for subpoenas, offer further guidance on what witnesses to call and what exhibits to prepare, and may suggest avenues for additional legal research. In addition, the responsive Statement will, in at least some instances, indicate that a non-petitioning party should prepare rebuttal witnesses, which may avoid the need for continuances that otherwise would have been necessary had the petitioner's response come after the opening of the hearing. For that matter, the responsive statement may also enable non-petitioning parties to narrow the scope of their witnesses' testimony and may eliminate the need for certain witnesses altogether. Thus, aside from permitting better preparation for hearings, the responsive statement could help parties save time and money. And at the very least, the responsive Statement will help non-petitioning parties evaluate the merits of the petitioner's positions and better formulate their responses in advance of the pre-election hearing. These are, of course, some of the very reasons the 2014 amendments introduced the initial Statement of Position requirement. See 79 FR 74362–74364.

In addition, the responsive Statement of Position will also help Agency personnel make hearings more efficient. Just like the initial Statement of Position, the responsive Statement saves government resources ''by reducing unnecessary litigation and making litigation that does occur more efficient.'' *Brunswick Bowling Products, LLC,* 364 NLRB No. 86, slip op. at 2 (2016). The Board has long sought ''to narrow the issues and limit its investigation to areas in dispute.'' *Bennett Industries,* 313 NLRB 1363, 1363 (1994). Historically, the Board has regarded the pre-election hearing as ''part of the investigation in which the primary interest of the Board's agent is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case.'' *Solar International Shipping Agency, Inc.,* 327 NLRB 369, 370 n.2 (1998) (internal quotations omitted). The responsive Statement will permit the Board to narrow the issues and its investigation prior to the hearing, rather than at the start of the hearing. Even where the responsive statement may not narrow the number of issues, it will in most cases enable Board personnel to better understand the parties' respective positions prior to the hearing, which will enable the hearing officer to better prepare for the hearing by, for example, reviewing relevant case law in advance and developing potential lines of questioning for the parties' witnesses. In short, the responsive Statement of Position promises to assist hearing officers in anticipating what types of evidence and testimony will be necessary to ensure a more complete, useful record. And this, in turn, will assist the Regional Director in preparing a decision after the hearing.

Second, even more than promoting narrower, more orderly hearings, we are confident that the responsive Statement of Position will provide additional opportunity and incentive for parties to reach election agreements. Here too, the reasoning the 2014 amendments articulated for adopting the initial Statement of Position requirement applies directly to the new responsive Statement. As with narrowing the scope of the hearing, ''[i]t clearly facilitates entry into election agreements . . . if *all parties* state what they believe the open issues (including eligibility issues) are and what they seek to litigate *in the event of a hearing.*'' 79 FR 74369 (emphasis added). Likewise, if ''[i]t plainly serves the goal of making it easier for parties to promptly enter into election agreements if the petitioner is advised of the nonpetitioner's position on those matters prior to the hearing,'' 79 FR 74370, the same can readily be said of advising the nonpetitioner of the petitioner's response prior to the hearing.[58]

Election agreements are the most obvious and efficient means of expediting the resolution of questions concerning resolution because they avoid altogether the time that would be spent in litigation of pre-election issues. It is this interest in facilitating election agreements that has led us to adopt the requirement that the responsive Statement of Position be filed and received no later than noon 3 business days before the hearing. As with the initial Statement, if the responsive Statement ''is to fulfill its intended purposes, then parties should be required to complete and serve it before the hearing.'' 79 FR 74362. As the 2014 amendments observed:

> one of the impediments to reaching an election agreement is that the parties sometimes talk past each other regarding the appropriate unit in which to conduct the election because, unbeknownst to them, they are using different terminology to describe the very same employees. In our experience, parties also sometimes use different terms to describe work locations and shifts.

79 FR 74366. Requiring that the responsive Statement of Position be filed and served 3 business days before the hearing will enable parties to identify circumstances where they are ''talking past each other,'' clarify the terminology at issue, and identify or even eliminate any related disputes. Providing more time between the due date for the responsive Statement of Position and the opening of the hearing will also give the parties more time to conclude an election agreement. In the days just before the hearing, however, negotiations for an agreement must be balanced with the parties' other preparations in the event an agreement cannot be reached. These often include

Statement of Position along with the petition, as some responses to the 2017 Request for Information proposed. Although in some instances a petitioner may be able to anticipate the issues nonpetitioning parties will raise in response to the petition, this will not always, or even often, be the case.

[58] The dissent suggests that our prediction that the responsive Statement of Position will facilitate election agreements lacks supporting evidence. It comments that there is no showing that a significant number of election agreements are reached following the petitioner's oral response to the initial Statement of Position at the hearing. Both criticisms miss the mark. Of course there is no empirical evidence that requiring the responsive Statement of Position before the hearing starts will facilitate election agreements, because to date no such response has been required prior to the start of the hearing. And although there may be no evidence that a significant number of election agreements are reached following the petitioner's oral response *at the hearing,* this is beside the point. Our view is that by requiring a response *before the hearing,* parties will be afforded a greater and better opportunity to reach election agreements. Once a pre-election hearing has already commenced, parties have already lost one of the primary advantages of an election agreement, viz., avoiding the need to prepare for and appear at a hearing in the first place.

preparations for travel to the hearing location by the parties and their representatives and, in some cases, by regional personnel as well.

Under the prior rules, the employer's Statement of Position was due by noon the business day before the opening of the hearing. In many instances, this gave the parties less than one full day before the hearing to try to finalize an agreement; it hardly need be said that a half-day is not much time to receive and process the Statement of Position (which may itself complicate negotiations for an election agreement) and meaningfully negotiate for an election agreement while concurrently preparing for the hearing should no agreement be concluded. The Board is accordingly of the view that more time should be provided between the filing and service of the responsive statement and the hearing so that parties have more time to balance these tasks. We believe that requiring submission of the responsive statement by noon 3 business days in advance of the hearing date serves this purpose, as it ensures parties and Agency personnel will have at least two full business days (the two days after the responsive statement is received) to manage and adjust their hearing-related tasks in light of the responsive statement while still having time to explore the possibility of an election agreement. It also affords regional personnel and the hearing officer more time and opportunity to facilitate the execution of an election agreement while still preparing for the contingency of a hearing.

In conclusion, the responsive Statement of Position amendment here merely modifies the existing requirement that the petitioner respond to the initial Statement to require that response in writing prior to the hearing. This modification promotes uniformity and transparency, will facilitate more efficient hearings, and in many instances will enable parties to reach election agreements, avoiding the need for a hearing altogether.

C. Posting of Notice of Petition for Election

The 2014 amendments introduced the requirement that, within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places and must distribute it electronically if the employer customarily communicates with its employees electronically.

This requirement serves the laudatory purpose of giving employees prompt notice that a petition for election has been filed, and the information contained on the Notice of Petition for Election provides useful information and guidance to employees and the parties. The Board has, however, determined that two refinements to this provision are warranted.

First, the final rule provides the employer with slightly more time to post the Notice of Petition for Election, requiring that it be posted within 5, rather than 2, business days after the service of the notice of hearing.

The Board believes that this change is warranted in view of the logistical difficulties many employers may face upon receipt of the notice of hearing. For some larger employers, especially large multi-location employers, it may take a significant amount of time to post the Notice of Petition for Election in ''all places where notices to employees are customarily posted,'' and it may likewise take time to determine with which of the petitioned-for employees the employer customarily communicates. More generally, in view of the changes to the scheduling of the pre-election hearing occasioned by the amendments discussed above, it is far less urgent that the Notice of Petition for Election be posted within 2 business days. Under the prior rules, where the pre-election hearing was generally scheduled for 8 days after service of the notice of hearing, in most instances the employees and the parties were guaranteed only 6 calendar days' posting of the Notice of Petition for Election prior to commencement of the pre-election hearing.[59] On such a timeline, requiring posting within 2 business days was understandable in order to ensure some reasonable posting period. But under the final rule, where the pre-election hearing will normally be scheduled to start 14 business days after the notice of hearing, requiring that the Notice of Petition of Election be posted within 5 business days will guarantee that the employees and parties will have the benefit of the notice posting for at least 9 business days prior to the start of the hearing. That being the case, the Notice of Petition will clearly continue to serve its intended purpose of providing ample notice and useful guidance to employees and the parties under the final rule. Further, inasmuch as the failure to timely post the Notice of Petition may be grounds for setting aside the election, providing an extra few days for the employer to comply with this requirement will hopefully minimize the occurrence of objectionable noncompliance.

Second, the final rule clarifies that in those situations where electronic distribution of the Notice of Petition for Election is warranted, the Notice only needs to be distributed electronically to the employees in the petitioned-for unit. This appears to have been the intent of the 2014 amendments, given that the explanation for the amendments states, in response to a comment questioning the reach of the electronic distribution requirement:

> If the employer customarily communicates with all the employees in the petitioned-for unit through electronic means, then the employer must distribute the Notice of Petition for Election electronically to the entire unit. If the employer customarily communicates with only some of the employees in the petitioned-for unit through electronic means, then the employer need only distribute the Notice of Petition for Election electronically to those employees.

79 FR 74379. The limitation of electronic distribution to employees in the petitioned-for unit is not, however, clear from the face of the prior rules. By clarifying this point, the final rule provides parties with clearer guidance and reduces the possibility of wasteful litigation over the proper interpretation of this provision.

102.64 Conduct of Hearing

Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), states that whenever a petition has been filed in accordance with the Board's regulations, ''the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.'' The Act itself does not define the parameters of the pre-election hearing, aside from providing that (1) it may be conducted by a regional officer or employee ''who shall not make any recommendations with respect thereto,'' and (2) if, upon the record of the pre-election hearing, the Board finds ''that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.'' Id.

Prior to the 2014 amendments, the Board's approach to the scope of the pre-election hearing was governed by *Barre National, Inc.,* 316 NLRB 877 (1995). In that case, the regional director determined that, in the absence of any other disputed issues, the supervisory status of certain individuals would not be litigated at the pre-election hearing, and that instead those individuals would be permitted to vote subject to challenge. The Board reversed, holding that by precluding litigation of the

[59] The employees and parties are guaranteed only 4 calendar days' posting of the Notice of Petition for Election if the Notice of Hearing is served on a Thursday.

supervisory issue, the pre-election hearing had not met the requirements of the Act or the Board's then-current rules and regulations.[60] Thus, under *Barre National* and its progeny, the Board held that parties had the right to present evidence in support of their respective positions at the hearing. See *North Manchester Foundry, Inc.,* 328 NLRB 372, 372–373 (1999). This right did not extend to pre-election *resolution* of eligibility and inclusion issues, however, given that reviewing courts had held that there was no general requirement that the Board decide all voter eligibility issues prior to an election. *Barre National,* 316 NLRB at 878 n.9 (collecting cases).

The 2014 amendments altered this longstanding approach to the scope of the pre-election hearing. First, the 2014 amendments modified § 102.64(a) to state that the purpose of the pre-election hearing ''is to determine if a question of representation exists'' and to further specify the circumstances under which such a question exists.[61] Second, the Board further modified § 102.64(a) to provide that ''[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.'' Third, the Board modified § 102.66(a) to limit the parties' right to present testimony and evidence to contentions that ''are relevant to the existence of a question of representation.'' Relatedly, the Board modified § 102.67 to reflect that regional directors could defer questions of eligibility and inclusion by directing that the affected employees vote subject to challenge. In making these modifications, the 2014 amendments expressly overruled *Barre National* and *North Manchester Foundry.* 79 FR 74386.

The 2014 amendments explained these changes as follows. First and foremost, the Board emphasized that the only requirement for the scope of the pre-election hearing set forth in the Act is the determination of whether a question of representation exists, and that whether particular individuals are in the unit and are eligible to vote is not relevant to whether a question of representation exists. 79 FR 74384–74386. Second, the Board explained that *Barre National* had relied on the text of the Board's regulations, not the text of the Act, in holding that the parties had a right to present evidence in support of their positions, and the 2014 amendments eliminated that language. 79 FR 74385–74386. The Board also opined that *Barre National* was not ''administratively rational'' because although it required litigation of issues, it permitted deferral of the resolution of those issues until after the election, and in many instances the election results would moot those very issues; accordingly, *Barre National* permitted unnecessary litigation that was a barrier to more expeditious resolution of questions of representation. 79 FR 74385–74386. Third, the Board expressed concern that unless the pre-election hearing were limited to evidence bearing on the existence of a question of representation, ''the possibility of using unnecessary litigation to gain strategic advantage exists in every case''; for example, a party could use the threat of litigating unnecessary issues at a hearing to extract favorable terms in an election agreement. 79 FR 74386–74387.[62] Fourth, the Board emphasized that not requiring litigation of these types of issues conserved Agency and party resources rather than wasting them on issues that could ultimately prove unnecessary to litigate and resolve in the first place. 79 FR 74387, 74391. In this regard, the Board stated that ''[e]very non-essential piece of evidence that is adduced adds time that the parties and the Board's hearing officer must spend at the hearing, and simultaneously lengthens and complicates the transcript that the regional director must analyze in order to issue a decision.'' 79 FR 74387.

The 2014 amendments accordingly permitted regional directors to defer litigation of eligibility and inclusion disputes in order to avoid wasteful litigation, to conduct elections more promptly, and to disincentivize delaying tactics. And more generally, the Board's holding was that any interest in pre-election litigation of these disputes was outweighed by the interest in prompt resolution of questions of representation. 79 FR 74391.

We agree with the 2014 amendments' decision to set forth the purpose of the pre-election hearing. We are also satisfied that defining that purpose as ''determin[ing] if a question of representation exists'' is consistent with the text of § 9(c)(1). And we do not dispute that deferral of issues that do not bear on the existence of a question of representation is permissible under the Act.[63] But contrary to the 2014 amendments, we conclude that, as a policy matter, the Board should return to the practice of permitting parties to present evidence in support of their positions with respect to disputed, properly-raised issues. In our view, permitting litigation of issues of eligibility and inclusion at the pre-election hearing—and encouraging regional directors to resolve such issues before directing an election—will better serve the interests of certainty and finality, uniformity and transparency, fair and accurate voting, and efficiency. The final rule accordingly modifies § 102.64(a) to provide that the *primary* purpose of the pre-election hearing is to determine the existence of a question of representation, but to specify that—absent agreement of the parties to the contrary—disputes concerning unit scope, voter eligibility, and supervisory status will normally be litigated and resolved by the regional director before an election is directed.

Returning to the practice of permitting parties to present evidence in support of their properly raised, adverse positions will promote certainty and finality of election results in several ways. To begin, it bears emphasis here that, with respect to the scope of the pre-election hearing, the 2014 amendments focused almost exclusively on establishing the *existence* of a question of representation. Although we readily agree that the existence of such a question is the prerequisite to the direction of an election, this does not mean that the litigation of additional issues is an impediment to the ultimate *resolution* of the question of representation. As explained earlier, the mere fact that an election has been conducted promptly does not mean that the question of representation has been resolved. Indeed, where litigation of eligibility or inclusion issues has been deferred, and the election results do not

[60] Before the 2014 amendments, § 102.64 provided that ''[i]t shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under section 9(c) of the Act,'' and § 101.20(c) stated that ''[t]he parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.'' As noted below, the 2014 amendments removed this language from § 102.64; the 2014 amendments eliminated § 101.20.

[61] ''A question of representation exists if a proper petition has been filed concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.''

[62] The Board commented that the temptation to use the threat of protracted litigation to gain a strategic advantage was heightened by the fact that, under the pre-2014 rules and regulations, parties had a right to take at least 7 days after the hearing to file post-hearing briefs, and elections directed after a hearing ordinarily could not be scheduled for sooner than 25 days after the direction of election.

[63] We note that court challenges asserting the contrary were rejected. *Associated Builders & Contractors of Texas,* 826 F.3d at 220–223; *Chamber of Commerce,* 118 F.Supp.3d at 196–200.

render these issues moot, the question of representation cannot be resolved until these issues are litigated and decided by the regional director (and, if a request for review follows, by the Board). Prior to 2014, these issues would have at least been litigated before the election, creating a record permitting them to be resolved more quickly post-election even if the decisional process was deferred until then. Under the 2014 amendments, however, it may be necessary to conduct extensive hearings on these very issues after the election has been conducted. Given that many such issues could be litigated *and decided* prior to the direction of election, actively promoting their deferral to post-election proceedings comes at the cost of swifter certainty and finality. In our view, where the parties have not agreed to defer these types of issues, the Board should strive to maximize the opportunity for an election vote to provide immediate finality, subject only to the filing of objections to conduct allegedly affecting the results. Creating a record on which issues of eligibility and inclusion can be decided and encouraging regional directors to resolve the issues to the greatest extent possible prior to the election serves this goal.

Litigating and resolving eligibility and inclusion issues prior to an election will, as a general matter, reduce the number of challenged voters. Whenever a challenged vote is cast, it cannot but detract from certainty, because neither the Board nor the parties nor the individual voter can be sure, at the time the challenged vote is cast, whether it will be counted. Whenever challenges prove determinative of the ultimate election outcome, their post-election litigation and/or resolution litigation postpones finality. And even where challenged votes are not determinative, a shadow of uncertainty remains over the bargaining unit placement of the challenged voters that could impact a rerun election or contract negotiations over the placement of the challenged voters in the bargaining unit. This is not to suggest that all challenges should always be resolved regardless of whether they are determinative, nor is to deny that unanticipated challenges can arise on the date of the election regardless of what issues have been litigated and resolved previously. It is only to observe that challenges inherently detract from the goal of finality and certainty in the election results, and that seeking to minimize them accordingly serves this goal.[64]

In particular, encouraging the resolution of supervisory issues prior to the direction of election advances these purposes. Failing to resolve properly-raised issues of supervisory status prior to an election can lead to post-election complications where the putative supervisors engage in conduct during the critical period that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by nonparty employees.[65] As the dissent to the 2014 amendments observed, by not resolving supervisory issues before the election,

> many employees will not know there is even a question about whether fellow voters—with whom they may have discussed many issues—will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election.

79 FR 74438 n.581 (dissenting views of Members Philip A. Miscimarra and Harry I. Johnson III). The 2014 amendments did not, in our view, satisfactorily account for these possible complications. In this regard, the 2014 amendments dismissed similar concerns by suggesting that undisputed supervisors will almost always be present during the election campaign and by arguing that uncertainty cannot be entirely eliminated. 79 FR 74389. But the fact that undisputed supervisors may be present during the campaign does not respond to the concern identified by the 2014 dissent, and the fact that pre-election resolution of all supervisory status disputes may not always be possible or cannot forestall objectionable conduct that occurs prior to resolution does not mean that the Board should not ordinarily attempt to resolve supervisory status issues prior to an election when the parties are unable to agree to other disposition of these issues. At a minimum, resolution of supervisory issues at some point prior to the election can provide the parties with better guidance for the remainder of the election campaign and increases the possibility of forestalling objectionable conduct during that time.

The considerations identified above in support of this amendment in the final rule also promote transparency and uniformity. Having eligibility and inclusion issues litigated and generally resolved before a direction of election will assist the parties in knowing who is eligible to vote and who speaks for management. We think it goes without saying that these circumstances promote greater transparency in the Board's procedures. Further, given that the 2014 amendments encouraged deferral and gave regional directors broad discretion to determine whether to defer and how many individual voter eligibility and inclusion issues could be deferred, or to litigate and resolve these types of issues prior to directing an election, 79 FR 74388,[66] setting the expectation in the final rule that, unless the parties agree to defer them, these types of disputes will be litigated, and normally will be decided, before the election is directed also promotes greater uniformity in regional practice.

The final rule promotes fair and accurate voting as well. When issues of eligibility and inclusion are deferred,

[64] In addition, as discussed at greater length below with respect to the 20-business-day period between the direction and conduct of an election and the automatic impoundment of ballots when a request for review is pending, challenges carry a greater risk of compromising ballot secrecy. Thus, by litigating and resolving eligibility issues before the election, and thus removing the basis for at least some challenges, this change also serves the interest of ballot secrecy.

[65] For example, compare *Montgomery Ward & Co.,* 232 NLRB 848 (1977) (threats of job loss by supervisor objectionable) with *Duralam, Inc.,* 284 NLRB 1419, 1419 fn. 2 (1987) (''threats of job loss for not supporting the union, made by one rank-and-file employee to another, are not objectionable'').

[66] The Board had originally proposed language under which deferral of issues affecting less than 20% of the unit would have been mandatory, but the final 2014 amendments stated that a case-by-case approach permitting regional directors to exercise their discretion was preferable. See id. Still, the amendments encouraged deferral to this substantial degree, or more, in order to avoid any delay in the conduct of an election. This was recognized in the General Counsel's subsequent Guidance Memorandum, which stated ''The Board noted that it strongly believed that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election litigation of eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. GC Memo 15–06 at 12 fn. 18, *https://www.nlrb.gov/news-publications/nlrb-memoranda/general-counsel-memos* (citing 79 FR 74388 fn. 373). This guidance has been incorporated in the current advisory Casehandling Manual (Part Two) Representation Proceedings section 11084.3. This guidance contrasts with the prior version of the manual that provided, in relevant part, that ''As a general rule, the regional director should decline to approve an election agreement where it is known that more than 10 percent of the voters will be challenged, but this guidance may be exceeded if the regional director deems it advisable to do so.'' Notably, the General Counsel's Guidance Memo for implementation of the subsequently revoked 2011 election rule amendments applied the 10 percent rule to directed elections as well. GC Memo 12–04 at 9, *https://www.nlrb.gov/news-publications/nlrb-memoranda/general-counsel-memos.* As discussed below, although we agree that regional directors should retain a certain degree of discretion to defer resolution of individual inclusion and exclusion issues under the final rule, they should be encouraged to resolve all of them, rather than defer, as much as possible, and should not as a general rule defer issues that affect more than 10% of the unit.

employees cast their votes without the benefit of knowing the precise contours of the unit in which they are voting, and specific inclusions and exclusions may be of great significance to them. The potential for confusion increases as the number of deferred individual employee eligibility issues increases. It seems obvious that it would be important for voters to know who they are voting to join in collective bargaining when they decide whether or not they want to be represented by a union for purposes of collective bargaining. Accordingly, rules encouraging the resolution of unit eligibility and inclusion issues prior to the election do not represent wasteful litigation, even if they may not be a cost-free proposition, because they still promote the exercise of employee free choice by maximizing the information available to voters regarding unit scope and voter eligibility. The 2014 amendments acknowledged that eligible voters do indeed have an interest ''in knowing precisely who will be in the unit should they choose to be represented.'' 79 FR 74384 (quoting 79 FR 7331); see 79 FR 74387. But the 2014 amendments also gave this interest short shrift, commenting that although employees may not know whether particular individuals or groups will be eligible or included, this was already the case under the pre-2014 rules and regulations because the resolution of a certain number of eligibility issues, even if litigated pre-election, would still be deferred in many instances until after the election. 79 FR 74389.[67] This is, however, precisely why the final rule amends § 102.64(a) to state that issues of ''unit scope, voter eligibility and supervisory status will normally be litigated *and resolved*'' before the election is directed (emphasis added).

We recognize that there may be instances in which the detriment of delay from requiring pre-election resolution of a particular eligibility issue or issues outweighs the substantial interest in having all eligibility issues resolved prior to an election. For example, those instances may involve the eligibility of a few employees for whom the record evidence is not sufficient, even when the issue has been litigated, to permit a definitive finding.[68] The Board has also long held that disputes concerning the voting eligibility of economic strikers are properly resolved in post-election proceedings. See, *e.g., Milwaukee Independent Meat Packers Association,* 223 NLRB 922, 923 (1976) (citing *Pipe Machinery Co.,* 76 NLRB 247 (1948)). Accordingly, we are not imposing a requirement that, absent agreement of the parties to the contrary, all eligibility issues must be resolved prior to an election. Section 102.64(a) as modified by the final rule states only that that disputes concerning unit scope, voter eligibility, and supervisor status will ''normally'' be litigated and resolved by the regional director. However, we are making clear that, as a general rule, when regional directors consider the need to defer some properly-raised eligibility and inclusion issues, they should adhere to the general pre-2014 practice of limiting deferral of inclusion and exclusion issues to 10 percent of the proposed unit.[69] Doing so will, quite simply, help ensure that voters know the contours of the unit in which they are voting. And a more informed electorate plainly promotes fair and accurate voting.

The final rule also promotes fair and accurate voting by reducing the possibility that voters will be confused by use of the vote-subject-to-challenge procedure. When this procedure is used, the Notice of Election advising employees of the voting unit and the other election details states that the individuals in question ''are neither included in, nor excluded from, the bargaining unit, inasmuch as'' they have been permitted to vote subject to challenge, and that their eligibility or inclusion ''will be resolved, if necessary, following the election.'' § 102.67(b). Although the 2014 amendments optimistically described such language as providing the parties and voters with ''guidance,'' 79 FR 74403, we are not persuaded that this is especially useful guidance for the typical voter in a Board-conducted election. When voters are effectively being told that the Board will decide an issue later if it has to, it is unclear to us what ''guidance'' this provides. Although it may be the case that employees can take the notice of their challenged status in stride, we think this information runs the risk of being a disincentive for some employees to vote, even if they might ultimately be found eligible to participate. Even the possibility that this could happen and that it could affect the election outcome warrants an amended procedural rule that seeks to provide more comprehensive guidance to employees in advance of an election as to who can and who cannot vote.[70]

A few final observations concerning litigation of these issues are in order. First, we emphasize that the parties remain free to agree to defer litigation of these types of issues to post-election proceedings (should election results not render the issues moot), and the final rule expressly provides for this option.[71] Second, we reiterate that although the practice of deferring litigation can result in conducting elections sooner,[72] it is impossible to know in advance whether the eligibility and inclusion issues the parties have properly raised will be mooted by the election results, and little overall efficiency is gained when litigation of these issues proves necessary in post-election proceedings. Third, we are not requiring that regional directors resolve all disputes prior to the direction of election. As noted above, we are not at this time eliminating the discretion of the regional director to defer resolution of eligibility and

[67] The 2014 amendments also responded by pointing out that since 1947, voters in mixed professional/non-professional units do not know the precise composition of the unit when they vote, insofar as at the election, the professional employees must vote simultaneously on whether they wish to be included in a unit with non-professionals and whether they wish to be represented by the petitioning union. 79 FR 74389 (citing § 9(b)(1); *Sonotone Corp.,* 90 NLRB at 1241–42). This is true, but this procedure was developed in response to a specific statutory mandate. The fact that the Board has adopted this specific practice in this discrete area for statutory reasons is not, in our view, a persuasive reason not to seek to facilitate a better-informed electorate where this can be achieved through permitting litigation, and promoting resolution, of inclusion and eligibility issues prior to the direction of election.

[68] See, *e.g., Medical Center at Bowling Green* v. *NLRB,* 712 F.2d 1091, 1093 (6th Cir. 1983) (finding no error in Board's decision to allow certain individuals to vote under challenge where evidence was insufficient to determine whether they were statutory supervisors and noting ''[s]uch a practice enables the Board to conduct an immediate election'').

[69] The same limitation should apply to the regional director's consideration of election agreements to vote individuals subject to challenge. We leave to subsequent adjudication the question whether it may even be appropriate for a regional director to exceed the general 10 percent limitation on deferrals.

[70] The dissent indicates that our reasoning on this count is inconsistent with *UPS* v. *NLRB,* 921 F.3d 251 (D.C. Cir. 2019). Not so. The court in that case merely held that the Acting Regional Director's decision to defer ruling on the unit placement of two disputed classifications and instead vote the affected employees under challenge did not ''imperil the bargaining unit's right to make an informed choice'' given that the notice of election advised employees of the possibility of change to the bargaining unit's definition. Id. at 257. The court said nothing at odds with our conclusion that, as a policy matter, it will better promote fair, accurate, and transparent voting by providing that eligibility and unit scope disputes will normally be litigated and resolved prior to the election.

[71] As explained earlier, we do not view preserving this option as inconsistent with the benefits that attach to litigating and resolving issues prior to the election. See fn. 23, supra.

[72] That said, we are confident that in the vast majority of instances, disputes of this kind that would be deferred under the 2014 amendments can be litigated and resolved without dramatically expanding the pre-election hearing and without drastically protracting the length of time it will take the regional director to decide such issues.

inclusion issues, although we are making clear that they should normally do so and that there are, in any event, limits to the number of individual eligibility and inclusion issues that may be deferred. Fourth, we are not, through this change, countenancing free-for-all hearings at which parties will be free to introduce irrelevant evidence without limitation. As already discussed, the final rule retains the Statement of Position requirement, as well as the preclusion provisions, and it further requires responsive statements from petitioners. Parties will accordingly be limited to presenting evidence pertaining to issues they have properly raised, and on which they have taken adverse positions. And although evidence regarding eligibility and inclusion issues may not necessarily be relevant to the existence of a question of representation, such evidence can and in many cases will prove relevant to the resolution of that question. As for truly irrelevant evidence, as explained below nothing in the final rule disturbs the right of the hearing officer and regional director to police the hearing against the burdening of the record.[73] With these protections in place, we are not persuaded by the 2014 amendments' concern that the ability to litigate these issues will result in parties ''using unnecessary litigation to gain strategic advantage.'' 79 FR 74386.[74] Fifth, and finally, nothing in the final rule changes the fact that the regional director will direct an election upon finding that a question of representation exists. The final rule simply provides that the election thus directed will entail greater certainty about who is included in the unit and eligibility to vote in the election, thereby promoting a variety of the interests the Board's representation case procedures are required to balance and potentially limiting the litigation of post-election challenge and objections issues that could delay finality in the election results.

102.66 Introduction of Evidence: Rights of Parties at Hearing; Preclusion; Subpoenas; Oral Argument and Briefs

The final rule makes three significant modifications to § 102.66.[75] First, the final rule modifies § 102.66(a) to specify that parties have the right to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions that are relevant not just to the existence of a question of representation, but also the other issues in the case that have been properly raised. Second, the final rule modifies § 102.66(c) to emphasize that, notwithstanding the offer of proof procedure, in no event shall a party be precluded from introducing relevant evidence ''otherwise consistent with this subpart.'' Both of these changes simply reflect the modifications to § 102.64(a) explained immediately above. The rights of the parties at the pre-election hearing, and the discretion of the hearing officer to solicit (and the regional director to rule on) offers of proof, are both otherwise unmodified.

Third, the final rule modifies § 102.66(h) to provide that any party desiring to submit a brief to the regional director shall be entitled to do so within 5 business days after the close of the hearing, and that prior to the close of the hearing and for good cause the hearing officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Prior to the 2014 amendments, the Board's rules and regulations provided that, following the close of the pre-election hearing, any party that desired to submit a brief to the regional director had 7 (calendar) days to file it, although prior to the close of the hearing and for good cause the hearing officer could grant an extension of time of up to an additional 14 days. See § 102.67(a) (2013). The final rule here essentially reinstates that longstanding practice.

The 2014 amendments removed the right of the parties to file post-hearing briefs, providing that they would be permitted only upon ''special permission of the Regional Director and within the time and addressing subjects permitted by the Regional Director.'' Absent such permission, parties were limited to presenting their positions via oral argument (if requested) at the close of the hearing. § 102.66(h). The principal supporting rationale for these amendments was that (1) briefs are not necessary in the majority of representation cases, as they often raise ''recurring and uncomplicated legal and factual issues'' that do not require briefs in order for the parties to fully and fairly present their positions, and (2) providing the right to file briefs could delay issuance of the decision and direction of election, and thus delay the conduct of the election itself. 79 FR 74401–74402. Although we do not take issue with the proposition that the Board is not required to permit post-hearing briefs after pre-election hearings, we have nevertheless decided to reinstate the parties' right to file them. In this regard, we disagree with the premises underlying the removal of this right, and we further conclude that permitting post-hearing briefs will better accommodate the interests of efficiency and uniformity.

To begin, we do not agree with the 2014 amendments' pronouncement that post-hearing briefs are generally unnecessary because representation cases are so prone to ''recurring and uncomplicated legal and factual issues'' as to make briefing unnecessary in a ''majority'' of cases. We note that *An Outline of Law and Procedure in Representation Cases*—the Office of the General Counsel's summary treatise for representation case law—takes more than 300 pages merely to summarize the range of possible pre-election representation issues. It is true that some of the issues covered in that document arise far more frequently than others, but the cases in which there is clearly controlling precedent that dictates only one possible outcome are far less common than suggested by the 2014 amendments. Further, even when governing legal principles are clear, many of the admittedly recurring issues that are litigated in pre-election hearings are anything but factually ''uncomplicated.'' That was true even for issues directly involving whether a question concerning representation existed, such as those involving unit scope and contract bar, which still had to be litigated and resolved prior to an election under the 2014 amendments. As discussed above, under the final rule, properly-raised eligibility and inclusion issues will also once again be litigated at pre-election hearings. Many of these issues, such as those involving alleged supervisory or independent contractor status, frequently require detailed factual analyses in the context of multi-factor legal tests. In sum,

[73] See, *e.g, Jersey Shore Nursing and Rehabilitation Center,* 325 NLRB 603, 603 (1998). See also 79 FR 74397 (''A tribunal need not permit litigation of a fact that will not as a matter of law, affect the result, or as to which the party that seeks to litigate the fact cannot identify evidence that would sustain its position.'').

[74] We observe that despite the 2014 amendments' concern with the possibility of parties behaving in this way, the supplementary information to the amendments did not offer evidence establishing that such behavior was routine. See 79 FR 74445–74446 (dissenting views of Philip A. Miscimarra and Harry I. Johnson III). In addition, the Board's statistics reflect that parties continue to enter election agreements at the same rate that they did before the 2014 amendments took effect. See fn. 16, supra. If there was a widespread practice of parties using the threat of unnecessary litigation to gain strategic advantages in election agreements prior to the 2014 amendments, one would expect to see some meaningful change in this statistic following the 2014 amendments' elimination of this incentive.

[75] The final rule also modifies § 102.66(b) to reflect that, as now provided under § 102.63(b), at least two Statements of Position will have been filed prior to the start of the hearing and will need to be received in evidence at the start of the hearing. The final rule does not otherwise modify the requirements of this paragraph.

review of Board decisions on these and other representation issues suggests that factual and legal complexity is much more common in contested cases than the 2014 amendments supposed. And even in cases where no one issue is particularly complex, a multiplicity of issues may nevertheless result in a case that is complex overall.

We also do not accept the unsubstantiated premise that the right to file post-hearing briefs was a significant source of delay in pre-election proceedings prior to 2015. Outside of instances in which extensions were granted, the pre-2014 rules provided a mere 7 calendar days for filing post-hearing briefs. Thus, at best, the 2014 amendments saved 7 days between the close of the hearing and the issuance of a decision and direction of election. But even this figure is somewhat misleading. Following any pre-election hearing, the regional director typically requires at least a few days to draft and issue a decision and direction of election. And as the dissent to the 2014 amendments—quoting former Member Hayes's dissent to the vacated December 2011 rule—pointed out:

> [T]he majority points to no evidence that the 7 days . . . afforded parties to file briefs following pre-election hearings actually causes delay in the issuance of Regional directors' decisions. . . . There is no reason why a Regional director or his decision writer cannot begin preparing a decision before the briefs arrive and, if the briefs raise no issues the Regional director has not considered, simply issue the decision immediately. In fact, the Agency's internal training program expressly instructs decision writers to begin drafting pre-election Regional directors' decisions before the briefs arrive.

79 FR 74449 (quoting 77 FR 25567).

In addition, it seems more plausible that the information provided in post-hearing briefs would generally save time in the processing of cases from the close of the hearing to the regional director's decision, rather than causing delay. In this respect, the briefs serve the same purpose, but with greater specificity, as the *required* filing of pre-hearing statements by parties. Post-hearing briefs further clarify the issues presented and opposing views taken in pre-hearing statements, and they do so with the additional guidance of reference to specific caselaw and to specific pages in the record that support a party's position.

Ultimately, then, there is no evidence—only the 2014 amendments' ipse dixit—that post-hearing briefs are unnecessary and cause delay. That being the case, it is unclear whether permitting them only upon special permission of the Regional Director secured any tangible benefit for the processing of election petitions, but even assuming that the 2014 amendments did in some cases accelerate the issuance of the Regional Director's decision, we think that restoration of the right to file post-hearing briefs will yield benefits that easily outweigh any consequential addition of time for issuance of the subsequent decision.

We are strongly of the view that permitting post-hearing briefs in all cases will promote greater overall efficiency. The 2014 amendments generally permitted only oral argument, limiting parties to extemporaneous summaries of the evidence, relevant case law, and their arguments and positions on the issues without the benefit of the hearing transcript and post-hearing research of precedent. By contrast, permitting the routine filing of post-hearing briefs does allow the parties time to review the transcript, to engage in legal research, and to refine, moderate, or even abandon arguments or sub-arguments they otherwise might have only generally made, misstated, or even overlooked during oral argument. It seems obvious that the greater specificity in briefs, as opposed to oral argument, would benefit both the parties and the regional director in multiple ways by forging a better common understanding of the issues presented and the precedent and record evidence relevant to those issues. The regional director's need for independent research of the law and record would be reduced, as would the risk of misunderstanding or overlooking arguments that a party believed to be essential to its case. Again, without totally discounting the contention in the 2014 amendments that permitting the routine filing of post-hearing briefs may add time to the pre-election period, we believe it is just as likely that in many instances routine briefing can have the opposite result of contracting the time needed for the regional director to draft a decision. In any event, the additional time involved will be modest. As indicated above, the final rule provides that parties have 5 business days to file their post-hearing brief, absent securing permission for an extension of up to 10 more business days at the close of the hearing. In most instances, this will equate to time provided for post-hearing briefs prior to the 2014 amendments. Given that pre-election hearings can be—and often are—fact-intensive affairs involving multiple and/or complex issues, 5 business days is hardly an unreasonably long time to expect most parties to produce a brief.[76]

Finally, we are not requiring that post-hearing briefs be filed in each and every contested case. As was the case before the 2014 amendments, the parties will be free to waive the period for filing post-hearing briefs, and we expect that hearing officers will resume the practice of encouraging parties to argue their positions orally in lieu of briefs in appropriate circumstances.[77] We are confident that parties will generally do so in cases that are truly routine and uncomplicated.[78]

102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Appeals From Actions of the Regional Director; Statement in Opposition; Requests for Extraordinary Relief; Notice of Election; Voter List

The final rule makes several changes, most of them relatively limited, to § 102.67. First, the final rule modifies § 102.67(b) to emphasize that regional directors retain the right to issue the Notice of Election after issuing a decision and direction of election. Second, the final rule further modifies § 102.67(b) to provide that, absent a waiver by the parties, the regional director will normally not schedule an election before the 20th business day after the date of the direction of election. Third, the final rule modifies § 102.67(c) to provide for the impoundment of ballots if the Board has not ruled on a timely filed pre-election request for review by the date of the election. Fourth, the final rule codifies the existing practice of permitting reply briefs only upon special leave of the Board. Fifth, the final rule now specifies that a party may not file more than one request for review of a particular action or decision by the Regional Director. Sixth, the final rule aligns the procedure for requesting permission to depart from the formatting requirements for briefs,

[76] Although it is true, as the 2014 amendments pointed out, that many representation case hearings last less than a day, we nevertheless believe that even in simple cases the parties' arguments to the regional director will benefit from having time to review the transcript, conduct additional research, and structure and refine their arguments. Contrary to the dissent's imaginative reliance on comparative rates of Board reversals of Regional Directors' decision before and after implementation of those amendments, we do not regard those statistics as conclusive, or even probative, of the value of post-hearing briefs to the decisional process.

[77] See former CHM section 11242 (2014).

[78] To the extent parties insist on filing briefs in truly routine and uncomplicated cases, we note that these are the very cases in which the regional director (or his or her decision-writer) will be in the best position to largely prepare the decision while awaiting the posthearing briefs.

and for requesting extensions of time, with the procedure used for these actions in other types of Board proceedings. Finally, the final rule clarifies that the Notice of Election only need be electronically distributed to eligible voters. Finally, the final rule modifies the time for submitting the Voter List in directed elections consistent with the modifications discussed above with respect to election agreements.[79]

A. Timing of Election Details

The 2014 amendments modified § 102.67(b) to provide that if the regional director directs an election, the direction ''ordinarily will specify the date(s), time(s), and location(s) of the election and the eligibility period.'' Prior to the 2014 amendments, the Board's rules did not state when regional directors would specify the election details,[80] but the practice was to resolve such details after the decision and direction of election through consultation and negotiation with the parties. See 79 FR 74404; CHM section 11280.3 (2014). The rationale in the 2014 amendments for adding language providing for simultaneous issuance of the direction of election and election details was that parties will have already stated their positions on the election details in the petition, in the Statement(s) of Position, and at the hearing. Accordingly, there was generally no need for the region to solicit their positions again, and the election would be conducted sooner. 79 FR 74404. The 2014 amendments stated that simultaneous issuance should ''ordinarily'' occur, given that there could still be situations where the regional director concluded it was appropriate to consult further with about election details. 79 FR 74404 n.439. The 2014 amendments apparently envisioned that regional directors would only deviate from ordinary practice in the face of ''unusual circumstances,'' such as when an election was directed substantially after the close of the hearing, or where an election was directed in a unit very different from any the parties had proposed. 79 FR 74370 n.300.

The final rule modifies this language to state that the regional director ''may'' specify the election details in the direction of election, and to emphasize that the regional director ''retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election.''[81] This change represents a shift in emphasis, rather than substance. Given that the parties will have stated their positions on the election details both before and during the hearing, we fully agree with the 2014 amendments that the regional director should ordinarily be able to provide the election details in the direction of election, thus avoiding any delay in issuing the Notice of Election.

That said, we think that it will better promote transparency and efficiency to revise the wording of this provision to place more emphasis on the discretion regional directors have in this regard. By doing so, the final rule emphasizes what the 2014 amendments acknowledged, but did not overtly state in text of § 102.67(b): There may be situations where the regional director concludes it is appropriate to further consult with the parties concerning election details after issuing the direction of election. Replacing the word ''ordinarily'' with ''may,'' as well as the adding the final clause to the first sentence of § 102.67(b), makes the Regional Director's discretion absolutely clear.

This change in wording will also promote efficiency by eliminating any concern that regional directors face an either/or situation where there remains some post-hearing issue about election details. The regional director can issue a direction of election and resolve the election detail issue later without having to justify the bifurcated action based on the existence of ''unusual circumstances.'' The discretion afforded regional directors to engage the parties in post-hearing discussion of those details will likely lead in some, if not most, cases to consensus and thereby avoid any subsequent request for review or post-election objection based on such matters.[82] It also communicates that a party seeking review of the regional director's exercise of the discretion to issue a Notice of Election after a direction of election will do so in vain. Again, we expect that regional directors will in fact continue to ordinarily specify such details in the direction of election; the final rule accordingly should not result in any additional delay by virtue of this change.[83]

B. Period Between Direction and Conduct of Election

Before the 2014 amendments eliminated it, § 101.21(d) of the Board's Statements of Procedure provided that ''unless a waiver is filed, the [Regional] Director will normally not schedule an election until a date between the 25th and 30th day after the date of the decision, to permit the Board to rule on any request for review which may be filed.'' At the same time, a request for review of a decision and direction of election was required to be filed within 14 calendar days of that decision to be timely. See § 102.67(b) (2013).

As indicated, the 2014 amendments eliminated § 101.21(d) and revised § 102.67(b) to provide that a Regional Director ''shall schedule the election for the earliest date practicable consistent with these Rules.''[84] In addition, the 2014 amendments modified the request for review procedures to permit a party to file a request for review of any regional director's action ''at any time following the action until 14 days after a final disposition of the proceeding by the Regional Director,'' and they more specifically stated that a party is not ''precluded from filing a request for review of the direction of election within the time provided in this

[79] The final rule also modifies § 102.67(a) to reflect that the regional director will ''determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining *as provided in § 102.64(a),* and to direct an election, dismiss the petition, or make other disposition of the matter'' (emphasis added). This change is simply a matter of a cross-reference to reflect that issues of eligibility and inclusion will now be permitted at the hearing, and that the regional director will normally resolve those issues in the decision and direction of election. The reasons for these changes have already been discussed above. Similarly, the final rule simplifies § 102.67(b) and (l) to refer to the fact that voters may vote subject to challenge, without further explanation, as there is no need to set forth the method by which voters are permitted to vote subject to challenge. These changes also reflect the final rule's encouraging of regional directors to resolve eligibility and inclusion disputes prior to directing an election, which has been explained above.

[80] Under the pre-2014 practice, the regional director's decision and direction of election would contain the eligibility list requirements, however. CHM section 11273.1 (2014).

[81] The final rule also modifies subsequent language in § 102.67(b) regarding transmission of the Notice of Election to reflect that it may be transmitted separately after the direction of election.

[82] To be clear, we are not suggesting that consensus on these matters is required, or that a regional director is obligated to try to achieve consensus on the election details. As always, in directed elections such details are left to the discretion of the regional director. See *Manchester Knitted Fashions, Inc.,* 108 NLRB 1366, 1367 (1954). Nor do we suggest, via this change, that regional directors should be exercising their discretion in this area any more frequently than has been the case to date under the 2014 amendments. We merely modify the language of this provision to more clearly emphasize the discretion of regional directors to issue the Notice of Election separately from the Direction of Election.

[83] To the extent this provision does cause some additional delay in the issuance of the Notice of Election, we note that the mandatory period between the direction and conduct of election—as discussed immediately below—makes it highly unlikely that such circumstances would delay the scheduling of the election itself.

[84] The 2014 amendments described the insertion of the ''earliest date practicable'' language as a ''codification'' of guidance contained in the Casehandling Manual. 79 FR 74310. As discussed below, we think this characterization of the change is somewhat misleading.

paragraph because it did not file a request for review of the direction of election prior to the election.'' § 102.67(c). Thus, the 2014 amendments eliminated any specified minimum timeline between the direction and conduct of election [85] while at the same time instituting procedures that permitted a party to wait to file a request for review of the direction of election until after the election (the results of which may have removed the need to request review of the direction of election).

The rationale for elimination of the 25- to 30-day period was that it ''serve[d] little purpose.'' 79 FR 74410. More specifically, the Board stated that (1) the period unnecessarily delayed the conduct of elections, thereby postponing the resolution of questions of representation; (2) the period was in tension with the instruction in section 3(b), 29 U.S.C. 153(b), that a grant of review ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director''; (3) the period encouraged delay in elections conducted pursuant to election agreements because parties would use the threat of insisting on a hearing and the attendant 25- to 30-day period to extract concessions within the election agreement (including the scheduling of the election); (4) the period was designed to permit Board ruling on a request for review before an election, but because requests for review were filed in only a small percentage of cases, review was granted in an even smaller percentage, and stays of elections were virtually never granted, the period served little purpose; [86] and (5) even where a pre-election request for review was filed, the election ''almost always'' proceeded anyway, using the vote-and-impound procedure,[87] before the Board ruled on the request for review. 79 FR 74410.

Upon reflection, we have decided that the better procedural policy is to reinstate a modified version of the 25- to 30-day period. Section 102.67(b) will continue to provide that the regional director ''shall schedule the election for the earliest date practicable,'' but restores this phrase to its original context by providing that ''unless a waiver is filed, the regional director will normally not schedule an election before the 20th business day after the date of the direction of election.'' We have replaced the 25- to 30-day period with the ''20th business day'' formulation in keeping with our general conversion of representation procedure time periods to business days, and also to provide more certainty and uniformity with respect to the minimum period of time between the direction and conduct of election. Further, consistent with prior practice, the final rule emphasizes that this period is designed ''to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section.'' However, the final rule also retains the flexibility introduced by the 2014 amendments, insofar as a party may wait until after an election has been conducted to decide whether to file a request for review of the direction of election. Also, consistent with the pre-2014 regulations, the parties remain free to agree to waive the 20-business-day period.

As an initial matter, we do not agree with the 2014 amendments' characterization of the addition of the ''earliest date practicable'' language to § 102.67(b) as a codification of pre-2014 practice. The precursor to the 25- to 30-day period was already present in the rules and regulations promulgated in the immediate wake of the Board's delegation of its representation case authority to the Regional Directors pursuant to section 3(b). 26 FR 3886 (May 4, 1961).[88] The language in the Casehandling Manual that the Board purported to codify in the 2014 amendments must, of course, be understood in conjunction with the Board's extant procedures. As such—and indeed, as acknowledged in the 2014 amendments [89]—the fact that the Casehandling Manual had long provided that ''[a]n election should be held as early as is practical'' [90] nevertheless assumed the existence of a period between the direction and conduct of an election during which a request for review could be filed, considered by the Board, and potentially ruled upon. By removing that period and providing for elections to be held on ''the earliest date practicable,'' the 2014 amendments accordingly did represent a ''sea change'' compared pre-2014 practice.[91]

In any event, the 25- to 30-day period was not, as the 2014 amendments stated, ''unnecessary delay'' that served ''little purpose.'' As the pre-2014 regulations explicitly stated, this period existed ''to permit the Board to rule on any request for review which may be filed'' in response to a direction of election. The 1961 institution of this period and the provisions in § 102.67 related to it was not some sort of accident or oversight; indeed, when certain aspects of § 102.67 were amended in 1977, the Board emphasized that they were ''designed to facilitate consideration and disposition of requests for review of regional directors' decisions, thereby *further contributing to the prompt resolution of representation issues.*'' 42 FR 41117 (Aug. 15, 1977) (emphasis added). Although the 25- to 30-day period did indeed preclude scheduling the election at an earlier time after the direction of election, this was a calculated tradeoff, because—as the emphasized quote above demonstrates—the Board had concluded that the prompt resolution of representation issues prior to the election would facilitate other interests.

In many respects, this procedural amendment goes hand-in-hand with the amendment permitting litigation of eligibility and inclusion issues at the pre-election hearing and serves the same policy interests.[92] For example, providing a period before the election during which parties can file and the Board can rule on requests for review permits issues to be definitively resolved prior to the election (or at least prior to the counting of the votes), thereby promoting finality and certainty. As previously stated, the mere fact that an election is conducted promptly does not mean that the question of representation has been resolved. When a request for review has been filed, there is no final resolution until the Board rules on the issues

[85] However, the scheduling of any of election under the 2014 amendments would still have to permit sufficient time for the required posting of the Notice of Election, which § 102.67(k) defines as ''at least 3 full working days prior to 12:01 a.m. of the day of the election.'' Further, nonemployer parties are entitled to have the Voter List for 10 days, although the parties entitled to the list may waive the 10-day period to proceed to an election more quickly. See *The Ridgewood Country Club,* 357 NLRB 2247 (2012); *Mod Interiors, Inc.,* 324 NLRB 164 (1997); CHM 11302.1.

[86] The Board further observed that by providing that a request for review of a direction of election could be filed after the election, it was likely even fewer pre-election requests for review would be filed, further reducing the number of cases the 25- to 30-day period would serve. 79 FR 74410.

[87] Prior to the 2014 amendments, § 102.67(b) provided that when a pending request for review had not been ruled upon or had been granted prior to the conduct of the election, ''all ballots shall be impounded and remain unopened pending such decision.'' The 2014 amendments also eliminated this procedure. See 79 FR 74409. As explained in the next section, we are reinstating a modified version of this procedure at § 102.67(c).

[88] The period provided for in 1961 was a 20- to 30-day period, rather than a 25- to 30-day period.

[89] See 79 FR 74405 n.442.

[90] CHM section 11302.1 (2014).

[91] 79 FR 74405 (''The Board likewise categorically rejects the notion that the proposed language, which the final rule adopts, constitutes a sea change from the Board's practice which existed prior to the NPRM.'').

[92] These amendments are, however, severable, and we would adopt each of them independently of the other.

raised by that request for review. Although there may be circumstances where the election results moot the issues raised by a pre-election request for review, there is no way to know beforehand whether this will be the case. Permitting time for the Board to rule on a pre-election request for review could just as well dispose of issues that would *not* be mooted by the election results and would have to be addressed later anyway. Here too, what we have said before applies: The Board should strive to maximize the opportunity for *the election* to provide finality. Permitting the Board a reasonable amount of time, prior to the election, to consider and rule on a request for review as to issues that might otherwise give rise to challenges or objections requiring post-election litigation clearly serves this goal, increasing the likelihood of final agency action—issuance of the appropriate election certification—soon after the tally of ballots.

Reinstating a minimum time period between the direction and conduct of election will also serve uniformity and transparency.[93] Under the 2014 amendments, an election would be scheduled ''for the earliest date practicable,'' an ill-defined term that provides very little guidance. An election could still be scheduled in 25 to 30 days, as under the prior rule, or in less than a week after the direction of election if the nonemployer parties waived the right to have the voter list for 10 days (the only other limitation being the requirement that the employer post the Notice of Election for 3 full working days). § 102.67(k). This is neither a uniform nor transparent standard for the public or agency personnel, and we believe a more consistent and predictable approach to the scheduling of a Board election is preferable by far. The 20-business-day period accordingly promotes uniformity and transparency by notifying parties that in all cases—unless they agree to the contrary—there will be a finite minimum period of time between the direction and conduct of election.

Further, under the 2014 amendments, there was no guidance at all as to when or even whether the Board would rule on a timely filed request for review prior to the election. Now, the 20-business day minimum period from direction to election restores the opportunity for the Board to address and resolve issues that involve a question of representation as well as eligibility and inclusion issues.

If a party does file a pre-election request for review over issues of eligibility, inclusion, and/or unit scope, the 20-business-day period will also promote fair and accurate voting. As previously discussed, when the Board is able to rule on a request for review raising these types of issues prior to the election, it provides the voters with more precise information regarding the contours of the unit in which they are voting. Similarly, as discussed above with respect to § 102.64(a), the inclusions in and exclusions from a unit may be crucial campaign issues that may influence how employees intend to vote. Again, the 2014 amendments acknowledged that voters have an interest in ''knowing precisely who will be in the unit should they choose to be represented.'' 79 FR 74384. Giving parties a pre-election period during which to file a request for review that the Board has a realistic opportunity to resolve clearly promotes that interest.

We acknowledge here that the 20-business-day period will detract from how promptly elections were—or at least could be—conducted under the 2014 amendments. Such tradeoffs are unavoidable when balancing competing interests. We note that in most instances the 20-business-day period will add only about two weeks to the typical period between the direction and conduct of election. Under the 2014 amendments, the employer had 2 business days after the direction of election to supply the required Voter List, after which the nonemployer parties were entitled to 10 calendar days to use the list prior to the election. Thus, absent a waiver of the 10-day period, parties could expect an election to be conducted no sooner than two weeks after the direction. Under the final rule, the 20-business day period (absent intervening federal holidays) translates to about four weeks.[94] In our view, providing for an additional two weeks to facilitate the Board's ruling on a request for review is a worthwhile tradeoff, given the potential gains to fair and accurate voting, finality and certainty, and uniformity and transparency such a ruling will occasion. Further, the 20-business-day period will also promote efficiency because—as discussed at length at several points above—deciding issues prior to the election (in the absence of agreement by the parties to defer those issues to post-election resolution) will contribute to a more efficient resolution of the question of representation by clearing away issues that may otherwise linger on after the election.

We also reject the 2014 amendments' other grounds for eliminating the 25- to 30-day period. First, such a period is not in tension with section 3(b) of the Act. Section 3(b) simply states that ''such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' The 20-business-day period is not a stay. It simply sets a uniform minimum period of time during which a pre-election request for review may be filed and ruled on by the Board prior to an election. As explained below, the election will go forward as scheduled even if the Board has not ruled on a pending request for review by the election date (unless the Board specifically orders a stay of the election). Second, as discussed already with respect to § 102.64(a), the 2014 amendments' claim that parties used the threat of unnecessary litigation and the delay that came with it to gain leverage in negotiating election agreements was unsupported by objective evidence. The retention of the Statement of Position requirement and the authority of the regional director and hearing officer to require offers of proof should minimize the potential for abuse. Third, the fact that requests for review are filed in a small percentage of cases, and granted in only a fraction of those cases, does not explain why a pre-election period for requesting review should not be permitted in directed election cases, particularly when such a procedure may to lead to faster resolution of issues that *are* raised in a request for review and in doing so enhance the possibility of finality in election results without the need for post-election litigation. Fourth, although it may well be true that the Board frequently failed to rule on pre-election requests for review prior to the conduct of elections before the 2014 amendments, this says more about the historical shortcomings of the Board itself than it does about the desirability of a procedure providing the greater possibility of pre-election resolution.

In conclusion, while we find that reinstatement of a pre-election period for the resolution of issues that are timely raised by requests for review is desirable for the policy reasons we have stated, we emphasize that the 20-business-day period is likely to have a limited practical effect on the conduct of elections. The period applies only to

[93] The dissent faults us for discussing other interests served by the 20-business-day period despite the fact the regulatory text refers only to permitting the Board to rule on a request for review. The purpose of the 20-business-day period is indeed to permit the Board to rule on a request for review, should one be timely filed during that period. But that period also happens to serve others interests, and there is nothing irregular in discussing them here.

[94] Due to the fact that the final rule retains the ''earliest date practicable'' language, it is foreseeable that elections will be scheduled as soon as possible after the 20-business-day period has elapsed.

the historically small number of cases in which the parties cannot reach an election agreement, and even then the parties remain free to waive the 20-business-day period if they so desire.[95]

In sum, the 25- to 30-day period eliminated by the 2014 amendments, and its purpose of giving the Board the opportunity to rule on pre-election requests for review, served a variety of important interests that outweighed the significance of the extra time required to accommodate that purpose and these interests. Accordingly, we are reinstituting a similar period, but will now instead provide that unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election.

C. Pre-Election Requests for Review and Impoundment of Ballots

Prior to the 2014 amendments, the Board's rules provided that a request for review of a decision and direction of election could be filed with the Board within 14 days after the service of the direction of election. The regional director would schedule and conduct the election, but § 102.67(b) (2013) provided that ''if a pending request for review ha[d] not been ruled upon or ha[d] been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.''

The 2014 amendments eliminated this impoundment provision and amended § 102.67(c) to read that, if a request for review is filed:

> such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the Regional Director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the Regional Director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

In justifying the removal of the impoundment provision, the 2014 amendments stated that doing so codified the approach purportedly set forth in section 3(b) of the Act, which states that stays will not take place ''unless specifically ordered by the Board.'' 79 FR 74409. The amendments observed that nothing in the Act itself provides for impoundment, and accordingly argued that the removal of this mechanism ''is consistent with the purpose of Section 3(b) to prevent delays in the Board's processing from impacting regional Section 9 proceedings.'' 79 FR 74409. In addition, the 2014 amendments stated that, although removing the impoundment procedure could result in unnecessary rerun elections, parties still remained free (under § 102.67(j)) to request impoundment in a particular case, ballots of those employees permitted to vote subject to challenge would still be segregated and impounded, and the possibility of reruns was minimized in any event because the Board rarely reverses the regional director. 79 FR 74409.

As indicated, the 2014 amendments did not eliminate automatic impoundment in all circumstances. The ballots of individuals permitted to vote subject to challenge—whether by the agreement of the parties or at the direction of the regional director—were still segregated and impounded. When such ballots proved determinative of the election outcome, the eligibility of the challenged voters would be resolved by the regional director, but even then the ballots could remain impounded. As provided in GC Memo 15–06, ''Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015,'' following a regional director's decision ordering ballots to be opened and counted, the region ''should not open and count until the time for filing a request for review has passed and no request was filed or the Board has ruled on the request for review'' in order ''[t]o help protect ballots secrecy.'' *Id.* at 33.

As discussed above, the final rule retains the option in the 2014 amendments for a party to wait to file a request for review of a decision and direction of election until after an election has been conducted. A significant inducement for exercising this option is that the results of the election may moot the arguments an aggrieved party would otherwise raise, thereby eliminating the need to file a request for review. See 79 FR 74408–74409. Even so, we have decided to reinstate the pre-2014 impoundment procedure in limited form. Accordingly, the final rule amends § 102.67(c) to provide that, if a pre-election request for review is filed within 10 days of the direction of election and remains unresolved when the election is conducted, ''ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision. A party retains the right to file a request for review of a decision and direction of election more than 10 business days after that decision issues, but the pendency of such a request for review shall not require impoundment of the ballots.'' [96]

As these modifications indicate, automatic impoundment will be strictly limited to situations in which the request for review is filed within 10 business days after the decision and direction of election. In this regard, the final rule also modifies § 102.67(i)(3) to provide that no extensions of time will be granted to circumvent the impoundment provisions in § 102.67(c). Thus, any party that files a request for review of a decision and direction of election more than 10 business days after the issuance of the decision will be precluded from securing automatic impoundment.[97]

As discussed in the previous section, having a period between the direction and conduct of election during which the Board has the opportunity to rule on

[95] We agree with the statement in the preamble to the 2014 amendments that implementing a 20-business-day period only in cases where a request for review is actually filed would be impractical (as the election details typically set forth in the direction of election would necessarily be contingent on whether a request was filed) and would invite gamesmanship in the form of parties filing frivolous requests for review solely to delay the election. See 79 FR 74410. For these reasons, as well as for the sake of uniformity and transparency, we think that the only way to guarantee the benefits of the 20-business-day period is to provide for it in all contested cases, absent waiver by the parties. We note that even absent waiver, we have—in keeping with the pre-2014 language—provided that the regional director will *normally* not schedule an election before the 20th business day after the date of the direction of election. Accordingly, we are not altering any procedures or precedent pursuant to which an election can be held on a faster timeline. For example, the Board historically permits regional directors to schedule elections earlier than would ordinarily be the case in order to preserve the voting eligibility of economic strikers. See, *e.g., Northshore Fabricators & Erectors, Inc.,* 230 NLRB 346 (1977); *Kingsport Press,* 146 NLRB 1111, 1112 fn. 4 (1964). Similarly, nothing in the final rule disturbs the Board's historic practice with respect to expedited elections conducted pursuant to section 8(b)(7). See also § 102.73 *et seq.*

[96] In keeping with these changes, the final rule also amends § 102.67(h) to state that ''[t]he grant of a request for review shall not, *outside of the provision for impoundment set forth in paragraph (c) of this section,* stay the Regional Director's action unless otherwise ordered by the Board'' (emphasis added).

[97] A party that files a request for review of a decision and direction of election more than 10 business days after the issuance of the decision will still be able to request impoundment pursuant to § 102.67(j). Relief pursuant to that provision, however, is only granted upon a clear showing that it is necessary under the particular circumstances of the case, and this standard is ''not routinely met'' and such requests are ''very rarely granted.'' 79 FR 74409.

any request for review of the decision and direction of election promotes finality and certainty, fair and accurate voting, transparency and uniformity, ballot secrecy, and even (in certain respects) efficiency. The advantages of the 20-business-day waiting period are largely undercut if the ballots are counted and the tally of ballots issues before the Board rules on the request for review. But even apart from that consideration, providing for impoundment where a request for review is filed within 10 business days of the decision and direction of election will also promote each of these interests.

First, providing for automatic impoundment in these limited circumstances promotes finality and certainty. In this regard, providing that all ballots will remain impounded pending the Board's ruling on a timely-filed request for review ensures that the issues raised in the request for review are resolved prior to the counting of votes. As a result, when the tally of ballots issues, it will not be subject to revision or invalidation based on the Board's ruling on a pending request for review. Although the tally of ballots may of course still be altered or nullified based on post-election litigation, at least the pre-election issues will have been cleared away. As we have stated before with respect to the litigation and resolution of eligibility and inclusion issues, as well as the 20-business-day period from direction to election, although it is possible that the results of an election will render issues moot, there is no way to know in advance if this will be the case, and where the issues are *not* mooted by the election results, the parties will have greater finality and certainty if these matters are resolved prior to the vote count.

More specifically, impoundment serves the interest of finality and certainty in situations where the issues raised in a pre-election request for review result in challenges. Resolving such issues by ruling on the request for review before the ballots are counted may remove the basis for pending challenges, thereby permitting the challenges to be summarily overruled and for those ballots to be commingled and counted with the other ballots. By the same token, the Board's ruling on the request for review may agree with the basis for the challenges, allowing them to be summarily sustained. In either case, as we have explained elsewhere, challenges inherently detract from certainty and finality; resolving the basis for them before the count moves forward accordingly promotes these interests.[98] More than that, ruling on the request for review prior to the count may also remove the basis for post-election objections, such as where the request for review raises issues of supervisory status. This may in turn facilitate the certification of the results of the election.

Providing for impoundment in these narrow circumstances also promotes transparency and uniformity. With respect to transparency, impoundment of the ballots will reduce the possibility of confusion where results are announced prior to the Board's ruling on a pending request for review, but then the Board's subsequent ruling nullifies or alters the results. As for uniformity, this interest is advanced because (1) impoundment assures the parties that in all cases where a pre-election request for review is filed within 10 business days of the direction of election, the count will not happen until after that request has been ruled on (as opposed to the situation under the 2014 amendments, where the Board might never rule on the request); (2) impoundment avoids situations where sometimes some votes are not counted based on the guidance contained in GC Memo 15–06 concerning secrecy; and (3) on a related note, impoundment guarantees that, for the most part, all votes will be counted at the same time.

Restoring impoundment also promotes ballot secrecy. As noted above, even under the 2014 amendments the General Counsel recognized that in at least some situations impoundment remained necessary to protect ballot secrecy. This is naturally true of those situations where individual challenges might, if isolated from the count, compromise secrecy, or where all affected voters have voted the same way, but it is also true as a general matter. In many instances, a party will file a request for review of a decision and direction of election challenging the very propriety of the election, or of the unit. Although proceeding to a ballot count in these situations may not compromise ballot secrecy with respect to individuals, issuance of a tally of ballots nevertheless reveals the sentiments of the employees in the petitioned-for unit. Yet the Board's ruling on a request for review challenging the propriety of the election or the unit may nullify the results of the election while still revealing the sentiments of the employees.

As with the institution of the 20-business-day period from direction to election, we acknowledge that providing for automatic impoundment in these limited circumstances may come at the cost of some promptness and efficiency, but we think the advantages outlined above outweigh the costs, particularly as the final rule also promotes efficiency in certain other respects. For instance, by limiting automatic impoundment to requests for review that are filed within 10 business days of the direction of election, the final rule requires an aggrieved party to promptly decide which request for review option they will exercise: File a pre-election request for review and receive impoundment, or wait until after the election to see if a request for review is even necessary in the first place. In addition, for the reasons already discussed above with respect to certainty and finality, the final rule promotes efficiency by resolving pre-election issues before the commencement of post-election proceedings. As a result, the need to litigate challenges or even objections may be eliminated, whereas counting the ballots may spur post-election litigation that ultimately proves unnecessary based on the Board's resolution of a pending request for review. Further, keeping ballots impounded pending resolution of a pre-election request for review avoids situations where ineligible ballots do get counted, only to be nullified, and will also avoid situations where the Board's ruling on the request for review requires a rerun election because challenged ballots were opened and commingled with the valid ballots.

For largely the same reasons that we disagree with the rationale in the 2014 amendments' reasoning for eliminating the 25- to 30-day pre-election waiting period, we also disagree with the 2014 amendments' criticisms of impoundment. Providing the 10-business-day period for filing a pre-election request for review, and for automatic impoundment when such a request is filed but not yet ruled on when the election is held, is not in actual tension with § 3(b), because impounding the ballots is not a ''stay'' of the regional director's action. The election will go forward as directed; impoundment only postpones the count to ensure the count comports with the Board's ruling on the pending request for review. We also place little weight on the fact that the Board rarely reverses findings in a regional director's decision and direction of election. That may be

[98] Even where such challenges may not have proven dispositive, resolving them before the count will clarify the contours of the bargaining unit, which will promote greater certainty and finality by removing any need for the parties to bargain over these employees or resort to unit clarification proceedings if the tally of ballots results in certifying a union.

an accurate description of the Board's experience in this area, but it is not a particularly compelling reason for seeking to avoid the complications that follow in the small number of cases where the Board *does* reverse a regional director's decision and direction of election. In addition, any delay that may be attributed to the impoundment procedure is based not on the impoundment procedure itself, but on the inability of the Board to rule on the request for review prior to the election. In our view, this should have been motivation for the Board to endeavor to rule on requests for review more swiftly, rather than a reason to eliminate the impoundment procedure.

We reiterate that, as with the 20-business-day period from direction to election, the automatic impoundment procedure will only apply in the small number of cases where parties are not able to conclude an election agreement, and even then will only apply in those cases where a party exercises the option to file a request for review within 10 business days of the issuance of the decision and direction of election. Accordingly, we think that while the reinstated impoundment provision is an important option in representation case procedure, it will only be activated in a very small number of cases.[99]

D. Oppositions and Replies

The Board has long provided that, when a request for review has been filed, any party may file with the Board a statement in opposition thereto, although the Board need not await such an opposition to rule on the request for review. The right to file an opposition is currently located at § 102.67(f). From time to time, after an opposition has been filed, the party seeking review will attempt to file a reply to the opposition. The Board's general practice has been to reject such replies on the basis that the Board's representation procedures do not provide for them; further, the Board's experience is that the reply briefs parties attempt to file in representation cases are generally unhelpful, as in most cases they simply reiterate points already made in the initial request for review. At times, however, the Board has accepted reply briefs, such as when a reply contains previously unavailable information that may be useful in assisting the Board's consideration of the request for review. We conclude that it will serve the interests of uniformity and transparency for the Board to codify its practice with respect to reply briefs. The final rule accordingly revises § 102.67(f) to provide that ''[n]o reply to the opposition may be filed except upon special leave of the Board.''

The same limitation should apply when the Board grants a request for review. The parties are permitted to file briefs on review, and from time to time one of the parties may seek to file a reply brief. The Board typically rejects such replies, but has accepted them on occasion. We accordingly conclude that it will also serve the interests of uniformity and transparency to codify this practice. The final rule thus revises § 102.67(h) to provide that ''[n]o reply briefs may be filed except upon special leave of the Board.'' The alignment of § 102.67(f) and (h) also promotes overall uniformity in the Board's procedures for handling reply briefs in representation cases.

E. Prohibition of Piecemeal Requests for Review

As previously discussed, the 2014 amendments modified § 102.67(c) to provide that a party may file a request for review of a regional director's action

> at any time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

Further, the 2014 amendments revised § 102.67(i)(1) to allow a party to ''combine a request for review of the regional director's decision and direction of election with a request for review of the regional director's post-election decision, if the party has not previously filed a request for review of the pre-election decision.'' The same paragraph also states that ''[r]epetitive requests will not be considered.''

As already discussed, these modifications were designed to give parties flexibility in deciding when to file a request for review, particularly requests for review of a decision and direction of election (which were formerly required to be filed within 14 days of the issuance of the decision and direction). At the same time, the 2014 amendments to § 102.67(i)(1) aimed to ensure there was still an orderly process for raising issues via a request for review. Thus, ''repetitive requests'' were not permitted under the 2014 amendments, nor could a party seek review of a decision and direction of election while also seeking review of a post-election decision if that party had already filed a request for review of the pre-election decision.

These modifications unintentionally left open an important question: Whether a party that has requested review of part of a regional director's action can subsequently file a request for review of a different part of that same action. In *Yale University,* Case 01–RC–183014, et al., the regional director issued a decision and direction of election on January 25, 2017, finding that (1) nine separate petitioned-for bargaining units were appropriate and (2) the petitioned-for graduate students in each of these units were ''employees'' within the meaning of the Act. The employer filed a request for review arguing the merits of the unit determination issue, and also registered its disagreement with the employee status issue, stating that it intended to request review of that issue, if necessary, following the regional director's final disposition of the case. The elections went forward,[100] and the petitioning union prevailed in six of the nine elections. Subsequently, the employer filed a letter with the Board requesting an extension of time to file a request for review addressing the employee status issue. The petitioner opposed this motion, contending that the Board should not permit such a piecemeal approach to seeking review of a single action by a regional director.

The petitioner in *Yale University* ultimately withdrew the relevant petitions before the Board had the opportunity to address the propriety of the employer's decision to sever its arguments concerning the direction of election into separate requests for review,[101] but it is foreseeable that this

[99] With respect to the filing of pre-election requests for review, and the impoundment that follows such a timely filed request, the dissent charges that it is internally inconsistent for the Board to strive to maximize the opportunity for an election to provide finality (on the one hand) while also permitting parties to wait until after the election (and vote count) and then file a request for review that may still cover pre-election issues (on the other). This again misunderstands our project of balancing the various competing interests. We have outlined the many advantages to resolving pre-election issues prior to the ballot count, but just as we have recognized there are also many advantages to permitting parties to agree to defer eligibility and inclusion issues, we also recognize that there are advantages to permitting parties to wait to file requests for review until after the election has been conducted. Thus, despite the clear advantages to resolving pre-election issues prior to the ballot count, we also will not stand in the way of a party that decides to wait to see the results of the election before filing a request for review embracing pre-election issues.

[100] The employer also requested expedited consideration of this issue, as well as a stay of the election. The Board denied the requests for expedited consideration and a stay of the election, see 365 NLRB No. 90 (2016), but did not pass on the merits of the request for review.

[101] The Board accordingly informed the employer, by letter dated February 13, 2018, that its first request for review and its request for an extension

Continued

circumstance will arise again.[102] The final rule therefore modifies § 102.67(i)(1) to expressly prohibit such a piecemeal approach by stating: ''A party may not, however, file more than one request for review of a particular action or decision by the Regional Director.'' Taking this approach will better serve the interests of efficiency, fairness, finality, and certainty. Although in some circumstances it may possibly promote efficiency to permit a party to raise different issues pertaining to a single action at different times, we are confident that in the vast majority of circumstances permitting such a piecemeal approach will be far less efficient than requiring a party to raise all issues it may have with a single action in a single request for review. In addition, requiring a party to confine its arguments concerning a single action to a single request for review permits the Board to efficiently allocate its resources to a case's resolution by guaranteeing that the propriety of a single regional action cannot be raised to the Board on more than one occasion. It also promotes fairness to any parties in opposition—and provides guidance to all parties—by permitting them to focus on the issues that have been raised with respect to a regional director's action without having to consider whether other issues may be subsequently raised.[103]

F. Requests To Deviate From Formatting Requirements and for Extensions

For many years, § 102.67(i)(1) stated that if a party sought to exceed the 50-page limit to a request for review, the party was required to file a motion setting forth the reasons therefore filed ''not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due.'' By contrast, § 102.67(i)(3), which governed extensions of time to file requests for review, oppositions, or other briefs permitted by § 102.67, simply stated that a request for an extension of time must be filed with the Board (or the regional director) and served on the other parties.

Section 102.2(c) also provides a procedure for filing a request for an extension of time that applies ''[e]xcept as otherwise provided,'' and requires a party to file an extension of time ''no later than the date on which the document is due,'' and further provides that a request for an extension of time ''filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance.'' Section 102.2(c) further states that a request for an extension must be in writing and served simultaneously on the other parties, encourages the party requesting the extension to seek agreement from other parties for the extension (and states that the request should indicate the others parties' positions), and states that an opposition to a request for an extension should be filed as soon as possible following receipt of the request. In practice, the Board has applied § 102.2(c) by permissively granting requests for extensions of time filed more than 3 days in advance of the due date, but has been restrictive in granting requests filed within 3 days of the due date in keeping with the ''grounded in circumstances not reasonably foreseeable in advance'' standard.

It is unclear why § 102.67(i)(3) differs in its provisions for extensions of time, and we see no reason why the process for requesting extensions of time in representation cases should differ from that set forth in § 102.2(c). The final rule accordingly amends § 102.67(i)(3) to state that a request for an extension ''shall be filed *pursuant to § 102.2(c)*'' (emphasis added). This change promotes uniformity among the Board's procedures, and also promotes transparency insofar as § 102.67(i)(3) (2013) did not provide any timeline or required showing for filing an extension. Cross-referencing § 102.2(c) will put parties on notice that the Board will be permissive in granting extensions of time unless they are filed within 3 days of the due date,[104] in which case it falls to the requesting party to make the requisite showing.

We are also of the view that the process set forth in § 102.2(c), which by its terms is applicable to extensions of time, can also be workably applied to any requests to exceed the request for review page limit. The final rule therefore amends § 102.67(i)(1) to state that a request to exceed the page limit may be ''filed *pursuant to the procedures set forth in § 102.2(c)*'' (emphasis added). This change also promotes uniformity in the Board's procedures, and further promotes transparency by signaling that requests to exceed the page limit will be permissively granted unless filed within with 3 days of the due date.

G. Notice of Election

The 2014 amendments modified the already-existing notice posting requirement in Section 102.67(k) by adding the requirement that the employer also ''distribute [the Notice of Election] electronically if the employer customarily communicates with employees in the unit electronically.'' The final rule amends this provision to state that the Notice of Election need only be electronically distributed ''to all eligible voters (including individuals permitted to vote subject to challenge) if the employer customarily communicates with employees in the unit electronically.'' As with the Notice of Petition for Election, discussed above in relation to § 102.63, this appears to have been the intent of the 2014 amendments, given their statement that ''if the employer customarily communicates with employees in the unit by emailing them messages, it will need to email *them* the Notice of Election.'' 79 FR 74405–74406 (emphasis added). The final rule accordingly clarifies a minor imprecision in the wording of the 2014 amendments. This minor clarification provides parties with better guidance and reduces the possibility of wasteful litigation over the proper interpretation of this provision.

H. Voter List

The final rule makes the same change with respect to the timing of the list of eligible voters that the employer must file after a direction of election as described above in relation to § 102.62. In addition to the reasons stated there for giving the employer with 5 business days, as opposed to the former provision of 2 business days, to file and serve the list, the provision for the 20-business day period between the direction and conduct of election discussed above means that the extra time for providing the voter list will not, in directed elections, contribute to any delay in the scheduling or conduct of election.

of time to file the second request for review were moot and would not be ruled on by the Board.

[102] Indeed, the employer in *Reed College,* Case No. 19–RC–213177, similarly filed two requests for review seeking review of different aspects of the Regional Director's decision and direction of election, and the petitioner opposed the second on the grounds that the decision and direction had already been affirmed by the Board's denial of the first request for review. As in *Yale University,* the petitioner in *Reed College* disclaimed interest and withdrew its petition before the Board ruled on the second request for review, and the Board accordingly advised the employer that the second request for review was moot and would not be ruled on by the Board.

[103] The Board's experience in *Yale University* and *Reed College* indicates that, at a minimum, the employers' decision to seek review of the decisions and directions of election in two separate filings caused significant confusion on the part of the petitioners.

[104] The exception, of course, being a request for an extension attempting to circumvent the impoundment provisions set forth in § 102.67(c), as discussed above.

102.69 Election Procedure; Tally of Ballots; Objections; Certification by the Regional Director; Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Regional Director Decisions on Objections and Challenges

The final rule makes a series of changes to § 102.69. Several of these are consistent with changes that have already been discussed. In this regard, the final rule modifies § 102.69(f) and (g) to conform to the modifications made to § 102.67(i), which are discussed above. The final rule also subdivides § 102.69(a) into 8 subparagraphs so that the various procedures and requirements contained therein are easier to cite and locate. And consistent with the global changes discussed earlier, the final rule updates several cross-references and rephrases all time periods in terms of business days.

The final rule also makes three significant procedural modifications to § 102.69. First, the final rule modifies § 102.69(a) to provide additional instruction and guidance with respect to the selection of the parties' election observers. Second, the final rule modifies § 102.69(c)(1)(iii) to provide parties with the right to file post-hearing briefs with the hearing officer following post-election hearings. Third, the final rule modifies § 102.69(b) and (c) to eliminate the practice of regional directors issuing certifications while a request for review remains pending (or the time for filing one has not yet elapsed). In conjunction with this change, the final rule also adds § 102.69(h), which defines ''final disposition'' and thus provides clearer guidance as to the last point at which a party can file a request for review.

A. Election Observers

The practice of permitting the parties to be represented by observers at Board-conducted elections dates to the earliest days of the Act,[105] and since 1946 the Board's rules and regulations have provided that ''[a]ny party may be represented by observers of [its] own selection, subject to such limitations as the Regional Director may prescribe.'' See 11 FR 177A–602, 612 (Sep. 11, 1946) (amending § 203.55); § 102.69(a).[106] But the Act itself does not make any provision for observers to be present at an election, and the Board has long made clear that there is no such right, instead characterizing the practice as a ''courtesy'' or ''privilege.'' *Jat Transportation Corp.,* 131 NLRB 122, 126 (1961); *Simplot Fertilizer Co.,* 107 NLRB 1211, 1221 (1954); *Union Switch & Signal Co.,* 76 NLRB 205, 211 (1948).[107] Indeed, one of the first Board cases to deal with observers held that it was not an abuse of discretion to refuse to permit a party from having a representative present at the balloting. See *Marlin-Rockwell Corp.,* 7 NLRB 836, 838 (1938).

In addition, although the Board's rules make open-ended provision for a party to select observers ''of its own selection, subject to such limitations as the Regional Director may prescribe,'' the Board's decisional law has imposed a series of more specific limitations on the selection of observers. Thus, the Board has long held that employers may not use individuals ''closely identified with management'' as observers. See, *e.g., First Student, Inc.,* 355 NLRB 410, 410 (2010); *Sunward Materials,* 304 NLRB 780, 780 (1991); *Peabody Engineering Co.,* 95 NLRB 952, 953 (1951). Unions are likewise barred from using supervisors as their observers. See *Family Service Agency,* 331 NLRB 850 (2000). And unions cannot use nonemployee union officials as observers in decertification elections. See *Butera Finer Foods, Inc.,* 334 NLRB 43 (2001).

Conversely, the Board has encouraged parties to use nonsupervisory employees as observers. For example, the Board has commented that ''it is standard procedure to permit the parties to use *employees,* and unusual to permit *outside* observers.'' *Jat Transportation,* 131 NLRB at 126 (emphasis in original). Likewise, the Board has stated that ''nonemployees may be used as observers only if 'reasonable under the circumstances.' '' *Butera Finer Foods,* 334 NLRB at 43 (quoting *Kelley & Hueber,* 309 NLRB 578, 579 fn. 7 (1992)). Former editions of the Board's Casehandling Manual went further, stating that ''[o]bservers *must* be nonsupervisory employees of the employer, unless a written agreement of the parties provides otherwise.'' CHM section 11310 (1989) (emphasis added). And even now, the current Casehandling Manual states that ''[o]bservers *should* be employees of the employer, unless a party's use of an observer who is not a current employee of the employer is reasonable under the circumstances.'' CHM section 11310.2 (2017) (emphasis added).[108]

In keeping with these principles, the Board historically found that the refusal to permit nonemployees to serve as observers was neither an abuse of discretion nor otherwise objectionable. See, *e.g., Jat Transportation,* 131 NLRB at 126; *Tri-Cities Broadcasting Co.,* 74 NLRB 1107, 1110 (1947). But the Board has also been unwilling to sustain objections based on the use of nonemployees as observers absent misconduct by such observers or prejudice to the other parties. See, *e.g., Embassy Suites Hotel, Inc.,* 313 NLRB 302 (1993) (use of former employee not objectionable); *San Francisco Bakery Employers Ass'n,* 121 NLRB 1204, 1206 (1958) (use of nonemployee not objectionable).

In a similar vein, Casehandling Manual section 11310.2 currently provides that nonemployee union officials should not serve as observers,[109] but the Board has nevertheless excused that very practice. Thus, in *E–Z Davies Chevrolet,* 161 NLRB 1380, 1382–1383 (1966), enfd. 395 F.2d 191, 193 (9th Cir. 1968), the Board reasoned that because it was unobjectionable to use a nonemployee observer in *San Francisco Bakery Employers,* and because it is generally unobjectionable to use employee union officials as observers, it was also unobjectionable for a nonemployee union official to serve as an observer (absent any showing of misconduct by the observer or prejudice to the other party). Likewise, in *NLRB* v. *Black Bull Carting Inc.,* 29 F.3d 44 (2d Cir. 1994), the court, citing cases including the 9th

[105] See, *e.g., Paragon Rubber Co.,* 7 NLRB 965 (1938) (sustaining objection based on use of ''high supervisory official'' as observer).

[106] The 2014 amendments left this provision undisturbed, aside from clarifying that it applies ''[w]hen the election is conducted manually.''

[107] See also *Southern S.S. Co.* v. *NLRB,* 120 F.2d 505, 507 (3d Cir. 1941) (''The [A]ct confers no right upon the employer to have its representatives present and it is obvious that their presence is not essential to a fair election.''), *rev'd on other grounds,* 316 U.S. 31 (1942).

[108] The Board has generally been permissive regarding the meaning of ''employee'' in these circumstances. See, *e.g., Correctional Health Care Solutions,* 303 NLRB 835, 835 fn. 1 (1991) (individual whose employment status was ''a matter of some dispute at the time of the election . . . was entitled to act as an observer''); *Kellwood Co.,* 299 NLRB 1026, 1029 (1990) (''[d]ischarged employees are entitled to be considered employees of the employer for the purpose of serving as observers at an election pending resolution of [unfair labor practice charges] against the employer''); *Thomas Electronics, Inc.,* 109 NLRB 1141 (1954) (''inasmuch as Lapinsky's eligibility to vote as a laid-off employee had not been determined at the time of the election, she was entitled to be considered an employee for the purpose of acting as an observer at the time of the election'').

[109] The Board permits union officials who are also employees to serve as observers, however. See, *e.g., United States Gypsum Co.,* 81 NLRB 197 (1949) (''[a] fellow employee of the eligible voters does not possess the disciplinary power of a supervisor, or the ability to intimidate employees, merely because he holds office in the union that is seeking to be elected as the employees' bargaining representative''). See also *Soerens Motor Co.,* 106 NLRB 1388 (1953) (''[t]he Employer concedes that the presence of a union official as an observer at an election is proper, if such official is otherwise qualified'').

Circuit's enforcement of *E–Z Davies,* held that the Board had not abused its discretion in refusing to set aside an election based on the petitioner's use of a nonemployee union official.

Additional considerations may arise in cases involving an election agreement. Typically, in accord with the template Board agents use in such situations, election agreements contain a provision that ''[e]ach party may station an equal number of authorized, nonsupervisory-employee observers'' at the polling place(s). And yet the Board has, since 1993, consistently held that a union's use of nonemployee observers *is not* a material breach of the election agreement, while also holding that if—by preventing a union from using nonemployee observers—a union is left with fewer observers than the employer, such disparity *is* a material breach. See *Browning-Ferris Industries of California, Inc.,* 327 NLRB 704 (1999) (setting aside election where union had no observers at election because Board agent refused to permit union to use former employees as observers); *Longwood Security Services, Inc.,* 364 NLRB No. 50 (2016) (setting election aside where union had no observer because Board agent refused to permit union to use one of its officials as observer).[110] The Board has rationalized this approach by explaining that the policy favoring the use of current employees as observers, and thus the language in the Board's election agreement template, is ''aimed primarily at preventing intimidation that might take place should the *employer* choose to have *supervisory* employees present.'' *Embassy Suites,* 313 NLRB at 302 (quoting *New England Lumber,* 646 F.2d at 3 (emphasis in original)). By contrast, because observers ''help to assure the parties and the employees that the election is being conducted fairly,'' an imbalance in the number of observers introduces '' 'a significant risk that an imbalance in the number of observers, with the acquiescence of the Board agent, could create an impression of predominance on the part of [one party] and partiality on the part of the Board.' '' *Browning-Ferris Industries,* 327 NLRB at 704 (1999) (quoting *Summa Corp.* v. *NLRB,* 625 F.2d 293, 295 (9th Cir. 1980)).[111]

As the foregoing account illustrates, the current state of Board law concerning the selection of observers is riddled with inconsistencies. Thus, despite the fact that the use of observers is a courtesy and privilege, rather than a right, the Board has set elections aside based on the absence of observers. Even though the Board's own guidance documents and precedent set forth an explicit preference—sometimes even phrased in mandatory language—that parties use employees as observers, the Board has nevertheless permitted (and in some cases gone out of its way to allow) certain parties to use nonemployee observers. Contrary to guidance strongly disfavoring the use of nonemployee union officials, the Board has nevertheless countenanced the use of just such persons as observers, even in cases where the election was conducted pursuant to an election agreement explicitly stating that observers should be nonsupervisory employees.[112] In addition, intentionally or not, the Board decisions discussed above repeatedly permit a union's use of a nonemployee agent, contrary to the Board's stated preference against nonemployees generally and nonemployee agents in specific. And Board precedent in this area has not been entirely rigorous in distinguishing between directed elections and those conducted pursuant to election agreements.[113]

In light of this undesirable state of affairs, and in order to better promote transparency, uniformity, and efficiency with respect to the selection of observers, the final rule amends the provision permitting election observers, now located at § 102.69(a)(5), to read:

> When the election is conducted manually, any party may be represented by observers of its own selection; whenever possible, a party shall select a current member of the voting unit as its observer, and when no such individual is available, a party should select a current nonsupervisory employee as its observer. Selection of observers is also subject to such limitations as the Regional Director may prescribe.

These modifications promote transparency by qualifying the statement that ''any party may be represented by observers of its own selection'' in order to codify the Board's historical preference that parties use nonsupervisory employees as their observers. Prior to the final rule, this preference could only be found in a handful of older Board decisions and the Casehandling Manual. Moreover, these modifications promote transparency because further qualifying the ''observers of its own selection'' phrase better reflects the fact that the use of observers is a privilege, not a right, and that as such a party does not have an unqualified right to use whatever observer it wishes. In addition, by explicitly setting forth this preference in the rules and regulations, we make clear that the preference is applicable to ''any party,'' rather than only to employers, as certain decisions discussed above might otherwise suggest.

On that note, these revisions also promote uniformity. Aside from the fact that the final rule makes the Board's preference for nonsupervisory employee observers explicit, and expressly applies that preference to all parties, the final rule sets forth a clearer framework under which the parties will now select their observers. First, the parties will be expected to use current members of the voting unit ''whenever possible''; second, in the event this is not possible, a party ''should'' select a current nonsupervisory employee. We

[110] See also *New England Lumber Division of Diamond International Corp.* v. *NLRB,* 646 F.2d 1, 3 (1st Cir. 1981) (holding Board did not abuse discretion by permitting nonemployee union official to serve as observer notwithstanding typical stipulation language).

[111] The Board has accordingly held that, at least with respect to elections agreements, when a party proposes using an individual alleged to be ineligible, the proper procedure is not for the Board agent to prohibit the use of that individual as an observer, but instead to inform the parties that the use of an ineligible observer may result in the election being set aside later, and then to proceed to conduct the election with the parties' chose observers. See *Longwood Security Services,* 364 NLRB No. 50, slip op. at 1; *Browning Ferris Industries,* 327 NLRB at 705.

[112] The Board has excused this tension by explaining that the ''nonsupervisory-employee'' language does not specify that the observer must be an employee of the employer. See, *e.g., Longwood Security Services,* 364 NLRB No. 50, slip op. at 1; *Browning Ferris Industries,* 327 NLRB at 704. At least one court has stated that whether this language ''is sufficiently ambiguous . . . to warrant the Board's interpretation is uncertain'' (even while accepting the Board's interpretation of the language as specifically aimed at preventing an employer from using supervisory employees as its supervisors). See *New England Lumber,* 646 F.2d at 3. For our part, we think it much more plausible that parties confronted with this ''nonsupervisory employee'' language will assume that it refers to employees *of the employer.*

[113] For example, *Embassy Suites,* in which the election took place pursuant to a stipulated election agreement, see 313 NLRB at 302 fn. 1, makes no mention of the ''material breach'' precedent and relies primarily on *San Francisco Bakery Employer,* 121 NLRB at 1204, and *E–Z Davies,* 161 NLRB at 1381, which both involved directed elections. Similarly, *Longwood Security,* 364 NLRB No. 50, which does employ the ''material breach'' analysis, relies in part on the Ninth Circuit's decision enforcing *E–Z Davies,* as well as *Black Bull Carting,* 29 F.3d at 44, another directed election case. *Longwood* also freely cites cases involving the use of *employee* union officials to support its conclusion that the use of *nonemployee* union officials is permissible. See *Shoreline Enterprises of America,* 114 NLRB 716, 718–719 (1955). More than that, both the Board—see *Embassy Suites,* 313 NLRB at 303—and the courts—see *Black Bull Carting,* 29 F.3d at 46—have cited *Standby One Associates,* 274 NLRB 952 (1985), to support the use of nonemployee representatives as observers in Board elections, but that case involved the limited question of whether to extend comity to a certification issued by the New York State Labor Relations Board (the Board holding that the use of a nonemployee union official as an observer in the state proceeding was not a sufficient basis to refuse to extend comity).

acknowledge that the first step of this framework is a new innovation, but we think it is readily justified. Given the indisputably important role that observers play in Board elections—representing their principals, challenging voters, generally monitoring the election process, and assisting the Board agent in the conduct of the election [114]—it is highly desirable that the parties' observers be drawn from those persons most interested and invested in the outcome of the election: The members of the voting unit. Of course, due to unit size, employee schedules, and an employer's operational considerations there may be times when it is not possible for a party to select a voting unit employee as its observer. In such circumstances, a party will be able to fall back on the Board's historical preference and select some other current nonsupervisory employee of the employer to serve as an observer.[115] Recognizing that there may be highly unusual situations where it is also impossible to select some other nonsupervisory employee, we have only phrased this second step in terms of ''should.'' But to be clear, the intent of § 102.69(a)(5) is—absent agreement of the parties to the contrary—to limit observers to current nonsupervisory employees of the employer at issue.[116]

By limiting the selection of observers to nonsupervisory employees of the employer, the final rule also promotes efficiency by eliminating wasteful litigation. As our earlier discussion of observer cases makes abundantly clear, litigation over the identity of observers is a recurrent issue before the Board. It should strike the reader as peculiar that this has been the case even though the parties have no right to have observers present. Although we have no quarrel with the general policy of permitting observers, we also agree with the Third Circuit's long-ago observation that ''it is obvious'' that the presence of observers ''is not essential to a fair election.'' *Southern S.S. Co.,* 120 F.2d at 506. That being the case, the Board's history of dedicating time, energy, and ink to sorting out disputes over the identity of particular observers is at the very least a questionable policy choice. In order to avoid this type of litigation, we expect that in directed elections Board agents will, going forward, simply apply § 102.69(a)(5) and disallow parties from using nonemployee observers.[117] We likewise expect that in directed elections, regional directors will summarily overrule objections contending that a party was wrongly prevented from using a person who is not a current employee of the employer as its observer (as well as objections contending that a party impermissibly used a nonsupervisory employee of the employer as its observer).[118]

As for cases involving elections conducted pursuant to election agreements, the final rule does not disturb the overall approach to alleged breaches (*i.e.,* determining whether the breach was material), but we have decided to adopt a new interpretation of the standard ''nonsupervisory-employee'' language. Consistent with the fact that the parties should reasonably understand any reference to ''employer'' in an election agreement to refer to the employer who is a party to the agreement, we will no longer construe ''nonsupervisory-employee'' to include employees who are employed by some other employer. Accordingly, whenever an election agreement provides that the parties ''may station an equal number of authorized, nonsupervisory-employee observers'' at the polling place(s), we will henceforth treat any use of an observer not employed by the signatory employer as a material breach of the election agreement. Further, because the use of a nonemployee observer constitutes a material breach of the election agreement, we will expect Board agents to disallow the use of such observers, rather than following the current procedure of permitting the use of such observers while advising the parties that this may result in the election being set aside. Moreover, if, as a result of noncompliance with the ''nonsupervisory-employee'' provision, a party ends up having fewer observers than the others, that party will be estopped from contending that the disparity constitutes a material breach of the agreement, insofar as the disparity will have resulted from the party's own material breach of the election agreement. See, *e.g., Republic Electronics,* 266 NLRB 852, 853 (1983) (''a party to an election is ordinarily estopped from profiting from its own misconduct'').[119]

These changes represent only a limited departure from the Board's prior practice. The Board has long preferred that parties use nonsupervisory employees as observers; we are merely curtailing the use of nonemployee observers. We do not expect that the observer issue will arise all that often, given that (1) an employer should have little issue finding a nonsupervisory employee to act as its observer; (2) a union that is either an incumbent or has already produced a sufficient showing of interest should also have little issue finding a nonsupervisory employees to act as its observer; and (3) as always, the parties remain free to stipulate to other arrangements for observers, to the extent they are willing to do so. Finally, we conclude by emphasizing that we are not setting forth any new grounds on which parties can object to the selection of observers. To the contrary, the goal in modifying § 102.69(a)(5) is to reduce (or ideally even eliminate) litigation surrounding a party's choice of observer. The parties now have clear guidance in the rules and regulations that they should be choosing nonsupervisory employees, and we have made clear here that Board agents will be empowered to police the choice of observers prior to the conduct of the election. As a result, there should be fewer grounds on which to object in the first instance, and those objections that are filed should be easily disposed of.

B. Final Dispositions and Stays of Certifications

Prior to the 2014 amendments, regional directors issued certifications of results (including certifications of representative where appropriate) in limited circumstances, generally where no objections were filed to an election (or to a revised tally of ballots) and where challenges were not determinative. See § 102.69(b), (h) (2013); CHM section 11472 (2014). In most stipulated election cases where objections were filed or challenges were determinative, the Board would issue the certification; so too in directed election cases, unless the regional director chose to resolve challenges/objections via supplemental decision. See § 102.69(c)(3) (2013); CHM sections 11472.2, 11472.3 (2014).

As already described above, the 2014 amendments modified § 102.67(c) to provide that a request for review could

[114] See Casehandling Manual section 11310.3.

[115] We will continue to broadly define ''employee'' consistent with prior precedent. See n.108, supra. The dissent's contention that we are overruling precedent permitting the use of potential discriminatees as observers is therefore meritless.

[116] To the extent any previous Board decisions can be read to the contrary, we overrule them.

[117] In those unusual situations where it is truly not possible for a party to use a nonsupervisory employee, a Board agent will determine whether the use of a proposed nonemployee observer is ''reasonable under the circumstances,'' consistent with past precedent. *Kelley & Hueber,* 309 NLRB at 579 n.7. We emphasize, however, that it will be the extremely rare case in which this inquiry will be warranted.

[118] As noted above, this expectation incorporates the Board's longstanding approach to broadly defining ''employee'' in this context.

[119] To the extent that they are inconsistent with the principles set forth above, we overrule cases such as *Browning Ferris Industries,* 327 NLRB 704, and *Longwood Security,* 364 NLRB No. 50.

be filed ''at any time following the action until 14 days after a final disposition of the proceeding by the regional director,'' thereby removing the prior requirement that a request for review of a decision and direction of election be filed before the election, as well as the requirement that the Board rule on such request prior to the ballots being counted. The 2014 amendments also thoroughly overhauled the procedure for post-election appeals by providing, in § 102.69(c)(2), that appeals of post-election determinations by the regional director could only be made to the Board pursuant to the request for review procedure set forth in § 102.67(c). Further, the 2014 amendments provided that regional directors would issue post-election certifications, including certifications of representative, where appropriate, in most cases, irrespective of whether a request for review remained pending or could still be timely filed. See § 102.69(b); (c)(1)(i) and (iii), (c)(2). Additionally, although the 2014 amendments did not explicitly define ''final disposition,'' GC Memo 15–06 effectively defined the phrase to include the regional director's issuance of a certification of representative. Id. at 27.[120]

Taken together, these changes created a process under which regional directors were effectively required to issue certifications after the vast majority of elections, including where a request for review of a decision and direction of election was still pending before the Board and where a request for review could still be timely filed. Indeed, by defining the issuance of the certification as a ''final action,'' the 2014 amendments guaranteed that parties could wait to file requests for review until after certifications had already issued, and our experience reflects that parties have frequently done so.

The 2014 amendments accordingly instituted a shift from a procedural model in which regional directors infrequently issued certifications when an appeal to the Board was pending or still possible to a model where regional directors almost always issue certifications despite the pendency or possibility of an appeal. This represented a significant change in the Board's practice and procedure, yet the 2014 amendments offered little explanation for it. At one point, the 2014 amendments state that they are ''intended to carry out the Board's statutory mandate to establish fair and efficient procedures for,'' inter alia, ''certifying the results of secret-ballots elections,'' and at another point stated that ''a question cannot be answered until the election results are certified.'' 79 FR 74326, 74411. Elsewhere, the 2014 amendments observed that the practice of issuing certifications notwithstanding the possibility a party may still file a request for review was permitted in limited situations under the prior rules. 79 FR 74414 (citing CHM section 11742.3 (2014)). Finally, the 2014 amendments also justified the practice by noting that certifications were always subject to challenge in technical 8(a)(5) proceedings in the courts. 79 FR 74414. Further, in a case decided after the 2014 amendments took effect, a Board majority defended the practice of regional directors issuing certifications by stating that ''Sec. 3(b) of the National Labor Relations Act expressly authorizes, and [§] 102.69 of the final rule expressly requires, that regional directors issue certifications even though a party may file a request for review of that (or any other) regional director action.'' *Republic Silver State Disposal, Inc., d/b/a Republic Services of Southern Nevada,* 365 NLRB No. 145, slip op. at 1 n.1 (2017).

From these remarks, it would seem the 2014 amendments viewed the regional directors' issuance of certifications even when requests for review were pending or could still be filed with the Board as promoting efficiency, finality, and uniformity. As explained below, we take a different view. In fact, we think that the issuance of certifications prior to a final Board ruling on any request for review that has already been, or may yet be, filed has been a source of unnecessary confusion and needless litigation. To the extent that the regional directors' issuance of certifications serves any relevant interests, those interests are substantially outweighed by other interests that will be served by instituting a uniform practice under which regional directors will not issue certification where a request for review is pending or may yet be filed. Accordingly, the final rule modifies relevant provisions of § 102.69 to provide that regional directors will only issue certifications after the time for filing a request for review has passed without any being filed. If any request for review is filed, the certification will issue only after the Board's ruling on that request. These changes will better serve the interests of transparency, finality, efficiency, and uniformity.

First, the final rule advances transparency by eliminating confusion and complications occasioned by certifications that issue prior to the Board's ruling on a request for review. The issuance of a certification of representative triggers legal obligations on the parts of the employer and the certified representative.[121] Both parties become obligated to bargain with each other in good faith;[122] the union must meet its duty of fair representation;[123] and the employer must refrain from making unilateral changes to mandatory subjects of bargaining.[124] But if a certification of representative issues before the Board has ruled on any request for review, such ruling by the Board may require that the certification be modified or vacated. Likewise, the issuance of a certification of results may, depending on the circumstances, dissolve a previous bargaining obligation and/or require a union (or unions) to refrain from filing a petition to represent the unit for a period of time.[125] But here too, if the certification issues before the Board has ruled on any request for review, such ruling by the Board may reestablish the bargaining relationship and/or remove the bar to petitioning to represent the union; indeed, the Board's ruling may even establish a new bargaining relationship.

The drawbacks of requiring regional directors to issue certifications that the Board may alter or vacate are accordingly clear: A certification of representative may create the appearance of rights and obligations on the part of unions and employees that may yet be nullified, and the issuance of a certification of results may create the appearance that a legal obligation does not exist that may yet be imposed. Thus, any case in which the Board grants review and reverses a regional director has the potential to, at minimum, cause confusion among employees and the parties. Further, the issuance of a certification despite the (potential) pendency of a request for review places an employer in the difficult position of either (1) refusing to bargain while awaiting the Board's ruling on a request for review, or (2) devoting resources to bargaining while

[120] The Board's practice since the 2015 implementation of the 2014 amendments has reflected the same view of ''final disposition.''

[121] Cf. *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services,* 365 NLRB No. 84, slip op. at 2 (2017) (''Under well-established law, an employer is not relieved of its obligation to bargain with a certified representative of its employees pending Board consideration of a request for review'' (citing *Benchmark Industries,* 262 NLRB 247, 248 (1982), enfd. mem. 724 F.2d 974 (5th Cir. 1984))).

[122] See section 8(a)(5), (b)(3), (d).

[123] See section 8(b)(1)(A).

[124] See, *e.g., NLRB* v. *Katz,* 369 U.S. 736 (1962); *Raytheon Network Centric Systems,* 365 NLRB No. 161 (2017).

[125] See section 9(c)(3).

awaiting the Board's ruling.[126] In the former scenario, the employer risks committing unfair labor practices should the Board uphold the certification; in the latter scenario, the employer risks wasting resources should the Board invalidate the bargaining obligation. In all of these situations, the parties and employees are left to wonder whether the legal rights and obligations that supposedly attach to the certification actually exist.

The complications for employers outlined above will be compounded if an employer refuses to bargain while a request for review is pending, the certified union files unfair labor practice charges based on that refusal, and the regional director finds merit to, and processes, a technical 8(a)(5) refusal-to-bargain charge. The potential result is that both the unfair labor practice charge and the underlying representation case on which it is based end up pending before the Board at the same time. It plainly detracts from transparency for a region (or even the Board) to process unfair labor practice charges that are premised on a certification whose validity is still being challenged before the Board. We acknowledge that this situation is largely hypothetical; although the processing of refusal-to-bargain charges while the underlying certification is still being appealed to the Board is not entirely unheard of,[127] since the 2014 amendments took effect our experience has been that regions generally hold refusal-to-bargain charges in abeyance pending the Board's ruling on a request for review. But this practice also detracts from transparency, insofar as it gives the appearance that regions are delaying vindication of the rights that attach to already-issued certifications.[128]

In short, where a certification issues notwithstanding the (potential) pendency of a request for review that may nullify the certification, the possibility for confusion is greatly amplified, and whatever course the region takes with respect to the filing of unfair labor practice charges premised on the certification detracts from the legal effect of the certification. All of these problems are readily solved by simply requiring regional directors to refrain from issuing certifications until the Board has ruled on any request for review. Given that the Board employed that approach in most cases for over 50 years prior to the 2014 amendments, it is clearly a valid and viable approach.[129]

For the same reasons just discussed, the final rule also better promotes certainty and finality. In addition, with respect to finality, to the extent that the 2014 amendments suggested that the faster issuance of certifications promoted finality, we disagree. In this regard, the 2014 amendments stated that ''a question [of representation] cannot be answered until the election results are certified.'' 79 FR 74411. But the amendments also tacitly acknowledged that the issuance of a certification is not the final word on the matter by commenting that ''a proceeding cannot necessarily be considered closed'' until the time for filing a request for review has passed. 79 FR 74414. Regardless of technical niceties, a certification cannot be considered the ''final'' disposition of a question of representation until either the time for a request for review has passed, or the Board has ruled on any request for review that has been filed. To describe an action of a regional director, who is a Board delegate, as ''final'' when the Board itself may yet vacate or modify that very action robs the word of its ordinary meaning. By contrast, a certification that issues after the time for any request for review has passed, or after the Board has ruled on any pending request for review, will in fact be final for the Board's purposes.[130]

All of the reasons discussed thus far also demonstrate that the final rule serves efficiency, particularly in the form of providing for orderly litigation and resolution of disputes. Given that the Board's ruling on a request for review may nullify a previously-issued certification, waiting to issue any certification until after the Board's ruling is a far more orderly way of proceeding, and we can detect no harm in waiting to issue the certification until that point. As already discussed, regions are, as a practical matter, postponing the processing of unfair labor practice charges premised on certifications of representative until after the Board rules on a request for review, so any delay that might be caused by waiting to issue certifications already exists.

Further, the final rule promotes efficiency insofar as it will eliminate the perceived need or incentive for parties to file requests to stay certifications, or at least the legal effect thereof. Since the 2014 amendments became effective, the Board has processed a steady stream of such requests,[131] but to date has declined to grant any. Given the regional practice, noted above, of holding refusal-to-bargain charges in abeyance pending the Board's ruling on a request for review, it is unclear whether, as a practical matter, any requested stay of certification has been or ever could be truly ''necessary,'' but parties clearly are entitled to file such requests under the 2014 amendments, and have the incentive to do so given the legal rights and obligations that attach to the certification. Postponing the issuance of certifications until after the Board has ruled on any pending request for review removes both the need and incentive to file such requests. Accordingly, the final rule promotes efficiency by eliminating any basis to request stays of certifications, thereby avoiding needless litigation and better conserving the resources of the Board and the parties.

In conclusion, under the final rule regional directors will only issue certifications after the time for filing a request for review has passed without any such request being filed. If any

[126] See *Audio Visual Services,* supra, slip op. at 2 (''By relying on its filing of a request for review in refusing to bargain with the certified Union, the Respondent acted at its peril'' (citing *Allstate Insurance Co.,* 234 NLRB 193, 193 (1978)).

[127] See *Audio Visual Services,* supra, slip op. at 2 and cases cited therein.

[128] The 2014 amendments' comment that most requests for review are ultimately rejected do not alleviate these concerns, which are only indirectly related to the rate at which the Board reverses Regional Directors' determinations. Rather, these concerns are based on the appearance of the Board's inaction with respect to the rights and obligations that attach to certifications.

[129] Although we do not question that the 2014 amendments' approach to issuing certifications was permissible under section 3(b), we do not agree that the 2014 amendments' approach is somehow more consistent with section 3(b). Although section 3(b) states that a request for review ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director,'' it has nothing to say about the time at which a certification should issue vis-à-vis a request for review. Further, nothing in the legislative history of section 3(b) suggests that Congress intended for regional directors to issue certifications prior to the Board's ruling on a request for review.

[130] As noted above, the 2014 amendments apparently justified the premature issuance of certifications by pointing out that a certification still can be challenged before the courts. We acknowledge that a certification may not be given full effect until a circuit court enforces the Board's test-of-certification decision, but this is entirely beside the point in deciding, as a policy matter, when in the course of the Board's representation proceedings a certification should issue.

[131] See *Didlake, Inc.,* 367 NLRB No. 125, slip op. at 1 fn. 2 (2019); *Troutbrook Co. LLC d/b/a Brooklyn 181 Hospitality LLC,* 367 NLRB No. 56 (2019); *Premier Utility Services, LLC,* 363 NLRB No. 159, slip op. at 1 fn. 1 (2016); *St. Luke's Hopsital,* Case 01–RC–230363 (Mar. 20, 2019); *Universal Television Productions,* Case No. 31–RC–226424 (Jan. 30, 2019); *Warner Bros. Television,* Case No. 31–RC–226460 (Jan. 23, 2019); *Centerpoint Energy Houston Electric, LLC,* Case No. 16–RC–229214 (Nov. 28, 2018); *Rhode Island LFG Genco, LLC,* Case No. 01–RC–208704 (Nov. 7, 2018); *Northwestern University,* Case No. 13–RC–177943 (Sep. 27, 2018); *Bronx Lobster Place, LLC,* Case No. 02–RC–191753 (Feb. 2, 2018); *Saint Mary's University,* Case No. 19–RC–173933 (Jun. 27, 2016); *Volkswagen Group of America, Inc.,* Case No. 10–RC–162530 (Apr. 13, 2016).

request for review is filed, the certification will issue only after the Board's ruling on that request.[132] Given that a certification was previously a ''final disposition'' that would trigger the time for filing a request for review, the final rule has added § 102.69(h) to provide the parties with clearer guidance regarding what actions will now trigger the time for filing a request for review with the Board.

C. Posthearing Briefs Following Post-Election Hearings

In overhauling the Board's post-election procedures, the 2014 amendments provided that following the close of a post-election hearing, ''[p]ost-hearing briefs shall be filed only upon special permission of the Hearing Officer and within the time and addressing the subjects permitted by the Hearing Officer.'' This was consistent with the Board's prior practice. See 79 FR 74402, 74417 n.475, 74426; CHM § 11430 (2014); Hearing Officer's Guide at 167.

It is not entirely clear why the Board has historically pursued this course; under the 2014 amendments, at least, it may be partly due to the fact that, unlike with pre-election hearings, there is an additional level of review following post-election hearings.[133] The Board's Casehandling Manual simply states that ''[t]he filing of briefs is generally to be discouraged to the extent that they are unnecessary and interfere with the promptness with which post-election matters should be resolved.'' CHM section 11430. Even so, the Casehandling Manual provides that when such briefs are allowed, the hearing officer can set the time limit for filing them, but that it is assumed that ''no more time than is necessary will be allowed, usually 7 days.'' Id.

The final rule amends § 102.69(c)(1)(iii) to provide for the filing of post-hearing briefs within 5 business days of the close of hearing as a matter of right and further provides that prior to the close of a hearing the hearing officer may, for good cause shown, grant an extension of time not to exceed and additional 10 business days. We have decided that the parties should be permitted to file post-hearing briefs in post-election proceedings for the same reasons we have restored the right to file post-hearing briefs in pre-election proceedings. These reasons are fully discussed above with respect to § 102.66(h), and need not be repeated in detail here; suffice it to say, we think that hearing officers will benefit from post-hearing briefs for the same reasons regional directors will in pre-election proceedings, and the parties will also benefit from the opportunity to better formulate their post-election arguments.[134] Any delay will be minimal and consistent with prior practice, as the 5 business days to file briefs provided by the final rule accords with the 7 calendar days to file briefs set forth in CHM section 11430. To promote uniformity, we have made the same provision for extensions of time set forth in § 102.66(h), but we observe that the hearing officer will be under no obligation to grant an extension absent a showing of good cause, and is under no obligation to wait to begin drafting his or her report until briefs have been filed. Finally, as with post-hearing briefs in pre-election proceedings, the parties will be free to waive the period for filing post-hearing briefs, and hearing officers will be free to encourage the parties to opt for closing oral argument in lieu of filing briefs.[135]

102.71 Dismissal of Petition; Refusal To Proceed With Petition; Requests for Review by the Board of Action of the Regional Director

Section 102.71 sets forth the requirements for filing a request for review of a regional director's administrative dismissal of a petition, as well as a regional director's determination that a petition should be dismissed or held in abeyance due to the pendency of concurrent unresolved unfair labor practice charges. Section 102.71(c) sets forth formatting requirements, which are limited to ''[t]he request shall be printed or otherwise legibly duplicated,'' and provides—without further elaboration—that requests for an extension of time to file the request shall be filed with the Board. In keeping with the changes to §§ 102.67(i) and 102.69(f) and (g), the final rule modifies § 102.71(c) to require that any request for review comply with the formatting requirements of § 102.67(i)(1), and also states that a request for an extension of time shall be filed pursuant to § 102.2(c).

Section 102.71 does not explicitly provide for the filing of an opposition to a request for review filed pursuant to this section, but in practice the Board has accepted oppositions to requests for review filed pursuant to this section. To promote transparency and uniformity, the final rule codifies this practice in § 102.71(d), which, consistent with the changes to §§ 102.67(h), (i), and 102.69(f), (g), specifically provides that a party may file an opposition brief with the Board as a matter of right. The rule also specifies requirements for service and formatting, and requests for extensions of time to file, and requests for extensions of time to file. Finally, the rule also states that the Board may grant or deny a request for review without waiting for an opposition and that no reply to the opposition may be filed except upon special leave of the Board.

V. Response to Dissent

Our colleague dissents to the entirety of our rule revisions, although she specifically discusses only some of those that in her view contribute to unnecessary delay and its corollary, unnecessary litigation.[136] Where appropriate, we have addressed specific arguments in our justification of the particular contested revisions. We have also addressed her argument that the Board should engage in notice and comment rulemaking even though not required to do so under the Administrative Procedure Act exception for procedural rulemaking. Nothing more needs to be said in those respects. Here, we consider only the dissent's overarching contentions that this rulemaking cannot pass muster under the Administrative Procedure Act because the rule revisions made (1) are not supported by empirical evidence drawn from the agency statistics available to us, and (2) as measured by the standards set in the 2014 amendments, they will delay the conduct of an election.

[132] Either the Board will do so when it rules on the request for review, or the regional director will do so following the Board's ruling on the request.

[133] Thus, the hearing officer conducting the post-election hearing issues an initial report; a party aggrieved by the hearing officer's report may file exceptions and an accompanying brief with the regional director, who issues a decision; and a party aggrieved by the regional director's decision may file a request for review with the Board. § 102.69(c)(1)(iii), (2).

[134] Further, given that briefs will ensure that hearing officers fully address the arguments raised therein, providing for post-hearing briefs in post-election proceedings should also help regional directors more swiftly deal with exceptions raised to hearing officers' reports.

[135] Obviously, the right to file a post-hearing brief will attach only where there has been a post-election hearing. Regional directors can, and frequently do, overrule objections without a hearing. See § 102.69(c)(1)(i).

[136] Not surprisingly, the dissent voices no complaint about our retention of numerous procedural changes made in the 2014 amendments, including the vitally important Statement of Position requirement, the reorganization of the process for post-election appeals, the Notice of Petition requirement, electronic filing of petition, simultaneous submission of showing of interest, option of waiting to file a request for review until after an election, electronic distribution of the notice of election, and simultaneous submission of offer of proof in support of objections. Of the revisions we do make today, she expresses no specific opposition to several of them that do not involve the alleged delay that she contests.

Our colleague does not claim, nor could she, that we are not operating within the range of our broad discretionary statutory authority to define the particulars of representation election procedures. Our revisions are clearly permissible under the Act. Instead, her dissent purportedly looks to the same procedural legal standard set by the APA for administrative agency action as we do, but her view of the proper application of that standard in this instance is far off the mark. It is certainly true that the APA requires the setting aside of agency action that is ''arbitrary'' or ''capricious,'' and that an agency must ''examine the relevant data and articulate a satisfactory explanation for its action.'' *State Farm,* supra, 463 U.S. at 43. However, the dissent fundamentally errs in its estimation of what are relevant data in this proceeding and what can be a satisfactory explanation for our action in revising or rescinding certain of the 2014 amendments in this proceeding.

First, the dissent is clearly mistaken to the extent that it implies our rationale for rescinding or modifying the 2014 amendments must be better than the rationale for implementing them. ''The [Administrative Procedure Act] makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.'' *Fox Television Stations,* supra, 556 U.S. at 515. Further, ''the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.'' Id.

We have extensively explained the reasons why we believe the election rule provisions we announce today selectively improve on those made in the 2014 amendments. Further, the new policy we set here does not rest on factual findings that contradict factual findings made by the Board majority in the 2014 amendments. To the contrary, that majority made no significant factual findings relevant to the provisions in the amendments that we address in this rulemaking. It specifically rejected the statistical argument that no rule revisions were needed because the Board was consistently meeting its extant statistical time targets. 79 FR at 74316. The reasons extensively set forth there were based on non-statistical policy choices, and our reasons for revising or rescinding some of the 2014 amendments are similarly based on non-statistical policy choices. That is a permissible approach to rational rulemaking under *State Farm* and *Fox.* See, *e.g., BellSouth Corp.* v. *FCC,* 162 F.3d 1215, 1221 (D.C. Cir. 1999) (''When . . . an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, our role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive''), and *Chamber of Commerce* v. *SEC,* 412 F.3d 133, 142 (D.C. Cir. 2005) (an agency ''need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be 'entitled to conduct . . . a general analysis based on informed conjecture.' '') quoting from *Melcher* v. *FCC,* 134 F.3d 1143, 1158 (D.C. Cir. 1998), and cited with approval in *Chamber of Commerce* v. *NLRB,* supra, 118 F.Supp. 3d at 183.

The Board majority in the 2014 amendments also did not claim that the pre-2014 representation procedures that they modified on policy grounds and that we selectively restore to the same or similar state here, were ''arbitrary'' or ''capricious.'' A different weighing of all relevant factors can lead to a different conclusion as to which is the better procedure for the conduct of representation elections. This brings us to the one factor that our dissenting colleague, in common with the 2014 rulemaking majority, stresses here far more than anything else: ''delay.'' Delay is a relative term, suggesting that an action takes longer than reasonably expected. It does not mean that any action is delayed that could possibly be taken sooner. If that were so, all governmental speed limits should be set aside as arbitrarily delaying drivers from going from Point A to Point B as fast as their vehicles can take them.

It is undisputed that the Act does not specify a maximum time for any stage of a representation proceeding, particularly the time between the filing of a petition and the conduct of an election. The Supreme Court has instructed that ''[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co.,* supra, 329 U.S. at 331. These goals are expressed in the conjunctive, not separately, and consistent with the Act the Supreme Court has deferred to the Board's determination of how best to balance and achieve them. The 2014 rulemaking majority believed that elections could be conducted more speedily without detriment to the goals of doing so accurately and efficiently. Our colleague agrees with the timeline set there and consequently views our extension of that timeline to be unacceptable, arbitrarily-imposed delay. We obviously disagree.

We readily concede that the revisions to the pre-election timeline we make here may result in a return to pre-2015 median times, particularly in contested cases. Unlike the dissent, we do not regard that extension of time as unreasonably delaying the conduct of a fair election in which votes are recorded ''accurately, efficiently, and speedily.'' For reasons that have been extensively explained, we believe that the expedited processes implemented in 2014 at every step of the election process—from petition to hearing, from hearing to regional decision, from decision to election, and from election to final resolution of post-hearing issue—unnecessarily sacrificed prior elements of Board election procedure that better assured a final electoral result that is fundamentally fairer and still provides for the conduct of an election within a reasonable period of time from the filing of a petition. We believe that the representation election procedures we announce today are balanced measures necessary to redress those shortcomings.

VI. Dissenting View of Member McFerran

Member Lauren McFerran, dissenting.

A. Introduction

In 2014, the National Labor Relations Board comprehensively revised its regulations addressing the processing of petitions for representation elections under the National Labor Relations Act.[137] The 2014 rule was the product of a painstaking, three-and-a-half-year process, involving the consideration of tens of thousands of public comments generated over two separate comment periods totaling 141 days, including 4 days of hearings with live questioning by Board Members. The rule was designed to simplify and modernize the Board's representation process, to establish greater transparency and consistency in administration, and to better provide for the fair and

[137] *Representation-Case Procedures,* 79 FR 74308 (Dec. 15, 2014).

expeditious resolution of representation cases.

The implementation of the 2014 rule went smoothly. In the words of the Board's Regional Directors—the agency's own in-house experts charged with administering the representation case process on a day-to-day basis—''[w]hile parties initially voiced great concerns about the 2014 Election Rule, to all the parties' credit, after the initial learning curve, there have been very few difficulties in the adoption of the rules.'' [138] In addition, all available evidence indicates that the 2014 rule has achieved its intended goals. As explained in greater detail below, Board procedures are more transparent, and more meaningful information is more widely available at earlier stages of our proceedings. Across regions, employees' statutory rights are afforded more equal treatment, the timing of hearings is more predictable, and litigation is more efficient and uniform. Parties are more often spared the expense of litigating, and the Board is more often spared the burden of deciding, issues that are not necessary to determine whether a question of representation exists, and which may be mooted by election results. Voters are able to receive election information using modern means of communication rather than door-to-door visits.

And all of this has been accomplished while processing representation cases more expeditiously from petition, to election, to closure. The 2014 rule reduced the median time from petition to election by more than three weeks in cases involving a pre-election hearing, and by two weeks in cases involving an election agreement.[139] And the Agency's 100-day closure rate for representation cases is better than ever. In three of the four full fiscal years since the 2014 rule's implementation, the agency has achieved historic highs of closing 88.8%, 89.9% and 90.7% of its representation cases within 100 days of a petition's filing—besting any year's performance preceding the 2014 rule.[140] The 2014 rule has thus proved remarkably successful in doing exactly what it was intended to do, while promoting the goals of the National Labor Relations Act.

Certainly, the 2014 rule was the subject of employer criticism at the time of its enactment. While much of this criticism centered on misguided claims that the revisions were designed to put a thumb on the scale in favor of unions winning more representation elections,[141] that has not proven to be the case in practice.[142] The 2014 rule was also the subject of numerous legal challenges alleging that it went beyond the Board's statutory authority, or was inconsistent with the requirements of the Administrative Procedure Act (APA) or the Constitution. The courts rejected these claims, and the validity of the rule has uniformly been upheld.[143]

But the success of the 2014 rule was apparently too good to last. On September 25, 2017—roughly two and a half years after the 2014 rule's effective date—the composition of the Board's majority shifted. Less than three months later, a new Board majority announced a Request for Information (RFI) seeking ''to evaluate whether the [2014] Rule should be [1] [r]etained without change, [2] retained with modifications, or [3] rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule's adoption.'' [144] The perfunctory request did not identify any specific problems with the rule's implementation or negative effects that justified its revisiting. Nor did the then-majority (including two members of the current majority) make any effort to take even a preliminary look at the agency's own wealth of data and records about the rule's effect and operation before seeking to reopen its provisions. The RFI simply noted that the composition of the Board had changed,[145] observed that the rule had been in effect for more than two years,[146] and then conducted the functional equivalent of a straw poll on the rule's popularity.[147]

The RFI was, in short, a fishing expedition—a transparent effort to manufacture an evidentiary basis for revisiting the rule. The effort, predictably, was unsuccessful. The public's responses provided no empirical basis for amending the 2014 rule, and likewise articulated no statutory arguments that were not previously rejected by the Board and the courts. Indeed, the current majority now expressly *disclaims* that it is relying on anything obtained through that process in generating or justifying its amendments to that rule. A reasonable observer might have thought that the 2014 rule was safe after the RFI, but that is not the case.

Fast forward two years, and the majority now issues a direct final rule substantially rewriting the 2014 rule *without any notice to, or comment from, the public about the specific changes being made.* The primary effect of these changes will be to dramatically increase the timetable for conducting

[138] See Regional Director Committee's Response (RDs' Response) to 2017 Request for Information concerning the 2014 Rule p.4.

[139] See *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election* (showing a median of 37 days to process an election agreement case from petition to election in pre-rule FYs 2013–2014, as compared to only 22 or 23 days in post-rule FYs 2016–2017, and 59 days for contested case in FYs 2013–2014, as compared to only 35 or 36 days in post-rule FYs 2016–2017).

[140] See Performance Accountability Reports, FYs 2013–2017, *www.nlrb.gov/reports-guidance/reports* (indicating the following representation case 100-day closure rates: FY 2019–90.7%, FY 2018–88.8%, FY 2017–89.9%, FY 2016–87.6%, FY 2014–88.1%; FY 2013–87.4%; FY 2012–84.5%; FY 2011–84.7%; FY 2010–86.3%; FY 2009–84.4%).

[141] See, *e.g.,* 79 FR 74326 fn.83.

[142] See NLRB, *Annual Review of Revised R-Case Rules,* available at *https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules* (showing, in comparison between pre- and post-rule elections, no substantial change in party win-rates).

[143] See *Associated Builders & Contractors of Texas, Inc.* v. *NLRB,* 826 F.3d 215, 229 (5th Cir. 2015) (*ABC of Texas* v. *NLRB*) (noting that the Board ''conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions''), affg. No. 1–15–CV–026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of U.S.* v. *NLRB,* 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (*Chamber* v. *NLRB*) (''[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the [2014] Final Rule, and it directly addressed the commenters' many concerns[.] [P]laintiffs have not shown that the Final Rule contravenes either the NLRA or the Constitution, or that the Final Rule is arbitrary and capricious or an abuse of Board discretion''). See also *UPS Ground Freight* v. *NLRB,* 921 F.3d 251 255–257 (D.C. Cir. 2019) (*UPS* v. *NLRB*) (rejecting a challenge to the application of various 2014 rule provisions including scheduling of the pre-election hearing, the timing of the employer's statement of position and the pre-election deferral of the voting eligibility of two employees in disputed classifications).

[144] *Representation-Case Procedures,* 82 FR 58783 (Dec. 14, 2017).

[145] This certainly is not a ''good reason'' for revisiting a past administrative action, particularly in the context of rulemaking. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29 (1983). Even in the context of adjudication, the Board has long and consistently rejected motions to reconsider its decisions based on a change in the composition of the Board. See, *e.g., Brown & Root Power & Mfg.,* 2014 WL 4302554, *3 (Aug. 29, 2014); *Visiting Nurse Health System, Inc.,* 338 NLRB 1074 (2003); *Wagner Iron Works,* 108 NLRB 1236, 1239 (1954).

[146] As I mentioned in my dissent at the time, even the most ardent advocates of regulatory review would not support such a short regulatory lookback period. Indeed, Section 610 of the Regulatory Flexibility Act, for example, contemplates that agencies may take up to 10 years before they may adequately assess a rule's effectiveness. See 5 U.S.C. 610 (providing that agencies shall develop plan ''for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule'').

[147] The majority also summarily cited congressional votes, hearings, and proposed (but never-passed) legislation as reasons to issue the RFI. As I pointed out at the time, though such congressional actions might raise concern over a rule's actual effectiveness in other circumstances, here—where criticism was leveled in the absence of any meaningful experience under the rule—they seem to signify little more than partisan opposition to the rule.

representation elections by imposing unnecessary delay at each stage of the representation case process. *Under the new rule, the minimum total number of days from the filing of an election petition to certification of a union in a case that is contested both pre- and post-election will rise from 23 days (under the 2014 rule) to 78 days.* The majority provides no reasoned explanation for proceeding in such utter disregard of public input, or for codifying such a substantial delay in conducting elections.

On the procedural front, even assuming notice and comment was not legally required, there is no question that the *better* choice would be to seek the input of workers, unions, employers, legal practitioners, Board regional staff, and other affected stakeholders about any specific proposed changes before rushing them to completion. We owe the public the opportunity to weigh in on something so central to our core mission as an agency.[148]

Unfortunately, the substance of the majority's analysis is even more problematic. The current majority is in a unique and superior position as compared to the 2014 Board in evaluating whether to keep changes made in 2014, to revert to pre-2014 procedures, or to do something else entirely: The Board now has a rich source of data from which to determine whether any of the predicted problems with the 2014 rule actually materialized, and whether there is an objective basis to prefer one set of procedures to another. However, continuing the irresponsible pattern of the RFI, my colleagues appear to have conducted *no analysis* of the more than four years of available agency data and records about the actual, real-world impact of the 2014 rule. In justifying the changes enacted today, the majority does not cite even anecdotal evidence that significant problems with the operation or implementation of the 2014 rule have actually emerged. Instead, my colleagues base their criticism of the 2014 rule largely on their own unsupported suppositions, and those of previous dissenting Board members. Incredibly, the majority does not expressly invoke its own experience administering the 2014 rule to justify its amendments.

While the majority repeats (over and over again) that these changes are necessary to promote ''fairness, accuracy, transparency, uniformity, efficiency, and finality,'' repeating this mantra does not make it so. The majority cites no data whatsoever substantiating its conclusion that the 2014 rule has *impaired* those interests. Nor does it cite any evidence supporting its conclusions that the changes it makes today will *promote* these goals—despite the fact that my colleagues characterize several of these changes as a functional reversion to practice prior to 2014, which would presumably allow them to draw on a wealth of historical agency experience.

It is one thing for an agency to change its mind based on a reasoned analysis of available evidence—or even a reinterpretation of the data it previously relied upon,[149] but it is quite another for an agency to refuse to examine *any of the relevant information readily available within the agency itself* to test the hypotheses underlying its new approach. This is particularly irrational in the context of a direct final rule that will not even provide members of the public with the opportunity to assist the agency in evaluating the wisdom of specific changes. The majority's complete and indefensible failure to investigate the agency's own data and experience on these issues renders the rule enacted today arbitrary and capricious.

This flawed analysis, unsurprisingly, produces an equally flawed result that undermines the fundamental goals of our statute. Section 9 of the National Labor Relations Act is animated by the principle that representation cases should be resolved quickly and fairly. As the Supreme Court has recognized, ''the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' [150]

Recognizing the importance of timely elections to the fundamental goals of the Act, ''every time Congress has amended laws governing representation cases, it has reaffirmed the importance of speed,'' because ''[t]his is essential both to the effectuation of [NLRA] rights of employees, and to the preservation of labor peace.'' [151] In keeping with this fundamental goal, since the NLRA was enacted, the Board has revised its representation case procedures multiple times, and the Board's General Counsel has continually revised representation case time targets *downward* (not upward) to resolve questions concerning representation more fairly, expeditiously and efficiently.[152]

With this rule, my colleagues claim the dubious distinction of becoming the first Board in the agency's 84-year history to intentionally codify substantial delay in the representation case process, to the detriment of the mission of our Agency.[153] Because I

[148] Although Federal agencies are not required to engage in notice and comment rulemaking before promulgating, amending, or repealing ''rules of agency organization, procedure, or practice'' (5 U.S.C. 553(b)(A)), nothing prevents an agency from voluntarily using notice and comment rulemaking. Indeed, the Administrative Conference of the United States has recommended that Federal agencies use that process even for rules that fall within the so-called ''procedure or practice'' exception ''except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.'' Administrative Conference of the United States (ACUS), Recommendation 92–1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements* (June 18, 1992).

The majority offers no reasoned explanation for disregarding ACUS's recommendation. The majority cannot convincingly claim that the costs of providing the public with notice of, and an opportunity to comment on, the specific amendments at issue today outweigh the benefits of having public input and information on those specific changes. The majority's decision to disregard ACUS' recommendation suggests that the majority believes that the responses to the 2017 RFI were not helpful in evaluating the *2014 rule provisions,* and therefore engaging in notice and comment about *these amendments* would not be particularly helpful. But that would make no sense: The 2017 RFI did not provide the public with notice of any of the specific amendments the majority adopts today, and thus it is hardly surprising that the responses to the 2017 RFI did not provide illumination about these amendments.

Finally, it merits notice that the majority signals that they may be addressing in a future rulemaking the contents of the voter list provisions contained in very same 2014 rule that it amends today. It goes without saying that the majority would have to engage in notice and comment rulemaking to amend or repeal the substantive voter list provisions of the 2014 rule. Thus, the majority could have easily provided the public with notice of, and the opportunity to comment on, the majority's desire to make the specific changes at issue today in the very same notice of proposed rulemaking—just as the 2014 Board engaged in notice and comment rulemaking before adopting each and every one of the 2014 rule provisions. It is difficult to discern why the majority would opt to do two separate rulemakings rather than use the time and resources available to do a single rulemaking on a longer timetable that would allow for notice and comment.

[149] See, *e.g., Nat Assn. of Home Builders* v. *EPA,* 682 F.3d 1032 (D.C. Cir. 2012).

[150] *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 331 (1946). Indeed, Congress deliberately exempted Section 9 proceedings from the APA's provisions governing formal adjudications, *see* 5 U.S.C. 554(a)(6), because of ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' S. Comm. on the Judiciary, 79th Cong., Comparative Print on Revision of S. 7, at 7 (Comm. Print 1945). Because of this need for expedition, Congress also deferred judicial review of representation decisions unless and until the Board enters an unfair labor practice order based on those decisions. See *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 477–79 (1964).

[151] 79 FR 74316.

[152] *Id.* at 74310, 74316–74317.

[153] The majority is wrong to claim that this rule will merely result in a return to pre-2015 timeframes for contested cases. The reality is that the processing of representation cases will be even

Continued

cannot support this arbitrary exercise, or the unjustified burden it will place on workers seeking to exercise their fundamental workplace rights, I dissent.

My dissenting views are laid out in two separate analyses—Section B explains in summary fashion why the majority's rule violates the Administrative Procedure Act, while Section C includes a detailed discussion of the substance of the majority's particular amendments and why these changes are not the product of reasoned decisionmaking.[154]

B. The Majority's Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act

It is hard to see how the majority's rule could survive judicial review under the Administrative Procedure Act, given its glaring defects. The majority's rule is arbitrary and capricious—a textbook example of how administrative agencies should *not* proceed. The rule makes radical changes to the Board's 2014 rule without any factual basis. Simply put, there is no administrative record here supporting the rule. Indeed, the majority seems to have made a determined effort to *avoid* making factual findings related to the 2014 rule. It has (1) disclaimed any reliance on public submissions made in response to the Board's 2017 Request for Information concerning the implementation of the 2014 rule; (2) inexplicably made no attempt to collect, examine, and evaluate the Board's own records and data involving representation cases under the 2014 rule; and (3) dispensed with notice-and comment rulemaking, which would have provided some basis to evaluate the 2014 rule. But that is not all.

The majority's rule is arbitrary, too, in deliberately sacrificing the undeniable benefits of the 2014 rule—including dramatic reductions in unnecessary delay in the representation-case process—for purely speculative gains serving other policy goals that are (at best) secondary under the National Labor Relations Act. There can be no dispute that the 2014 rule reduced delay—the evidence proves it—and that this rule will, by design, *increase* delay by building it into the process at multiple points. There is no evidence at all, of course, that this increased delay will serve any legitimate statutory purpose. This action is not reasoned decision-making leading to a permissible change in Board policy, but rather the reflexive rejection of the 2014 rule, predetermined when the current Board majority was formed.

This rule must be set aside under the APA as ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'' [155] As the Supreme Court has explained, under the ''arbitrary and capricious'' standard, an agency must:

> examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, supra, 463 U.S. at 43 (internal citations omitted).

The ''arbitrary and capricious'' standard simply cannot be satisfied here, given the complete lack of any factual basis for the majority's rule. In addition, the majority's decision to discard the demonstrated benefits of the 2014 rule—such as reducing unnecessary delay in representation cases, a prime statutory objective—in favor of alleged process improvements that are purely speculative also fails the ''arbitrary and capricious'' test.

1. The Majority Has Arbitrarily Failed To Examine the Board's Actual Experience Under the 2014 Rule and Arbitrarily Failed To Rely on a Factual Basis for Its New Rule

In the Supreme Court's words, the ''APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy.' '' [156] Here, the majority's rule contradicts factual findings that underlay the Board's prior policy (as reflected in the 2014 rule), but the majority's rule does not rest upon any genuine factual findings at all.[157] The majority has disclaimed any reliance on public submissions made in response to the Board's 2017 Request for Information concerning the implementation of the 2014 rule, and it inexplicably has made no attempt to collect, examine, and evaluate the Board's own records and data involving representation cases under the 2014 rule.[158]

The Supreme Court has observed that in reviewing agency rules under the APA, the federal courts ''insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.' '' [159] The majority has arbitrarily chosen *not* to ''examine the relevant data'' (which is easily available to it) and so it cannot possibly ''articulate a satisfactory explanation'' for this rule, which is not ''a new policy created on a blank slate,'' but rather a departure from the 2014 rule that has been in effect for nearly 5 years.

That rule can only be rationally evaluated on the basis of the Board's actual experience during that period, and the majority cannot simply refuse to examine that information.[160] The question here is not whether, *in 2014,* the Board permissibly could have made different choices in deciding whether and how to improve the representation-case process, but instead whether *today* the choices made by the Board in 2014 have been vindicated or refuted by experience. The majority, however, deliberately avoids addressing that question and thus ''has failed to consider an important aspect of the

slower than before the 2014 rule. For example, under the majority's scheme, pre-election hearings will open no sooner than 20 days from the petition, yet in FYs 2011–2013, pre-election hearings were opening in a median of 13 days. See *infra* fn.182.

[154] The latter portion of the dissent incorporates passages, often verbatim, from the 2014 rule because the best evidence of the 2014 Board's reasoning for adopting that rule is contained in its preamble.

[155] 5 U.S.C. 706. See, *e.g., Citizens to Preserve Overton Park, Inc. et al.* v. *Volpe,* 401 U.S. 402, 413–414 (1971).

[156] *Perez* v. *Mortgage Bankers Assn.,* 135 S.Ct. 1199, 1209 (2015), quoting *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

[157] The majority argues that in 2014, the Board ''made no significant factual findings relevant to the provisions that [are] address[ed] in this rulemaking.'' But aside from the fact that the 2014 Board made multiple factual findings concerning pre-rule practice in the 2014 rule, it is beyond question that the implementation of the 2014 rule, over a period of more than four years, has created a new set of facts: The positive, real-world consequences of the 2014 rule that the Board sought to achieve (and effectively predicted). Those new facts are precisely what this rule contradicts, without justification.

[158] Even if the majority was free not to engage in notice-and-comment rulemaking, a *consequence* of that choice—given the majority's failure to rely on RFI submissions or to address the Board's own records and data—is that the Board has no factual basis for this rule. The majority, in other words, has assumed the risk of forgoing notice and comment, against the recommendation of the Administrative Conference. See ACUS Recommendation 92–1, supra.

[159] *Fox Television Stations,* supra, 556 U.S. at 513 (emphasis added), quoting *State Farm,* 463 U.S. at 43.

[160] See *Gas Appliance Mfrs. Assn.* v. *Department of Energy,* 998 F.2d 1041, 1047 (D.C. Cir. 1993) (''An important, easily testable hypothesis should not remain untested.''); *Natural Resources Defense Council, Inc.* v. *Herrington,* 768 F.2d 1355, 1391 (D.C. Cir. 1985) (agency ''may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties.'')

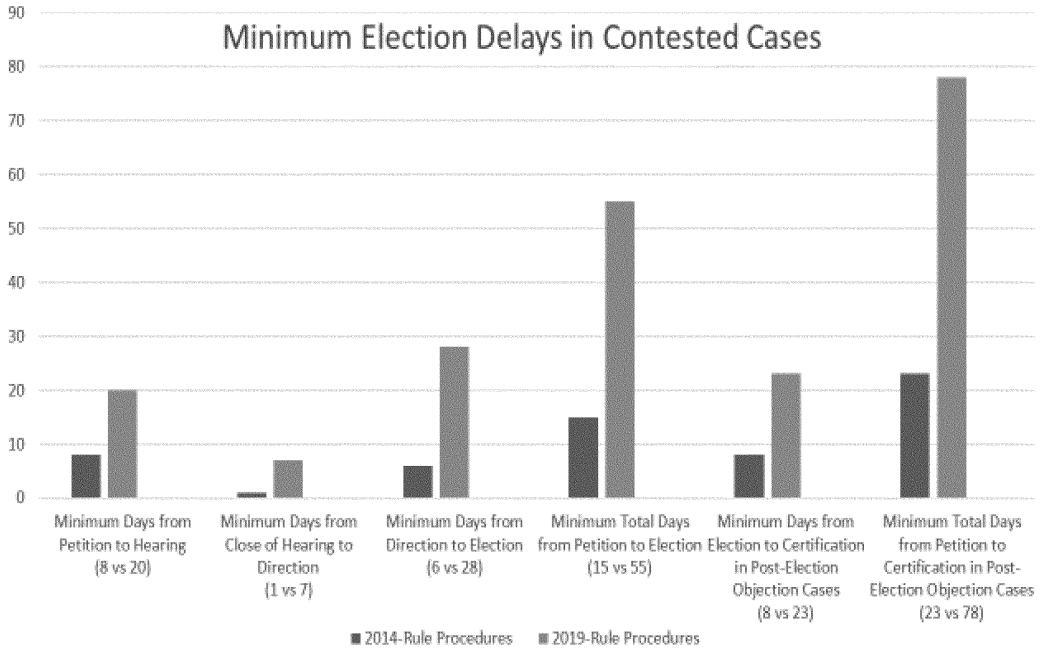
problem.'' [161] As Supreme Court precedent makes clear, when '' '[t]here are no findings and no analysis . . . to justify the choice made' '' by an agency's rule, the agency has acted arbitrarily and capriciously.[162] That is the case here.

2. The Majority Has Arbitrarily Chosen To Significantly Increase Delay in the Board's Representation Process for Unsupported and Unjustified Reasons

The lack of any factual basis for the majority's rule is glaringly apparent—and unacceptable under the Administrative Procedure Act. Equally arbitrary, in turn, is the majority's deliberate decision to *increase* delay in the Board's representation process, in the name of other considerations that are both unsupported and unjustified, given the Act's overriding policy goals.

The majority's amendments impose unnecessary delay at each stage of the representation case process: (1) Between the filing of the petition and the opening of the pre-election hearing; (2) between the opening of the pre-election hearing and the issuance of a decision and direction of election; (3) between the decision and direction of election and the actual election; and (4) between the election and the certification of results. My analysis shows that the majority's rule will cause elections to be held nearly two months from the filing of the petition in the simplest case. And it will add another three weeks to the time it takes for the results be certified.

The chart below compares the minimum amount of time it will take the Board to conduct an election and certify the results in a no-issue case under the rule the majority issues today, as compared to the 2014 rule.[163]



Thus, the majority's amendments will significantly delay certifications in the simplest directed election cases by close to two months. [164] The majority provides no reasoned explanation for codifying such a substantial delay into the Board's election process.

The majority concedes, as it must, that one of 2014 rule's legitimate purposes was to reduce delay in conducting elections, *and that it has succeeded in reducing delay in conducting both stipulated and directed elections.* But the majority then observes, by way of explanation for this action, that:

In other respects, however, it appears that the 2014 amendments have not resulted in a significant departure from the pre-2014 status quo. In this regard, the overall rate at which parties reach election agreements remains more or less unchanged. So too the rate at which unions win elections. Based on this state of affairs, it is reasonable to consider whether these gains in speed have come at the expense of other relevant interests. Based on our review of our current representation case procedures, Congressional policy, and concerns that have been previously and repeatedly voiced about the current procedures, we conclude that they have. [footnotes omitted]

* * * * *

[B]eyond the interest in speed, the Board's interests include efficiency, fair and accurate voting, and transparency and uniformity, among others. The provisions instituted today that will expand the time between petition and election serve each of these interests.

* * * * *

In sum, the final rules will likely result in some lengthening of the pre-election period, but the sacrifice of some speed will advance fairness, accuracy, transparency, uniformity, efficiency, and finality. This is, in our

[161] *State Farm,* supra, 463 U.S. at 43.

[162] *State Farm,* supra, 463 U.S. at 48, quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167 (1962).

[163] As discussed below, a party has the right under the Act to insist on a pre-election hearing even if there is no substantive dispute between the parties concerning the Board's jurisdiction, the propriety of the petition, and the appropriateness of the petitioned-for unit. Accordingly, the chart assumes that the employer facing an RC petition refuses to enter into a stipulated election agreement, and instead proceeds to a pre-election hearing that only requires the regional director to direct an election.

Regarding the timing of the election, the chart assumes that the petitioning union waives the 10-day period to use the voter list contact information. Regarding the timing of post-election certification, the chart assumes the regional director can overrule the losing party's election objections the day after they are filed.

[164] Directing simple elections to be conducted in 55 days is nearly twice as long as the so-called ''minimum period'' that critics of the 2014 rule previously insisted (erroneously) was necessary ''as a 'safeguard against rushing employees into an election.'" See *ABC of Texas* v. *NLRB,* 826 F.3d at 226–227 (rejecting critics' mistaken claim that Congress had recognized the necessity for a minimum 30-day waiting period between petition and election).

considered judgment, a more than worthwhile tradeoff.

The majority's explanation is demonstrably insufficient. It rests on a mischaracterization of the purposes of the 2014 rule, and it offers conclusions that are unsupported by any evidence. Most importantly, the majority's ostensible cost-benefit analysis—the ''tradeoff'' it embraces of increased delay for other supposed benefits—is arbitrary.

First, the majority's purported analysis of the results of the 2014 rule is fundamentally misleading. The majority is wrong to conclude that only one of the purposes of the 2014 rule (reduced delay) has been accomplished. Contrary to the majority, increasing the ''rate at which unions win elections'' was never a purpose of any of the 2014 rule amendments.[165] Accordingly, the fact that union win rates have not increased hardly provides a justification for re-evaluating, let alone amending, the 2014 rule.

Second, the majority fails to acknowledge other purposes of the 2014 rule, such as reducing unnecessary litigation and reducing the overall costs of litigation, objectives that the rule has successfully achieved.[166]

Third, as will be discussed in more detail below, the majority's failure to examine the relevant data about how the 2014 rule has worked in practice, and to acknowledge pre- and post-2014 rule judicial precedent, allows the majority to wrongly assert that the rule's accomplishments have come at the expense of, and are outweighed by, the interests in finality, efficiency, fair and accurate voting, transparency, and uniformity. Remarkably, the majority cites no data to substantiate its conclusion that the 2014 rule has impaired those interests. Nor does it cite any case holdings that support its conclusions. This failure is damning, given that the rule went into effect in April 2015, more than four years ago.

In contrast, my analysis of the agency's own data indicates remarkable stability in every relevant statistical measure—proving, for example, that elections have been no less final, certain, fair, accurate, transparent, and uniform since the 2014 rule went into effect.[167] For example, the obvious gains in prompt case processing from eliminating the entitlement to litigate irrelevant individual eligibility issues at the pre-election hearing, and from eliminating the 25-day waiting period between the decision and direction of election and the election itself, have caused none of the majority's claimed unwelcome side effects. The number of Board reversals of regional director decisions and directions of elections has remained stable,[168] as has the number of cases involving post-election objections [169] and determinative challenges.[170] Similarly, the number of rerun elections has shown equal stability.[171] The majority is unable to point to a single case since the 2014 rule went into effect where the Board or the courts have set aside an election because employees were ''confused'' as a result of the Board's failing to decide pre-election a small number of individual eligibility or inclusion issues.[172] Nor is the majority able to cite a single case in which the courts have set aside an election due to an issue attributable to the case's processing under the 2014 rule. Thus, the benefit of moving cases from petition to election much more promptly has not been accompanied by any countervailing costs. The more expeditious post-2014 rule elections have been just as final, just as certain, and just as fair and accurate as the pre-2014 rule elections in resolving questions of representation.[173]

In short, there is no rational or empirical basis for the majority's claim that these changes will promote the purposes of the Act in any respect. Having inexplicably decided not to give weight to the public's responses to the 2017 RFI, to examine the Board's own data (which refutes the premises of this rule), or to engage in notice-and-comment rulemaking, the majority is left with no *good* reasons for departing from the 2014 rule. This failure dooms the rule under the Administrative Procedure Act.

[165] See, *e.g.,* 79 FR 74326 fn.83.

[166] See 79 FR 74308–74310, 74383–74393, 74401–74404, 74407–74413, 74416–74417. For example, the 2014 rule has successfully reduced the number of decisions and directions of election appealed to the Board. See *infra* fn.233 (showing an approximate 23% decrease in pre-election requests for review from pre-rule FYs 2013–2014, to post-rule FYs 2016–2017).

Contrary to the majority's implicit suggestion, the statement of position requirement in the 2014 rule was not solely designed to increase the rate of election agreements, which was already above 90 percent. Rather, as the rule made clear, the requirement was designed to enable unions to make *informed* decisions about whether to enter into election agreements on alternative terms proposed by the employer by, for example, requiring the employer to provide the petitioning union with, among other things, the names and jobs titles of the employees that the employer wished to add to or subtract from the petitioned-for unit (in addition to narrowing the scope of the prelection hearing in the event parties were unable to enter into an agreement). 79 FR 74318 fn.32, 74361, 74362, 74363, 74367; see also 74424 & fn.518. Accordingly, the fact that the 2014 rule has not dramatically increased the rate of stipulated election agreements hardly proves that the requirement is not serving one of its primary purposes of enabling unions to make more informed decisions about whether to enter into agreements. In any event, as former Member Pearce and I have previously pointed out (82 FR 58786–58787), the fact that the 2014 rule has not *reduced* the election agreement rate (as predicted by the dissenting Board members) actually supports retention of the rule, because it demonstrates that the rule's benefits have not come at the cost of increasing the number of pre-election hearings.

[167] Much of my statistical analysis below is based on data produced from searches in the Board's NxGen case processing database. For several reasons, this analysis will typically involve comparison of the last two full fiscal years of data before the 2014 rule's implementation with the first two fiscal years of data after the 2014 rule's implementation (*i.e.,* I will compare data from FYs 2013 and 2014 with data from FYs 2016 and 2017). First, the Board's NxGen case processing database does not include full fiscal year data for years more distant than 2013. Second, because the rule was implemented in the middle of FY 2015, it is difficult to untangle pre-rule data from post-rule data for that year. Third, I have not had time to carefully review data available in the software for FYs 2018 or 2019. In some contexts where the 2014 Board relied on relevant data from older fiscal years produced through searches in the agency's older CATS software, I have referenced that data as well.

[168] See *infra* fn.231 (showing consistency of 3 post-rule reversals based on extant law during FYs 2016–1017, with 4 pre-rule reversals based on extant law during FYs 2013–2014).

[169] See *infra* fn.214 (showing 114 largely post-rule cases requiring a postelection regional director decision on objections in FYs 2016–2017 as compared to 118 such pre-rule cases in FYs 2013–2014).

[170] See *infra* fn.213 (showing 56 post-rule cases requiring a postelection regional director decision on determinative challenges in FYs 2016–2017 as compared to 53 such cases in FYs 2013–2014).

[171] See *infra* fn.215 (showing 61 largely post-rule (non-duplicative) cases in which regional directors directed rerun elections during FYs 2016–2017 as compared to 59 such pre-rule (non-duplicative) cases in FYs 2013–2014).

Nor has there been any significant increase in parties filing unit clarification (UC) petitions after a union election victory, in order for the Board to determine unit placement issues that were not decided pre-election. See *infra* fn.216 (showing stability in the rate of UC petitions filed in relation to the number of union election wins in the prior fiscal year for post-rule FYs 2016 (8.2%) and 2017 (7.2%) as compared to pre-rule FYs 2013 (7.3%) and 2014 (8.7%)).

[172] To the contrary, the District of Columbia Circuit has rejected the majority's premise that such a situation would cause confusion when, as the 2014 rule requires (29 CFR 102.67(b) (2015)), the notice of election alerts employees of the possibility of change to the unit definition. See *UPS* v. *NLRB,* supra, 921 F.3d at 257 (''the Acting Regional Director did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications . . . were part of the bargaining unit'' because it did not ''imperil the bargaining unit's right to make an informed choice'' given that the election notice '' 'alert[ed] employees to the possibility of change' to the definition of the bargaining unit.'').

[173] Moreover, due to the 2014 rule's elimination of the automatic ballot impound procedure, elections since the rule went into effect have been *more* transparent and timing of the ballot count more uniform than were their pre-2014 counterparts, and more transparent and uniform than elections will be under the rule the majority announces today.

C. Discussion of Particular Amendments

The majority provides no reasoned justification for adopting amendments that undermine the Act's policies of fairly and expeditiously resolving representation cases. The majority's rule negatively impacts the representation process by:

• *Requiring unnecessary delays before workers can get an election.* These changes build a number of unnecessary delays into the pre-election process, including:

○ Reverting to 1960s-era timeframes for employers to produce the voter list despite advances in widely-available technology that make it easier to collect and serve this information.

○ Delaying pre-election hearings by two weeks—beyond any Board's processing time in more than two decades—while simultaneously making such hearings easier to postpone.

○ Delaying the due date for the employer's statement of position and requiring that petitioners file an additional (and unnecessary) responsive statement of position, needlessly delaying the opening of pre-election hearings.

○ Expanding the purpose of the pre-election hearing beyond that mandated by Congress, which also wastes resources and incentivizes employers to threaten irrelevant litigation to extract concessions regarding the election's timing and voting unit.

○ Entitling parties to file post-hearing briefs in even the simplest cases, despite Congress's express decision to exempt Board representation cases from required post-hearing briefing due to ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition.''

○ Providing an unnecessary month-long waiting period between the direction of election and the election itself to allow time for the Board to rule on interlocutory appeals that might be filed, even though such appeals are rarely filed before the election, almost never result in reversals before the election, and in any event, could be mooted by the election results.

• *Making it more difficult to finalize the results of an election.* These changes also make it more difficult for workers to get finality in the results of their election. These delays include:

○ Impounding ballots in cases where pre-election appeals remain undecided, which will require the Board to waste resources deciding matters that may be rendered moot by the election results.

○ Stripping regional directors of the power to timely certify unions, despite Congressional authorization for regional directors to exercise such powers.

As discussed in more detail below, the majority fails to provide a reasoned explanation for these and other changes that build serious flaws into the election process.

1. The Majority Fails To Provide a Reasoned Basis for Amending Sections 102.62(d) and 102.67(l) to More Than Double the Time To Produce the Voter List

It is a bedrock principle of United States labor law that when a petition is filed with the Board seeking an election to enable employees to decide whether they wish to be represented by a union, the Board must strive to ensure that ''employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also free from other elements that prevent or impede a free and reasoned choice.'' *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1240 (1966). By definition, one factor that ''undoubtedly tend[s] to impede such a choice is a lack of information with respect to one of the choices available.'' *Id.* ''In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice.'' *Id.*

It is undeniable that as a practical matter an employer, through his possession of employee names and contact information as well as his ability to communicate with employees on plant premises, ''is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation.'' *Id.* It is equally undeniable that, without a list of employee names and contact information, a union, ''whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation.'' *Id.* at 1240–1241. Thus, dating back to its decision in *Excelsior Underwear, Inc.,* it has long been the Board's considered judgment that provision by employers of a list of eligible voters' names and home addresses promotes fair and free elections by ''maximiz[ing] the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.'' *Id.* at 1241.

The *Excelsior* Board reasoned that the requirement of prompt disclosure of employee names and home addresses would also further the public interest in the speedy resolution of questions of representation. *Id.* at 1242–1243. As the Board explained, in many cases at least some of the names on the employer's list of eligible voters—that are used by election observers to check off voters when they arrive at the polls—are unknown to the other parties. The parties may not know where the listed individuals work or what they do. Thus, for example, the union may be unable ''to satisfy itself as to the eligibility of the 'unknowns','' forcing it ''either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote.'' *Id.* at 1243. As the Board further explained, ''[t]he effect of putting the union to this choice . . . is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board.'' *Id.* Only through further factual investigation—for example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves—can the union potentially discover the facts needed to assess eligibility and avoid the need for election-day challenges based solely on ignorance. To avoid unnecessary delay, the union must receive the recipient's response in time to be able to determine whether the employer correctly included those names on the list of eligible voters or whether it should challenge those individuals if they come to vote.

Accordingly, for both of these reasons, the Board had—since 1966—required employers to produce *Excelsior* lists of employee names and home addresses within seven days after approval of an election agreement or issuance of a decision and direction of election with the regional director having discretion to extend the time to produce the list upon a showing of extraordinary circumstances. *Id.* at 1239–1240 & fn.5. It has now been fifty years since the Supreme Court upheld the Board's *Excelsior* list requirement as ''encouraging an informed employee electorate and [ ] allowing unions the right of access to employees that management already possesses.'' *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767 (1969).

In 2014, based on a notice of a detailed proposal, and review of extensive commentary (predicated, in part, on the transformative technological changes since *Excelsior*), the Board decided to update and codify the *Excelsior* requirements as the ''voter list'' in its representation case regulations. See 79 FR 74335–74361 (Final Rule discussion of voter list); see also 79 FR 7322–7323, 7326–7328

(NPRM discussion of voter list). The Board explained at length why it concluded that requiring employers to disclose the available home and personal cell phone numbers of the unit employees (as well as available personal email addresses) would help advance the principal objectives of the original *Excelsior* requirement. 79 FR 74336–74341.

Specifically, the 2014 Board determined that requiring the employer to furnish the other parties with the available personal email addresses and home and personal cell phone numbers of eligible voters would facilitate an informed electorate, thus serving the first purpose of the *Excelsior* rule. 79 FR 74340. In addition, the Board concluded that the expanded voter contact information would help the union (or decertification petitioner) investigate the identity of any unknown employees on the employer's voter list in a more timely manner, thereby helping to decrease the chances that the union (or decertification petitioner) would have to challenge voters based solely on ignorance of their identities. *Id.*

Most relevant to this rule, the 2014 Board ''conclude[d] that advances in recordkeeping and retrieval technology as well as advances in record transmission technology in the years since *Excelsior* was decided warrant[ed] reducing the time period for production, filing, and service of the list from 7 calendar days to 2 business days.'' *Id.* at 74353. Shortening the time period would help the Board to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided. As the 2014 Board explained, when the Board first established a 7-day time frame for producing the list, employers maintained their employees' records in paper form (because virtually no employer had access to personal computers or spreadsheets). *Id.* Employers also had to allow time for the filing of the list via U.S. Mail (because instantaneous electronic filing and service methods such as email did not exist in 1966). *Id.* In contrast, the typical modern employer can use computers to retrieve the necessary electronically-stored information to compile the list and to file and serve it instantaneously. 79 FR 74353, 74428. The Board found particularly persuasive that even ''under the technological constraints of the 1960s, [when *Excelsior* was decided] employers could and did produce voter lists, at least for deposit into the mails, in 4 calendar days or fewer.'' *Id.* at 74353. ''Thus, the advent of electronic filing and service via email alone warrants a substantial reduction in the time provided, and in the Board's view, technological advances fully justify the move to 2 business days for production of the final voter list.'' *Id.*

Additional factors likewise persuaded the Board that the 2-business day time frame was appropriate for production of the list. *Id.* First, in many cases the employer will have provided a preliminary list of employees in the proposed or alternative units as part of its required Statement of Position [174] before the clock ever begins running on the 2 business day deadline for production of the voter list. That initial list will be due no sooner than 7 days after service of the notice of hearing, and so the employer will have the same amount of time to produce the preliminary list as it had under *Excelsior. Id.* Accordingly, to produce the voter list, ''the employer need not start from scratch, but need only update that initial list of employee names, work locations, shifts, and job classifications, by adding employees' contact information and making any necessary alterations to reflect employee turnover or changes to the unit.'' *Id.*[175] Second, the description of representation case procedures which is served with the petition will explicitly advise employers of the voter list requirement—just as the opening letter did pre-2014—so that employers concerned about their ability to produce the list can begin working immediately; before an election agreement is approved or an election is directed and thus *before* the clock begins running on the 2-business day time period. *Id.* at 74353–74354.[176] Third, in the Board's experience, the units for which lists must be produced are typically small—with half of all units containing 28 or fewer employees over the past decade—meaning that even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task. *Id.* at 74354.[177] Finally, parties may enter into agreements providing more time for employers to produce the list subject to the director's approval, and the regional directors may direct a due date for the voter list beyond two days in extraordinary circumstances. *Id.*

Today, the majority quite properly retains the requirement that employers disclose the available email addresses and available home and personal cell phone numbers of eligible voters to the nonemployer parties to the case once an election is agreed to by the parties or directed by the regional director. However, without engaging in notice and comment, the majority more than doubles the time to produce the voter list by amending the Board's rules to provide that the list is due 5 business days from approval of an election agreement or issuance of a decision and direction of election. The majority justifies its elongation of the time to produce the voter list by claiming that: (a) In the minority of directed election cases changed in other respects by their rule, the added time will not delay the election; (b) the majority of stipulated election cases should then suffer a similar delay to make them ''uniform'' with the directed election cases; and (c) in any event, more time is better based

[174] The majority retains this aspect of the statement of position requirement.

[175] Today, the majority has also lengthened the time to produce the statement of position from 5 business days to 8 business days. The majority never addresses why despite this additional time, employers need more time to subsequently produce the voter list. Nor does the majority acknowledge that for directed election cases, employers will have still more time to work on the voter list, as hearings are delayed for another 10 days after the initial list is filed.

[176] The Board noted that the Casehandling Manual in effect before the 2014 rule provided in Section 11009.2 that the initial letter to the employer following the filing of the petition should advise the employer: ''In the event an election is agreed to or directed, the Agency requires that a list of the full names and addresses of all eligible voters be filed by the employer with the Regional Director, who will in turn make it available to all parties in the case. The list must be furnished to the Regional Director within 7 days of the direction of, or approval of an agreement to, an election, and the employer is being advised early of this requirement so that there will be ample time to prepare for the eventuality that such a list may become necessary.'' 79 FR 74354 fn.224. Contrary to the majority, advising employers of the voter list requirement early in the process promotes transparency and orderly case processing, and the majority gives no indication that it plans to cease the practice of advising employers of the requirement in the description of representation case procedures that is served along with the petition. In any event, because of the required statement of position, the employer will already have compiled much of the information required by the voter list before the 2-business day period even begins to run.

The majority strains to suggest that because the Board may direct an election in a unit different from that proposed by either party, it may be difficult for an employer to produce the voter list notwithstanding that it will have already produced the initial lists of employees as part of its required Statement of Position. But it certainly is not the norm for the Board to direct an election in a unit that bears no relation to either the petitioned-for unit or the employer's proposed alternative unit. And in the majority's fanciful scenario in which the Board concludes that the appropriate unit is so substantially larger and different from either the petitioned-for unit or the employer's alternative unit, so as to make it infeasible for the employer to produce the list within the normal time frame, that would obviously constitute extraordinary circumstances justifying additional time to produce the list.

[177] I note that this trend held steady in the years since the rule's implementation. The median size of bargaining units ranged from 24 to 26 employees in FYs 2016–2017. See *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections.*

on the possibility that some employers could have difficulty complying with the two-day timeframe to produce the list provided by the 2014 Board.

The majority claims that providing employers with more time to produce the information ''better balances'' the relevant interests in prompt elections, efficiency, accuracy, transparency and uniformity. But the majority has failed to show that the 2014 rule's accomplishments have come at the expense of efficiency, accuracy, transparency and uniformity.

For starters, the 2014 rule timeline for production of the voter list *was* uniform and transparent; the default due date was two business days in both the stipulated election context and the directed election context. While the majority's default five business day timeline is more than twice as long, it plainly is no more uniform or transparent than the 2014 rule. And while the 2014 rule provided for exceptions in both the stipulated and directed election contexts, the majority's rule provides for exactly the same exceptions in both the stipulated and directed election contexts despite providing so much more initial time to produce the lists. See amended §§ 102.62(d) and 102.67(l).

The majority also argues that providing more time for employers to produce the list decreases the chances that employers will provide inaccurate lists. But the majority provides no evidence whatsoever that the reduction in time to produce the list has caused any statistically significant increase in the number of election objections cases concerning inaccurate voter lists. Indeed, the evidence that the total number of election objections cases has held steady despite the reduced time to produce the voter list would suggest precisely the opposite.[178] One might reasonably expect that a new Board majority, skeptical of the wisdom of the 2014 Board's reducing the timeframe to produce the voter list, would examine available case records and agency statistics to see whether there have in fact been compliance problems warranting a change. Failing that, one might expect a skeptical 2019 majority to invite comment from stakeholders who had actually participated in Board proceedings involving the 2-day voter list production timeframe to hear specifics about their compliance experiences. But, here, one would be wrong. The majority demonstrates their disinterest in reasoned decisionmaking by failing to examine evidence relevant to its proposal or to solicit comments.

Although the majority cites two cases in support of its claim that the information required to be disclosed may not be available in centralized computerized form and thus may not be readily available, the majority's expanded time frame for producing the list would not have made any difference at all in those cases.[179]

And the majority's claim that its amendment will not delay elections is only true in the directed election context because, as the majority concedes, the majority has decided to amend § 102.67 to introduce a 20 business day (or 28 calendar day) waiting period between issuance of the decision and direction of election and the actual election. But for that waiting period, the majority's decision to more than double the time to produce the voter list would delay directed elections (because the election cannot be conducted until the list is produced).[180] And, as shown below, the majority's waiting period amendment is itself arbitrary and capricious and cannot shield its decision to more than double the time employers have to produce the voter list.

Echoing comments from the 2014 rule record, the majority contends that the rule's time frame may pose special problems for particular employers or industries such as construction industry employers. The 2014 rule dealt with these contentions at length (79 FR 74354–74356), pointing out that, among other things, an employer can obtain more time to produce the list even without a union's consent based upon a showing of extraordinary circumstances ''which may be met by an employer's particularized demonstration that it is unable to produce the list within the required time limit.'' 79 FR 74354. Here again, the majority cites nothing showing that employers in those industries have been unable to comply with the rule's provisions as a general matter or have been unable to obtain additional time where necessary.

Although the majority concedes that ''*many* employers have clearly been able'' to produce voter lists within two business days since the 2014 rule went into effect, the majority takes the position that ''the potential for greater compliance difficulties in *certain* types of cases counsels in favor of relaxing the general requirement, rather than placing the burden on the employer'' to justify why it needs more time than the default two business day time frame to produce the list. This is nonsensical; it amounts to a claim that the Act's policy in favor of expeditiously resolving questions of representation should be undermined in the overwhelming majority of cases where delaying the election is not necessary merely because in some cases employers may justifiably need more time to produce the list, which additional time they can obtain under

[178] See *infra* fn.214 (showing 114 largely post-rule cases requiring a postelection regional director decision on objections in FYs 2016–2017 as compared to 118 such pre-rule cases in FYs 2013–2014).

[179] *RHCG Safety Corp.,* 365 NLRB No. 88 (2017), certainly provides no support for the majority's lengthening the time to produce the list. To the contrary, the case shows that the employer at issue, with a larger than average sized voting unit, both (a) had sufficient time to contact its supervisors for voter list information that was not stored on a computer database, and (b) would have produced a deficient voter list devoid of available employee cell phone numbers even under the majority's 5 business day timeframe. As the Board explained, ''although [ ] the individual assigned to compile the voter list testified that he spoke to supervisors to obtain information relating to employees who might be eligible under the [construction industry] *Steiny/Daniel* formula, he admitted that he did not ask any supervisors for the phone numbers of the unit employees they had.'' *Id.* slip op. at 6. Moreover, the employer in that case ''voluntarily entered into a stipulated election agreement providing for the normal 2-business day timeframe'' to produce the list rather than ''negotiat[ing] with the Petitioner for a longer period of time to produce the list or, failing that . . . refus[ing] to enter into an election agreement and go[ing] to a hearing to explain why it needed more time to produce the list.'' *Id.* slip op. at 7. The fact that the employer in *RHCG* pursued neither option available under the 2014 rule would, if anything, tend to suggest that it thought it had sufficient time to comply with its voter list requirements, and certainly does not support the majority's implication that a 5-business day timeframe would have materially changed the outcome of that case.

Next, the majority cites *President and Fellows of Harvard College,* 01–RC–186442, to support its position that a 5-business day timeframe for production of the voter list should be applied to all cases due to the possibility that ''assembling the voter list may prove challenging for large or decentralized employers.'' But, again, the majority's 5-business day timeframe would seemingly have done nothing to change the outcome of that case. As recounted in the Regional Director's Decision and Direction of Second Election, slip op. at 22 (July 7, 2017), the employer entered into a stipulated election agreement on October 21, 2016 under which it was able to produce the voter list used in the election on November 4 (10 business days later). Moreover, the employer had in fact begun preparing its list in mid-September, so any difficulties it had would clearly not have been meaningfully impacted by my colleagues' adding 3 business days to the voter list's presumptive due date. If anything, *President and Fellows of Harvard College* shows the current rule's ability to adapt to extraordinary circumstances and hardly supports a general move to delay the production of voter lists in the main run of Board cases with bargaining units of twenty-some individuals, as opposed to the thousands at issue in the *Harvard* election.

[180] Moreover, the majority also imports its delay into the election agreement context (which accounts for more than 90% of Board elections) where it *will* undoubtedly delay the date on which elections could otherwise be held. See amended section 102.62 (increasing the time to produce the list in election agreement cases); see also *infra* fn.184 (showing pre and post-rule election agreement rates of 91.1% to 91.7%). Delaying more than 90% of elections merely to make them uniform with less than 10% of elections undermines the Act's interest in expedition.

the exceptions expressly provided for in the 2014 rule. Exceptions should not swallow the rule.

2. The Majority's Amendments to § 102.63 Create Unnecessary Delay Between the Petition and the Pre-Election Hearing

a. The Majority Amends § 102.63(a) To Delay the Opening of the Pre-Election Hearing by Two Weeks for No Good Reason

Unless parties enter into an election agreement, the Board may not conduct an election without first holding a pre-election hearing to determine whether a question of representation exists. See 29 U.S.C. 9(c)(1), (4). Accordingly, the timing of the pre-election hearing undeniably affects the timing of the election because the longer it takes to open the pre-election hearing, the longer it takes for the regional director to determine whether a question of representation exists and to conduct the election to answer the question. 79 FR 74371.

Prior to the 2014 rule, the Board's regulations did not specify when pre-election hearings would open. Instead, the regulations merely indicated that hearings would open at a time and place designated by the regional director. 29 CFR 102.63(a) (2011). Although pre-election hearings were routinely scheduled to open in 7 days to 10 days, practice was not uniform among regions, with some regional directors scheduling hearings for 10 to 12 days, even though a 1999 model opening letter indicated that hearings should open 7 days after service of the notice of hearing. 79 FR 74309, 74424 & fn. 517, 74373.

The 2014 rule scheduled pre-election hearings to open in 8 days from the date of service of the notice of hearing ''[e]xcept in cases presenting unusually complex issues.'' 29 CFR 102.63(a) (2015). The Board reasoned that this amendment would bring all regions in line with best practices and help to expeditiously resolve questions of representation, while allowing sufficient time for the filing of the nonemployer party's statement of position before the hearing. 79 FR 74309, 74370–74371. The amendment would also render Board procedures more transparent and uniform across regions, thereby affording employees' statutory rights the same treatment across the country, convey to the employees that the Board, not the parties, is in charge of the process, reduce the Board's expenses and make the process more efficient by discouraging abusive party delays and encouraging prompt settlement without litigation. 79 FR 74371–74373.

Today, however, the majority dramatically revises the hearing scheduling provisions of the 2014 rule and creates a significant delay between the filing of petitions and the opening of pre-election hearings. The majority substantially postpones the opening of pre-election hearings in all cases by some two weeks, with the majority delaying the opening of pre-election hearings from 8 calendar days to 14 business days (*i.e.,* 20 calendar days) from service of the notices of hearing.[181] The majority's amendment will delay pre-election hearings beyond any Board's processing in more than two decades.[182]

The majority fails to offer a reasoned explanation for changing the hearing scheduling provisions of the 2014 rule. The majority certainly cannot claim that the 8-day hearing scheduling provision contravenes the Act or the Constitution. Nor can the majority claim that the 8-day hearing scheduling provision contravened Board law. To the contrary, as the Board noted, the 8-day hearing scheduling provision was consistent with *Croft Metals, Inc.,* 337 NLRB 688 (2002), where the Board concluded that 5 business days' notice of pre-election hearings was sufficient. 79 FR 74309, 74370–74371, 74424. Nor can the majority cite any judicial authority for changing the hearing scheduling provisions. The courts have rejected every challenge to the hearing scheduling provisions of the 2014 rule.[183]

Significantly, the majority offers no empirical basis for concluding that the 2014 rule hearing timeframe has caused the parade of horribles forecasted by rule's critics. Indeed, the majority fails to cite any available data to support its conclusion that it somehow promotes efficiency to substantially delay all pre-election hearings. Thus, for example, the majority cannot show that the hearing scheduling provision reduced the rate of stipulated election agreements, prevented parties from adequately preparing for hearings, or from obtaining counsel, notwithstanding the ''additional obligations imposed by the 2014 final rule'' (*i.e.,* completing the statement position and posting the notice of petition for election). In fact, as the majority acknowledges, since the rule went into effect, the Board's election agreement rate has remained robust, with more than 90 percent of all elections having been held pursuant to stipulated election agreements.[184] Moreover, the median time for the parties to enter into election agreements approved by the regional directors has been 7 days from issuance of notices of hearings,[185] which constitutes powerful evidence that employers can in fact obtain advisors and have the conversations necessary to formulate positions on the issues that would be addressed at the pre-election hearing in the time frame set forth in the 2014 rule.[186]

Instead, the majority contends that its amendment represents a better balance of the interests in the expeditious processing of representation cases, efficiency, fairness, transparency, and uniformity. The majority chiefly argues that the 8-day default timeline between petitions and pre-election hearings is

[181] Unless the notice of hearing is served on a Monday, no pre-election hearing will open sooner than 20 calendar days from service of the petition and notice of hearing.

[182] See, *e.g.,* NLRB Annual Reports (Table 23) (FYs 1999–2009) (listing annual medians of only 13 to 15 calendar days to process cases from notice of a pre-election hearing to the close of the pre-election hearing); see also 79 FR 74353 and fn.222 (citing annual medians for FYs 2011–2013 of 10 calendar days to schedule pre-election hearings in the notices of pre-election hearings, and 13 calendar days to open pre-election hearings).

[183] See *UPS* v. *NLRB,* 921 F.3d at 256 (''an eight-day notice accords with both the Due Process Clause and [the employer's] statutory right to an 'appropriate' hearing''); *ABC of Texas* v. *NLRB,* 826 F.3d at 220, 222–223 (''the rule changes to the pre-election hearing did not exceed the bounds of the Board's statutory authority''), affirming *ABC of Texas* v. *NLRB,* 2015 WL 3609116 at *2, *5–*7; *Chamber* v. *NLRB,* 118 F.Supp.3d at 177, 205– 206 (rejecting due process challenge to hearing scheduling provision).

[184] Information reported in the Agency's NxGen case processing software shows post-rule election agreement rates of 91.7% in FYs 2016–2017, as compared with pre-rule election agreement rates of 91.1% in FYs 2013–2014.

[185] Information produced from searches in the Board's NxGen case processing software shows post-rule medians of 7 days from issuance of notice of hearing and regional director approval of election agreements for FYs 2016–2017.

[186] As the 2014 Board explained (79 FR 74375): Frankly, the Board finds it difficult to believe that an employer would commit to enter into a stipulated election agreement—and thereby waive its right to raise issues at a pre-election hearing—before satisfying itself that the Board did in fact have jurisdiction over it, that there were no bars to an election, and that the unit described in the agreement was appropriate. Indeed, as Jonathan Fritts testified on behalf of CDW, ''it's hard to say that negotiating a stip[ulated election agreement] would necessarily take less time than preparing for the hearing[.] I think that everything that precedes the negotiation, at least in my experience, is something that you would do to identify the issues that may be subject to litigation. And so, if you're going to negotiate a stip I think you have to know what the issues are that you might go to hearing on, and then you have to decide if you can resolve them. The process of identifying those issues, what the evidence is, what the circumstances are, that's going to happen I think regardless of whether you go to a hearing or whether you go to a stip. It's only once you've done all that that you really begin the process of negotiating a stip.''

too short and is burdensome and inconvenient for employers. And the majority argues that the additional time provided by its amendments will permit employers to ''more easily manage'' their obligations. According to the majority, providing more time ''promotes a sense of overall fairness in representation proceedings, which also serves the purpose of transparency.''

But the majority greatly exaggerates the burden or inconvenience of the 8-day hearing scheduling provision. For starters, despite the majority's claim that the 2014 rule caused a ''substantial reduction of time between the filing of a petition and the conduct of the pre-election hearing,'' the 2014 rule hearing scheduling provision, as shown, was *consistent* with Board caselaw and the best practices of the Board that existed before the rule.[187] Moreover, the majority simply ignores the fundamental facts that employers already know the necessary information to prepare for pre-election hearings before the notices of hearings even issue,[188] and that employers are frequently aware of union organizing campaigns even before the filing of the petitions.[189] The majority is unable to point to any demonstrable problems that have arisen since the 8-day default timeline became effective more than 4 years ago. In these circumstances and where, as here, the time provided by the 2014 rule exceeds that required by due process, the statutory interest in expeditiously resolving questions of representation clearly trumps the non-statutory interest in maximizing employer convenience.

The majority also claims that delaying the opening of the hearing from 8 calendar days to 14 business days (or 20 calendar days) will increase the rate of election agreements or will make hearings more efficient. But saying this does not make it so. The majority cites absolutely no evidence to support its proposition. And its explanation runs counter to the evidence before the agency. In fact, the rate of stipulated elections agreements was *not* meaningfully different prior to the 2014 rule when hearings were scheduled to open in more than 8 calendar days in some regions.[190] Nor was litigation at pre-election hearings more efficient then. Instead, all that the majority's hearing scheduling amendment is likely to do is either simply push off the date when election agreements are entered into and approved (or delay the date that hearings actually open in the event the parties do not enter into election agreements). As any experienced practitioner knows, parties to a representation case frequently attempt to negotiate election agreements the day before the hearing opens as the immediate prospects of a hearing—and its attendant costs—serves to focus the parties' attention on the matter at hand. 79 FR 74362.

The majority also speculates that the 14 business day (or 20 calendar day) timeline ''may even promote greater administrative efficiency by easing the logistical burdens the expedited 8-day timeline currently imposes on regional personnel.'' But that is all the majority offers in support of its specific amendment—sheer speculation. Although the majority takes ''administrative note'' that at various times since the 2014 rule took effect, regional personnel have voiced concerns over the 8-day timeline, the only ''evidence'' that the majority specifically cites for regional concern about the timeline is the response of the regional director committee to the RFI. But, as noted previously, the majority expressly states that ''[n]one of the procedural changes that we make today are premised on the responses to the Request for Information.''

In any event, the regional directors' response did not request that the pre-election hearing be scheduled to open in 14 business days (or 20 calendar days), let alone state that doing so would increase administrative efficiency, and it therefore provides no support for the majority's hearing scheduling amendment. All the regional director committee said regarding the pre-election hearing date was as follows: ''Some Regional Directors did not agree with this section of the rule which set hearings for eight days from the filing date of the petition. Other Regional Directors liked this section of the rule because it provides for consistency and is consistent with the hearing dates that were set by many Regions prior to the 2014 Election Rule.'' RDs' Response to 2017 RFI p.2. To the extent that the 2014 rule has required the agency to shift regional resources in order to accomplish the statutory goal of expeditiously resolving questions of representation, that is clearly appropriate.

The majority also argues that the hearing scheduling amendment promotes uniformity by bringing the pre-election hearing time frame ''into closer alignment'' with the time frame for post-election hearings, which the 2014 rule provided would open 21 calendar days from the tally of ballots. The majority's implicit suggestion that Board could have scheduled *post-*

[187] Although the majority cites the need in some cases to obtain counsel, identify and prepare witnesses, gather information, and provide for any hearing-related travel as necessary, all this was equally true before the 2014 rule, when, as shown, *Croft Metals* was decided and when the best practice was already to schedule the opening of pre-election hearings in 7 days. Moreover, the statement of position requirement cannot be used to justify granting parties additional time to prepare for pre-election hearings. While employers were not required to file and serve a written statement of position prior to the rule, the information solicited by the form routinely was requested by regional personnel prior to the 2014 rule. 79 FR 74424,74362–74370. And in any event, the form merely requires parties to do what they would have to do to prepare for pre-election hearings. Indeed, the requirement helps guide hearing preparation. 79 FR 74362–74370, 74424. Nor can the 2014 rule's requirement that employers post the notices of petitions for election justify granting parties additional time to prepare for pre-election hearings. The regional director provides the employer with the notice to be posted along with posting instructions, and so compliance with the requirement is hardly time consuming. See 29 CFR 102.63(a)(1), 79 FR 74463.

[188] As the Board noted,

The factual subject matter that is the focus of the hearing typically is not all that complex to litigate, and is intimately familiar to the employer, permitting very rapid preparation. As discussed, the Board need not direct an election in the most appropriate unit; it need only select an appropriate unit. In determining whether a group of employees constitutes an appropriate unit, the Board analyzes whether the employees in that unit share a community of interest by examining the employees' terms and conditions of employment, the employees' job duties, skills, training, and work locations, the employees' supervision, the extent of employee interchange and contact with one another, and the history of collective bargaining. The employer already knows all those things before the petition is even filed. Thus, the employer knows its employees' terms and conditions of employment because it established its employees' terms and conditions of employment. The employer knows its employees' job duties, work locations, and supervision, because it assigned those job duties, work locations, and supervisors to its employees. The employer knows its employees' skills because it sets the skill requirements for its positions, and hires and evaluates its employees. Similarly, the employer is aware of the collective bargaining history of its employees, as well as the level of employee interchange and contact, and the training it provides for its employees. The employer likewise knows its connection to interstate commerce, and whether the petitioned-for employees are covered by a collective-bargaining agreement or participated in a valid election in the preceding 12-month period, thereby barring an election. Even if preparation within ''a few hours'' would not be feasible in some cases, within a few days an employer should reasonably be able ''to gather his thoughts and his evidence and to make an informed decision about the best way to respond'' regarding the community of interest and other issues. 79 FR 74372, 74378–74379 (footnotes omitted).

[189] See, *e.g.,* 79 FR 74320–74321, 74372, 74378–74379. As the Board noted (79 FR 74320–74321), the Supreme Court's decision in *NLRB* v. *Gissel Pacing Co.,* 395 U.S. 575, 620 (1969), Board precedent, the Board's own experience in processing representation petitions and unfair labor practice cases, an academic study, and the 2014 rulemaking record confirm that employers are frequently aware of union organizing drives even before petitions are filed. See also *ABC of Texas* v. *NLRB,* 826 F.3d at 227 (noting the Supreme Court's observation that union organizing drives rarely catch employers by surprise).

[190] See *supra* fn.184.

election hearings to open in 8 days from the tally of ballots—in line with the *pre*-election hearing schedule of 8 days from the petition—(but chose not to) reflects nothing less than a fundamental misunderstanding of the representation case process and the Board's rules and regulations. Even before the 2014 rule, parties had 7 days from the tally of ballots to file objections to the conduct of the election. See 29 CFR 102.69(a) (2011). Accordingly, the Board could not possibly have scheduled a post-election hearing within 8 days of the tally of ballots because party objections were not due until 7 days from the tally. And *Croft Metals* required that parties be given 5 business days' notice of a hearing. This meant that the earliest the Board could possibly schedule a post-election hearing would be 14 days from the tally. However, if the objections/offer of proof were not filed until the close of business on the 7th day following the tally, that would leave no time for the regional director to evaluate the objections/offer of proof to determine whether the objections warranted a hearing and still provide parties the notice the Board has long required they should be afforded. Accordingly, the Board determined that post-election hearings should commence 21 days from the service of the tally, which would give directors time to weed out frivolous objections and provide parties adequate notice. No such obstacles prevented the Board from scheduling pre-election hearings for 8 days from service of petitions and notices of hearing. To the contrary, as shown, the 2014 rule *pre*-election hearing scheduling provision was fully consistent with Board precedent and best practices. Making pre-election hearing scheduling more uniform with post-election hearing scheduling hardly serves any legitimate statutory purpose; rather, it simply imposes unnecessary delay in conducting pre-election hearings.

The majority also plainly fails to offer good reasons for mandating that pre-election hearings may not open sooner than 14 business days (or 20 calendar days). Recall that the majority affords employers far more time to prepare for the pre-election hearing than they were afforded prior to the 2014 rule. In 2013, regional directors scheduled pre-election hearings to open in 7 to 10 calendar days in 76% of cases. And in those few cases that actually went to a hearing, 25% of pre-election hearings opened in 7 to 10 calendar days and 71% of the cases that went to a hearing opened within 14 calendar days. 79 FR 74424 & fn.517. The majority offers no reason whatsoever—let alone a good reason—why employers require more time to prepare for the pre-election hearing today than they needed in 2013.

Nor does the majority provide any explanation for why it selected that number of business days as opposed to any other number of days, apart from pointing to its statement-of-position amendments. For example, the majority offers no explanation for why it rejected the General Counsel's suggestion that the hearing open in 12 calendar days. See GC Response to 2017 RFI p.3. The majority has plainly failed to establish a rational connection between the facts before the agency and the choice made.

Finally, the majority is also simply wrong in contending that pre-election hearings must be postponed to 14 business days (or 20 calendar days) because of changes to the statement of position provisions, such as requiring written pre-hearing responsive statements of position from petitioning parties. Indeed, although the GC agrees that petitioners *should* be required to file such responsive statements of position, he argued that pre-election hearings should open in 12 calendar days, far quicker than the majority's 14 business day (or 20 calendar day) timeline. And the GC argued in favor of maintaining the 2014 rule's due date for employers' statements of position at 7 calendar days.[191] The majority does not explain why it rejected the GC's view. In any event, as I explain below, the statement of position changes are unwarranted, arbitrary and capricious and cannot be used to justify the majority's hearing scheduling amendment. Indeed, because the majority concedes that its hearing scheduling amendment is not severable from its statement of position amendments, the hearing scheduling amendment must be invalidated as well.

b. The Majority Further Amends § 102.63(a) To Make Postponing the Pre-Election Hearing Easier, Exacerbating Their Default Two-Week Delay to the Pre-Election Hearing

To make matters worse, the majority also makes it significantly easier for parties to seek postponement of pre-election hearings, further delaying elections. The 2014 rule provided that the regional director could postpone pre-election hearings for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. 29 CFR 102.63(a)(1) (2015). Today, however, despite automatically providing employers 2 extra weeks to prepare for pre-election hearings, the majority also substantially relaxes the standard for obtaining postponements of pre-election hearings by rewriting 29 CFR 102.63(a)(1) to provide that regional directors may postpone hearings for an unlimited amount of time upon request of a party merely showing ''good cause.''

Here, again, the majority offers no reasoned explanation for changing the 2014 rule standards governing postponements of pre-election hearings—no statutory or constitutional requirement of a good cause postponement standard, no judicial invalidation of the 2014 postponement standards, and no empirical basis for concluding that the 2014 standards were problematic. Significantly, the regional directors, the agency's nonpolitical career officials who were charged with administering the standards, have not requested any change in those standards in their response to the 2017 RFI about the rule. And the majority certainly provides no good reason for making it easier to obtain postponements now that it has automatically provided employers an extra 2 weeks to prepare for pre-election hearings. Thus, the majority nowhere explains why it should be easier for a party—who was given 20 calendar days to prepare for a hearing—to obtain a postponement than it was for a party who was given 8 calendar days to prepare for a pre-election hearing. If anything, common sense suggests that it should be harder to obtain postponements now that parties will have so much more preparation time.

The majority's arguments against what it calls the ''two tier'' postponement standard are based on erroneous readings of the pre-rule practice or the 2014 rule. Specifically, the majority's reliance on the casehandling manual in effect prior to the 2014 rule for the proposition that requests for postponements ''were not routinely granted'' is unavailing; the manual merely provided that the general policy ''should be'' that cases set for a hearing will be heard on the date set, and that a postponement request ''will not be routinely granted.'' Contrary to the majority (and contrary to the aspirational language in the manual), the 2014 rule noted (79 FR 74424 fn.517), that extensions ''were often granted.'' A stricter standard than good cause is also warranted because, the 8-day hearing timeframe does not apply to cases presenting unusually complex issues. See § 102.63(a)(1) (2015). In other words, requests to extend the opening of pre-election hearings beyond 8 days are unnecessary

[191] See GC's Response to 2017 RFI at p.3.

in cases presenting unusually complex issues, because regional directors will schedule those hearings to open in more than 8 days. The majority asks why regional directors should be limited to granting only a 2-day postponement if special circumstances are established, when regional directors are free to extend the opening of the pre-election hearing beyond 2 days from the default 8-day timeframe in ''unusually complex cases.'' This question is beside the point, because the 2014 rule expressly provided that the regional director can extend the opening of the pre-election hearing ''for more than 2 business days upon request of a party showing extraordinary circumstances.'' 29 CFR 102.63(a)(1) (2015).

c. The Majority's Amendment to § 102.63(b) Substantially Delays the Due Date for the Nonpetitioning Party's Statement of Position for No Good Reason

Today, the majority quite properly retains the 2014 final rule amendment requiring nonpetitioning parties to complete a written Statement of Position soliciting the parties' positions on issues such as the appropriateness of the petitioned-for unit, jurisdiction, the existence of any bar to the election; and the type, dates, times, and location of the election—issues that would have to be resolved in order to enter into an election agreement or addressed at the pre-election hearing. The majority also quite properly retains the preclusion provisions associated with failing to comply with the Statement of Position requirement.

However, the majority changes the Statement of Position scheduling provisions in ways that delay the opening of pre-election hearings and the conduct of elections. The 2014 rule provided that Statement of Position forms would be due no later than at noon on the business day before the hearing if the hearing were set to open 8 days from service of the notice. See 29 CFR 102.63(b)(1) (2015). And because the Statement of Position form largely requires parties to do what they would have do to prepare for a pre-election hearing, the 2014 rule provided that parties would always have at least 7 calendar days (5 business days) notice. 79 FR 74362, 74363, 74364, 74371–74375.

But today the majority automatically gives the nonpetitioning parties an extra 3 business days to prepare the statement of position, by providing that it is due on the 8th business day (or 10th calendar day) following service of the notice of hearing. See amended § 102.63(b)(1) through (3). As the majority concedes, delaying the due date for nonpetitioning parties' statement of position beyond 7 days necessarily delays the opening of the pre-election hearing, which also inevitably delays the election.

However, just as was the case with its hearing scheduling amendments, the majority provides no reasoned explanation for changing the 2014 rule's due date for completing the statement of position form. Thus, the majority certainly cannot claim that the statement of position scheduling provisions contained in the 2014 rule contravened the Act or the Constitution. Nor can the majority point to any judicial authority for changing the statement of position timeframes. Indeed, the courts have rejected every challenge to the time frames for completion of the statement of position.[192] And the majority offers no empirical basis for concluding that the statement of position timeframes have caused the parade of horribles predicted by the rule's critics. Thus, for example, the majority fails to cite any evidence showing that the 2014 rule statement-of-position time frames have regularly resulted in employers being precluded from raising or litigating issues. In addition, they concede that ''the overall rate at which parties reach election agreements remains more or less unchanged'' despite the 2014 rule's time frames for completing the statement position.

Instead, the majority claims that its statement of position amendment represents a better balance of the interests in the expeditious processing of representation cases, efficiency, fairness, transparency, and uniformity. The majority argues that the 2014 rule timeframe for completion of the statement of position was too short and was burdensome and even onerous for employers, when considered ''against the backdrop of other pre-election hearing preparation, which may involve a number of other time-consuming tasks, including retaining counsel, researching facts and relevant law, identifying and preparing potential witnesses, making travel arrangements, and coordinating with regional personnel and exploring the possibility of an election argument.'' Accordingly, the majority argues that the additional time provided by its amendments will permit employers to ''better balance'' their obligations.

But, as shown, the statement of position requires parties to do no more than what they have to do to prepare for a pre-election hearing; the form actually guides hearing preparation and facilitates entry into election agreements; and the 2014 rule's 7 day time frame for completion of the statement of position complies with *Croft Metals* and best agency practices. In short the required statement of position does not delay hearing preparation (or vice versa) or impede negotiations for a stipulated election agreement (or vice versa). Indeed, the rule provided approximately one business day to negotiate an agreement *after* the filing and service of the statement of position before the hearing opens. 79 FR 74375 & fn.325. At bottom, the majority's claim that employers need more time to complete the statement of position ignores that employers already have in their possession all the information necessary to complete the statement of position even prior to the filing of the petition,[193] and that employers typically are aware of union organizing drives prior to the filing of petition.[194] In these circumstances and where, as here, the time for filing the statement of position satisfies due process, the statutory interest in expeditiously resolving questions of representation trumps the non-statutory interest in maximizing employer convenience.[195]

The majority provides no support for its claim that providing more time to complete the statement of position promotes efficiency. The majority suggests that allowing a few more days to complete the statement of position should discourage parties from taking a shotgun approach and raising every possible issue in it, which should lead to more focused hearings. But the majority provides no evidence that this frequently occurs under the current timeline, much less that providing more time will matter. Thus the list of litigable issues is ordinarily quite

[192] See, *e.g., Chamber* v. *NLRB,* 118 F.Supp. 3d at 205 & n.14 (rejecting plaintiff's argument that ''the burdensome requirement of the Statement of Position violates [its] due process rights by not providing it sufficient time to respond'').

[193] See *supra* fn.188.

[194] See *supra* fn.189.

[195] Although the majority invokes the interests of transparency and uniformity, it offers no evidence demonstrating that its amendment better serves those interests. Indeed, it merely states (emphasis added) its amendment ''continues to serve the purposes of transparency and uniformity, and *perhaps* even improves upon the 2014 amendments in this regard, as the due date is now set forth in terms of a set number of business days following the notice of hearing, rather than being linked to the scheduled opening of the hearing.'' Contrary to the majority's implicit suggestions, parties faced with a petition under the rule did not wonder when their statement of position was due, because the notice of hearing served on them explicitly told them the date and time that the statement of position was due.

small—*e.g.,* election bars, jurisdiction, and unit appropriateness. It is difficult to understand why an employer needs three additional business days-on top of a week to ascertain whether an election involving its own employees has been held in the preceding 12 months, whether the petitioned-for employees are covered by contract (election bar issues), whether it is engaged in interstate commerce (jurisdiction), whether employees in the petitioned for unit share similar working conditions (unit appropriateness) or whether certain individuals employed by it are supervisors, because the employer already knows all these things before the petition is even filed. In any event, as the 2014 rule noted, the offer-of proof procedure—which the majority retains in its rule—provides tools for the region to ''swiftly dispose of the unsupported contentions that a party may set forth in its Statement of Position simply to avoid triggering the preclusion provisions.'' 79 FR 74375. Again, the majority provides no reasoned explanation for delaying the due date for the statement of position, which delays the election.

The majority also fails to offer any explanation for why it chose to set the due date at 8 business days as opposed to any other number of days. I note in this regard that although the GC advocated that the hearing date should be extended (to allow time for the implementation of his proposed requirement that petitioners file a prehearing responsive statement of position), the GC explicitly stated that he ''would *not* modify the requirement that the [nonpetitioning party's] SOP be filed at noon on the seventh day after filing of the petition.'' GC Response to 2017 RFI p.3. (emphasis added). The majority certainly fails to offer a good reason for why employers need more time to prepare a statement of position today than *Croft Metals* entitles them to prepare for a pre-election hearing.[196]

d. The Majority's Further Amendment to § 102.63(b) Makes Postponing the Statement of Position Easier, Exacerbating Their Default Delay Caused by Granting Parties Approximately 50 Percent More Time to Complete It

To make matters even worse, the majority also substantially increases the likelihood of further delay in opening pre-election hearings—and hence elections—by making it easier for nonpetitioning parties to obtain additional time to complete their statements of position. As noted, under the 2014 rule, if the hearing were set to open 8 days from the petition, then the nonpetitioning parties' statement of position would be due at noon on the 7th day. The 2014 rule provided that the regional director could postpone the due date for filing statements of position up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances. 29 CFR 102.63(b)(1) through (3) (2015). But today the majority makes it substantially easier for parties to obtain potentially lengthy extensions of time to file their statements of position, by providing that the regional director may postpone the time for filing statements of position merely for ''good cause.'' See amended § 102.63(b)(1) through (3).

Here again the majority offers no reasoned reason for changing the standard—no statutory or constitutional requirement of a ''good cause'' standard; no judicial invalidation of the 2014 rule standards for postponement requests, and no empirical evidence that the rule standards for postponement requests caused problems. And here again neither the GC nor the regional directors requested a change in the standard.

The majority's explanations for amending the two-tiered standard for granting postponements of the statement of position are identical to the explanations it offers for amending the two-tiered standard for granting request to postpone to pre-election hearing and are devoid of merit for the reasons previously discussed. And the majority certainly fails to offer good reasons for making it easier to obtain extensions of time now that nonpetitioning parties have approximately 50% more time to complete their statements of position.

e. The Majority's Amendments to § 102.63(b)(1)(ii), (b)(2)(iii), and (b)(3)(ii) Further Delay the Opening of the Pre-Election Hearing by at Least a Week by Requiring Petitioning Parties To Complete a Responsive Statement of Position

A representation case is initiated by the filing of a petition. The 2014 rule required petitioners to indicate on their petitions their positions with respect to a variety of relevant matters, including the appropriate unit, identifying both inclusions and exclusions, the number of employees, the existence of any bars to an election, possible intervenors, and election details, including the date, time, and place of the election.[197] As noted, nonpetitioning parties were then required to respond by filing their own statements of position a week later (normally at noon on the business day prior to the hearing).

The rule did not require the petitioner to respond in writing to the nonpetitioning party's statement of position prior the opening of the hearing. After all, the nonpetitioning party's statement of position itself was a response to positions already taken in writing by the petitioner,[198] and was due at noon the day before the opening of the hearing. Instead, the rule provided that, in the event the parties were unable to enter into an election agreement, the petitioner ''shall respond on the record to each issue raised in the Statement [of Position]'' after the Statement of Position ''is received in evidence [at the pre-election hearing] and prior to the introduction of further evidence[.]'' 29 CFR 102.66(b) (2015).

Today, the majority amends this process by requiring the petitioning parties to file a written responsive statement of position no later than noon 3 business days before the hearing. In other words, the majority has decided to impose a requirement that petitioners file what amounts to a second written statement of position prior to the opening of the pre-election hearing. Imposition of this requirement delays the opening of the hearing (and hence elections) by a week, because the majority has built in a significant amount of time to allow for the filing of this new responsive prehearing statement of position by petitioners.

However, the majority fails to provide a reasoned explanation for amending the 2014 rule in this regard—no statutory or constitutional requirement that petitioners file a written, pre-hearing responsive statement of position, no judicial criticism of the rule

[196] Moreover, even prior to the 2014 rule, parties committed to enter into election agreements in 7 days or less, which constitutes powerful evidence that employers can in fact obtain advisors and have the conversations necessary to formulate positions on the issues covered by the Statement of Position form within the 5 business-day time frame set forth in the rule. 79 FR 74375.

[197] 29 CFR 102.61 (2015); 79 FR 74328, 74424 (''This information will facilitate entry into election agreements by providing the nonpetitioning parties with the earliest possible notice of the petitioner's position on these important matters.'').

[198] As the Board noted (79 FR 74424): Our colleagues are wrong in contending that the final rule's statement-of-position provisions impose one-sided burdens on employers. The representation process in an RC case is initiated by a written petition for election, filed by employees or a labor organization on their behalf. The petition requires the filer to state a position on the appropriate unit, identifying inclusions and exclusions, and other relevant matters, including recognition and contract bar, election details, possible intervenors, the number of employees, the locations of the facilities involved, and the identities of the petition filer and the employer. All of this information is provided before the employer is required to respond in its Statement of Position. The statement-of-position form seeks essentially the same information from the employer's point of view.

amendment requiring petitioners to respond orally at the hearing to the nonpetitioner's statement of position, and no empirical evidence that the 2014 rule provision was causing problems.

Instead, the majority offers a number of unsupported contentions. First, the majority claims that requiring petitioners to file and serve a responsive statement of position prior to the hearing is more efficient than requiring petitioners to respond orally at the hearing to the nonpetitioner's statement of position, even though the majority's requirement will delay hearings and elections by a week. According to the majority, the requirement will increase the chances that parties enter into an election agreement. But saying this does not make it so. Indeed, even without the majority's new requirement, parties have entered into election agreements in over 90% of the cases.[199] The majority offers no evidence—or reason to expect—that requiring petitioners to file a responsive statement of position before the opening of the pre-election hearing will materially increase the election agreement rate. Indeed, the majority fails to show that a significant number of election agreements are reached after the petitioner responds orally on the record to the nonpetitioner's statement of position at the beginning of the pre-election hearing.

Alternatively, the majority insists that this amendment has the potential to streamline the pre-election hearing by clarifying what remains in dispute (*i.e.,* by informing the nonpetitioning party that the petitioner has changed its position from that which appeared on its petition in response to the nonpetitioner's statement of position). But if this is true, then the question arises why the majority does not also require the nonpetitioning parties to respond in writing (prior to the heating) to the petitioner's (second) statement of position, and thereby inform the petitioner that the nonpetitioning party has changed its position in response to the petitioner's second statement of position. The answer is obvious. At some point, the hearing has to open, and the cost of delaying the hearing to allow multiple rounds of exchanging written statements of position is not worth the delay—particularly since it is the norm for the parties to disclose whether their positions have changed when they attempt to negotiate a stipulated election agreement the day before the scheduled opening of the hearing. In any event, as the 2014 Board explained, because the employer already is in possession of all the facts necessary to litigate any issue at the pre-election hearing, no additional pre-hearing discovery (beyond the completed petition) is necessary from the petitioner. See 79 FR 74368; see also *supra* fn.188.

The majority also fails to provide a good reason for establishing the timeline associated with its new requirement that petitioners file a responsive statement of position: The petitioner's responsive statement of position is due 3 days after the nonpetitioner's statement of position is due and 3 days before the opening of the pre-election hearing. But given that petitioners have been able to respond orally to the nonpetitioner's statement of position less than 24 hours after service of the nonpetitioner's statement of position (as required by the 2014 rule), the majority provides no reason for tripling the amount of time for the petitioner to respond in writing. Indeed, the majority acknowledges that its responsive statement of position requirement ''simply takes an existing requirement and modifies it to the extent that the response is now due, in writing, 3 business days before the hearing;'' affirms that its new requirement that the petitioner file a pre-hearing responsive statement of position ''is not designed to be an onerous requirement;'' and states that it is simply designed to get the petitioner's response to the initial statement of position in writing prior to the hearing. So all the petitioner will have to note, for example, is that it disagrees with the employer's proposed alternative unit and maintains the positions it took on its petition—or that it agrees with the majority's position that for example, one classification that the employer seeks to add to the unit should be added. That should not take 3 business days.

Nor does the majority provide a good reason why the pre-election hearing should be delayed for another three business days following receipt of the petitioner's responsive statement of position, given that they fail to seek or produce any evidence that pre-election hearings have not been running smoothly notwithstanding that, under the 2014 rule, the pre-election hearing continues without adjournment after the petitioner responds orally on the record to the issues raised in the nonpetitioning party's statement of position. The employer certainly does not need an additional 3 business days to prepare for the hearing once it receives the petitioner's responsive statement of position, which it will receive 11 business days after service of the notice of hearing. After all, as noted above, the employer already is in possession of the relevant evidence on all issues that can be contested at the pre-election hearing.

Although the majority claims that allowing an additional three business days could increase the chances of the parties arriving at a stipulated election agreement, thereby sparing the Agency the expense of having to conduct a pre-election hearing and issue a decision and direction of election, the 2014 rule already granted regional directors discretion to postpone the prelection hearing if it appears likely that the parties will be able to enter into an election agreement. 79 FR 74375 fn.325, 74424. There simply is no good reason to build in an automatic delay in the process for those cases where there is no indication that the parties will be able to enter into an election agreement, given that such an automatic delay undermines the Act's policy of expeditiously resolving questions of representation. And, as shown, the majority offers no evidence—or reason to expect—that the election agreement rate will increase in any material way as a result of its amendment today. Instead, as noted, the most likely result is simply to push off the date that parties enter into election agreements.[200]

[199] See *supra* fn.184.

[200] The majority's remaining contentions are nonsensical. Thus the majority's claim that its amendment promotes uniformity by requiring that all parties file a written statement of position in advance of the hearing ignores that, as the 2014 rule explained (79 FR 74425), ''The nonpetitioning parties' prehearing, written Statement of Position is a response to the positions taken in writing 1 week earlier by the petitioner in its petition.'' The majority's related claim—that its new requirement eliminates any impression that the Board is imposing one-sided pleading requirements on nonpetitioning parties—fails for the same reason; no statement of position is due from the nonpetitioning party until the petitioner has set forth its position on relevant matters in writing on its petition. In short, the 2014 rule's statement of position requirement was not ''arbitrarily one-sided'', and the majority admits that any contrary impression was unwarranted. An agency should not alter its procedures to mollify unwarranted criticism. The majority's claim that the nonemployer party is required to furnish some additional information beyond that required of petitioners is partly true, but beside the point. As the Board explained (79 FR 74424–74425), ''Where the statement-of-position form seeks different or additional information, it is generally because the employer has exclusive access to it. For example, the questions relating to jurisdiction concern the *employer's* dealings in interstate commerce. The names and job titles of an employer's own employees are typically known only by the employer, and payroll details, including the length of the payroll period and the most recent payroll period ending date, are those established by the employer.''

f. The Majority Fails To Justify Amending § 102.63(a)(2) to Nearly Triple Employers' Time To Post the Notice of Petition for Election

Prior to the 2014 rule, employers were requested, but not required, to post a notice about the representation petition that was filed and the potential for an election to follow. 79 FR 74309. The 2014 rule required employers to post the Notice of Petition for Election in conspicuous places and to electronically distribute the notice to employees if the employer customarily communicates with its employees electronically. (The regional director furnishes employers with the notice of petition for election that they must post and electronically distribute.) 29 CFR 102.63(a)(1), (2) (2015), 79 FR 74463.

The Notice of Petition for Election specifies that a petition has been filed, as well as the type of petition, the proposed unit, and the name of the petitioner; briefly describes the procedures that will follow, and lists employee rights and sets forth in understandable terms the central rules governing campaign conduct. 79 FR 74379. The notice also provides employees with the Board's website address, through which they can obtain further information about the processing of petitions. *Id.* The rule further requires that employers maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. *Id.*

The Board reasoned that the Notice of Petition for Election would provide useful information and guidance to employees and the parties. *Id.* The employees benefit from a uniform notice practice, which provides them, equally and at an earlier date, with meaningful information about the petition, the Board's election procedures and their rights, and employers benefit from more detailed Board guidance about compliance. 79 FR 74309, 74379.

The Board explained that while it believed that most employers should be able to post the notice on the same day that it is received, it would not judge an employer to have failed to comply with this provision so long as the notice was posted within 2 business days of receipt, and, accordingly, the 2014 rule stated that the employer shall post the Notice of Petition for Election within 2 business days after service of the notice of hearing. 79 FR 74379. The Board left it to future case by case adjudication whether some unforeseen set of factual circumstances might justify an employer taking a longer period of time to post the notice. Accordingly, § 102.63(a)(2) of the 2014 rule further provided that the employer's failure properly to post or distribute the notice ''may be'' grounds for setting aside the election when proper and timely objections are filed. Rendering failure to post the notice grounds for setting aside the election provides an incentive for its timely posting. *Id.*

Although the majority concedes that the requirement serves a laudatory purpose, the majority today nearly triples the time employers have to post and distribute the notice, by providing that employers shall post it within 5—rather than 2—business days. But the majority provides no reasoned explanation for changing the period of time to post and distribute the notice—no statutory or constitutional mandate for a longer timeframe, no judicial invalidation of the notice positing requirement's time frame, and no empirical basis for concluding that the time-frame has caused problems.

The majority merely states that it believes that this change is warranted in view of the logistical difficulties many employers ''may face'' in complying with the requirement. Specifically, the majority claims that for some larger multi-location employers, it ''may'' take a significant amount of time to post the notice in ''all the places where notices to employees are customarily posted.'' But that is all the majority offers—sheer speculation, despite the fact that the rule has been in effect now for over 4 years. The majority certainly provides no empirical basis for concluding that two business days is insufficient time for an employer to post and electronically distribute the notice in the ordinary case. If the petitioned-for employees of a large employer work at more than one of the employer's facilities, it is likely that the employer has supervisors at each facility. And given the widespread availability and use of email, scanners, and facsimile machines, it should hardly prove difficult or time consuming for a ''large multi-location employer'' with a centralized human resources office to email, scan or fax the notices for posting to its on-site representatives at each of the facilities where its petitioned-for employees work and read the employer's posted notices. Significantly, the majority fails to cite any cases where parties complained that elections were improperly set aside due to an employer's failure to post the notice for election within 2 business days.

The majority also fails to provide good reason for granting employers 5 business days to post the notice. Recall that in 2002, the Board held that 5 business days constituted sufficient time to prepare for a pre-election hearing. The majority nowhere explains why employers need the same amount of time to post and electronically distribute a notice—supplied to them with posting instructions by the regional director—as they need to prepare for a pre-election hearing.

The majority's contention—that it is ''less urgent'' that the notice be posted within two business days of service by the regional director given the majority's decision to delay the opening of the pre-election hearing to 14 business days—reflects a fundamental misunderstanding of the purpose of the notice and the realities of organizing campaigns. The purpose of the notice is not to inform employees of the pre-election hearing; indeed, as the majority concedes elsewhere, the vast majority of representation cases never have a pre-election hearing. Rather, as noted, the purpose of the notice is to timely inform employees about the petition and the process and to timely inform employees, supervisors and managers of employee rights and the central rules governing campaign conduct. 79 FR 74379. Given the purpose of the notice (and that campaigning does not commence only with the opening of the pre-election hearing), it makes little sense to link the time for posting the notice with the opening of the pre-election hearing.[201] In any event, this amendment must be invalidated because the majority concedes that this amendment is not severable from its hearing scheduling amendment, which, as shown, must be invalidated.

3. The Majority's Amendments to the Pre-Election Hearing in §§ 102.64 and 102.66 Will Encourage Unnecessary Litigation; Create Unnecessary Delay Between the Opening of the Pre-Election Hearing and Issuance of the Decision and Direction of Election; and Create a

[201] The majority's remaining arguments miss the mark for the same reasons. The earlier the notice is posted, the better, regardless of when the pre-election hearing opens, and the 2014 rule did not link the end of the posting period to the opening of the pre-election hearing, as the required posting period does not end with the opening of the pre-election hearing. Rather, the 2014 rule made clear that the employer must maintain the posting of the notice of the petition for election until it is replaced by the Notice of Election—which is not posted until after the regional director directs an election or approves the parties' election agreement—or until the petition is dismissed or withdrawn. See 29 CFR 102.63(a)(2) (2015). Moreover, the fact that the majority's rule substantially delays the opening of the pre-election hearing does not mean that regional directors will serve the notice of the hearing any later than they did under the 2014 rule. After all, it would hardly serve the majority's purpose of giving parties more time to prepare for the pre-election hearing if the regional director delayed serving the notice of hearing.

Perverse Incentive for Employers To Threaten To Litigate Irrelevant Matters

a. Background

As Section 9(c)(1) of the Act makes clear, the purpose of the pre-election hearing is to determine whether a question of representation exists.[202] *ABC of Texas* v. *NLRB,* 826 F.3d at 222; *Chamber* v. *NLRB,* 118 F.Supp.3d at 197. However, prior to the 2014 rule, the Board's rules and regulations neither expressly stated the purpose of the pre-election hearing nor empowered regional directors to limit the evidence that parties could introduce at the pre-election hearing to that which was relevant the statutory purpose of the hearing. To make matters even worse, the Board had interpreted its pre-2014 statement of procedures and rules and regulations as entitling parties to litigate matters such as individual eligibility or inclusion issues (including supervisory status questions) that were not relevant to the statutory purpose of the pre-election hearing. This interpretation was particularly odd because, as the majority concedes, the Board and the courts had repeatedly held that parties were not entitled to a pre-election *determination* regarding such matters even if the parties had litigated them at the pre-election hearing.[203]

The 2014 rule modified the language which appeared in § 101.20(c) of its statement of procedures and amended §§ 102.64 and 102.66 of its Rules and Regulations to maximize procedural efficiency by ensuring that regional directors could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists.[204] And because the question of whether a particular individual falls within an appropriate unit and is eligible to vote is not ordinarily relevant to whether a question of representation exists, the 2014 rule provided that ''[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.'' [205]

The Board reasoned that it served no purpose to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record upon which the regional director can determine if a question of representation exists, and that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence.[206]

The Board also reasoned that the amendment would eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation and reduce the costs of pre-election litigation.[207] Every non-essential piece of evidence that is adduced at the pre-election hearing adds time that the parties and the Board's hearing officer must spend at the hearing, and simultaneously lengthens and complicates the transcript that the regional director must analyze in order to issue a decision, that is a prerequisite for the election. The Board reasoned that by reducing such irrelevant litigation at the pre-election hearing, hearings would be shorter (with attendant savings to the parties), and regional directors would correspondingly have to spend less time writing pre-election decisions, and be able to issue those decisions in less time than the then-current 20-day median. Thus, by eliminating such wholly unnecessary litigation, the 2014 amendments eliminate an unnecessary barrier to the expeditious resolution of questions of representation.

The Board also concluded based on the rulemaking record that without clear regulatory language giving the regional director authority to limit the presentation of evidence to that relevant to the existence of a question of representation, the possibility of using unnecessary litigation to gain strategic advantage exists in every case and skews the negotiation of pre-election agreements (79 FR 74386–74387) (footnotes omitted):

> That specter, sometimes articulated as an express threat according to some comments, hangs over all negotiations of pre-election agreements. In other words, bargaining takes place in the shadow of the law, and so long as the law, as embodied in the Board's regulations, does not limit parties to presenting evidence relevant to the existence of a question of representation, some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself . . . [with]the effect of disenfranchising statutory employees. According to these commenters, instead of resolving bargaining unit issues on their merits, election agreements are driven by the threat of a hearing devoted to the litigation of unnecessary issues.
>
> The temptation to use the threat of unnecessary litigation to gain such strategic advantage is heightened by both the right under the current rules to take up to 7 days to file a post-hearing brief (with permissive extensions by hearing officers of up to 14 additional days) and the 25-day waiting period, both of which are triggered automatically when a case proceeds to hearing. Every experienced participant in the Board's representation proceedings who wishes to delay the election in order to gain strategic advantage knows that under the [pre-2014] rules, once the hearing opens, at least 32 days (7 days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. The incentive to insist on presenting evidence, even though there are no disputes as to facts relevant to the existence of a question of representation, is thus not simply the delay occasioned by the hearing process, but also the additional mandatory 32-day delay, not to mention the amount of time it will take the regional director to review the hearing transcript and write a decision—a task that has added a median of 20 days to the process over the past decade. Accordingly, the bargaining units and election details agreed upon in the more than 90% of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation.

The Board also explained in the 2014 rule why it believed that the amendment would not merely shift litigation of individual eligibility or inclusion questions from before the election to after the election, but rather would eliminate unnecessary litigation. As the Board explained (79 FR 74391), the pre-2014 rule practice entitling parties to litigate individual eligibility or inclusion questions at the pre-election hearing often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated (and in some cases decided), even when their votes end up not affecting the outcome of the election. If a majority of employees vote against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become

[202] Section 9(c)(1) of the Act provides: ''Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.''

[203] 79 FR 74309, 74383–74386, 74425–74426 (and cases cited therein).

[204] See 29 CFR 102.64(a)(2015) (''The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists.''); see also 79 FR 74309, 74318, 74383, 74384–74387, 74391.

[205] 29 CFR 102.64(a) (2015), 79 FR 74380.

[206] 79 FR 74385–74386.

[207] 79 FR 74309, 74318, 74385–74387, 74391.

moot (and therefore never have to be litigated or decided). *Id.* If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election. *Id.*[208] (In that event too, the individual eligibility or inclusion issues never need to be litigated or decided by the Board.) And even if the parties cannot do so, the Board does not need to conduct another election to resolve the matter; rather, the unit placement of the small number of employees is resolved through a unit clarification (UC) procedure. *Id.*

The 2014 Board also explained why it rejected the argument, repeated by the majority today, that parties should be entitled to litigate at the pre-election hearing, and the Board should decide before the election, individual eligibility or supervisory status questions to enable employers to know who they can use to campaign against the union and to reduce the possibility of post-election objections based on conduct attributable to an individual whose eligibility/supervisory status was not resolved prior to the election. The Board noted that the Act clearly sets forth only one purpose of the pre-election hearing—to determine whether a question of representation exists—and thus it is not the purpose of the pre-election hearing to determine who is a supervisor and who the employer may use to campaign against the union. 79 FR 74389 & fn.382. The Board further explained that supervisory identification issues exist only at the margin, because in virtually every case where there is uncertainty concerning the supervisory status of one or more individuals, the employer nevertheless has in its employ managers and supervisors whose status is not in dispute and is undisputable. 79 FR 74389. The 2014 Board further pointed out that the policy arguments (embraced by the current majority) were based on a series of faulty premises: First even under the pre-2014 rules, employers had no right to a pre-election *decision* concerning individual eligibility or supervisory status questions. Second, even if parties are entitled to litigate supervisory status questions before the election, and even if regional directors are required to resolve them before the election, a regional director cannot issue a decision on any eligibility or supervisory status question until well after the filing of the petition because a hearing must be held and the regional director must issue a decision. Thus, even where the regional director resolves the individual eligibility or supervisory status issue in the decision and direction of election, the employer will not have the benefit of the decision for a substantial part of any campaign, including a substantial part of the ''critical period'' between the filing of the petition and the election. Third, even if the regional director issues a decision concerning an individual eligibility or supervisory status question, the decision is subject to a request for review by the Board. The Board rarely rules on such requests until shortly before the election and, sometimes, not until after the election.[209] Fourth, even if a regional director's decision and final Board decision are issued prior to an election, the Board decision is potentially subject to review in the courts of appeals and the court of appeals' decision cannot be issued pre-election.[210] Thus, uncertainty regarding a disputed individual's supervisory status will continue to exist even if parties are entitled to litigate individual eligibility/supervisory status questions at the pre-election hearing and even if the Board is required to resolve them before the election. 79 FR 74389 (footnotes omitted).[211]

b. The Majority's Amendments to § 102.64 and 102.66 Create Unnecessary Barriers to the Fair and Expeditious Resolution of Questions of Representation for No Good Reasons

Today, however, the majority takes a giant step backwards. The majority expands the purpose of the prelection hearing, by amending § 102.64 to state that ''[t]he *primary* purpose'' of the prelection hearing is to determine whether a question of representation exists. Having thus expanded the statutory purpose of the pre-election hearing beyond what Congress mandated, the majority then provides that ''[d]isputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Region Director before an election is directed.'' At the same time, the majority also expressly provides that parties can agree to defer eligibility questions (section 102.64(a)) and that regional directors need not always decide such matters even if they are litigated provided the directors adhere to the general pre 2014 practice of deferring ''up to 10% of the proposed unit.'' Thus, the majority characterizes its decision as a return to the pre-2014 final rule status quo.[212]

The majority offers no reasoned explanation for why it changes the 2014 rule amendments to sections 102.64 and 102.66. The majority certainly cannot claim that the 2014 rule provisions were contrary to the Act (or the Constitution). As shown, the express statutory purpose of the pre-election hearing set forth in Section 9(c)(1) of the Act is to determine whether a question of representation exists. The 2014 amendments to §§ 102.64(a) and 102.66(a) were entirely consistent with Section 9(c) because ''both permit[ted] parties to introduce evidence at the pre-election hearing that is relevant to whether a question of representation exists. Indeed, the [2014] amendment to § 102.66(a) expressly vest[ed] parties with a right to present evidence of the significant facts ''that support the party's contentions and are relevant to the existence of a question of representation.'' Nothing in Section 9(c) or any other section of the Act requires the Board to permit parties to introduce evidence at a pre-election hearing that is not relevant to whether a question of representation exists.'' 79 FR 74385. It is thus not surprising that every court to have considered the matter has rejected the claim that the statute entitles parties to litigate at the pre-election hearing (and requires the Board to decide prior to the election), all individual eligibility or unit inclusion issues. See *UPS* v. *NLRB,* 921 F.3d at 257; *ABC of Texas* v. *NLRB,* 826 F.3d at 222–223, affirming *ABC of Texas* v. *NLRB,* 2015 WL 3609116 at * 7, *14–*16; *Chamber* v. *NLRB,* 118 F.Supp.3d at 195–203.

The majority does not claim that the amendments caused administrative problems or failed to accomplish their objectives. Indeed, the Board's regional directors have not requested these changes, despite the Board specifically

[208] See *New York Law Publishing Co.,* 336 NLRB No. 93, slip op. at 1 (2001) (''The parties may agree through the course of collective bargaining on whether the classification should be included or excluded.'').

[209] See, *e.g., Mercedes-Benz of Anaheim,* Case 21–RC–21275 (May 18, 2011) (day before the election); *Caritas Carney Hospital,* Case 1–RC–22525 (May 18, 2011) (after the election); *Columbus Symphony Orchestra, Inc.,* 350 NLRB 523, 523 n.1 (2007) (same); *Harbor City Volunteer Ambulance Squad, Inc.,* 318 NLRB 764, 764 (1995) (same); *Heatcraft, Div. of Lennox Indus., Inc.,* 250 NLRB 58, 58 n.1 (1980) (same).

[210] See 29 U.S.C. 159(d) and 160(e); *Boire* v. *Greyhound Corp.,* 376 U.S. at 476–79.

[211] In fact, the period of uncertainty will be even greater under the majority' rule than it was before 2014 in cases where regional directors decided supervisory status questions, because the majority delays the hearing date and hence the date of the pre-election decision.

[212] Actually, the majority misrepresents the status quo that existed prior to the 2014 rule. As the rule explained, Board caselaw permitted more than 10% of the unit to be deferred in contested cases. 79 FR 74425; see also 79 FR 7331 & fn.54.

soliciting their opinions. In fact, the regional directors have reported that the amendments have ''worked well in reducing the amount of unnecessary pre-election litigation.'' RDs' Response to 2017 RFI p.3.

Instead, according to the majority, its amendment represents a better balance of the interests in the expeditious processing of questions of representation with certainty, finality, and efficiency; fair, and accurate voting and transparency; and uniformity. The majority insists that its amendment promotes certainty, finality, and efficiency because conducting an election in which individuals vote subject to challenge may result in determinative challenges or the filing of post-election objections, which will require post-election litigation to definitely resolve the outcome of the election.

But in keeping with their pattern of pontification without producing anything in support, my colleagues fail to analyze or cite any evidence that the 2014 rule's benefits of avoiding unnecessary litigation that also delays elections, have come at the expense of finality, certainty, and efficiency. Indeed, the majority's explanation that avoiding pre-election litigation and resolution of individual eligibility or inclusion issues causes elections to be less final and certain runs counter to the evidence before the agency and is therefore arbitrary and capricious. See *State Farm,* 463 U.S. at 43 (rule is arbitrary and capricious if the agency has offered an explanation that runs counter to the evidence before it). Thus, my analysis of the relevant data reveals that the number of elections resulting in determinative challenges has remained remarkably stable since the 2014 rule amendments have gone into effect despite a significant increase in regional directors' approving election agreements in which certain individuals would votes subject to challenge.[213] There has likewise been remarkable stability in the number of cases necessitating post-election decisions on objections by regional directors (which would tend to show that deferring more individuals' eligibility has not resulted in any significant increase in cases involving arguably objectionable conduct attributed to such individuals),[214] and stability in the number of rerun elections ordered by regional directors (which is likewise consistent with the lack of any significant increase in objectionable conduct resulting from increased deferral of eligibility litigation or resolution) [215] Just as telling is the stability in UC petitions (demonstrating that the increased pre-election deferral of individual eligibility decisions has not caused a spike in parties coming back before the Board to resolve individuals' placement inside or outside the relevant bargaining units).[216] Thus, elections are just as ''final'' and ''certain'' under the 2014 rule amendments as they were under the pre-2014 status quo to which the majority wishes to return. In short, contrary to the predictions of the 2014 rule critics, the 2014 amendments have not shifted litigation from before the election to after the election. Rather, just as the 2014 rule predicted, the amendments have eliminated pre-election litigation that was unnecessary, as proven by the absence of a corresponding increase in post-election litigation. Thus, by expanding the preexisting practice of deferring individual eligibility decisions, the 2014 rule demonstrates a remarkable gain in agency efficiency. See 79 FR 74413; *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994) (''The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue'').

The majority similarly fails to cite any evidence in support of its naked assertion that avoiding pre-election litigation and resolution of individual eligibility or inclusion issues impairs the interests in fair and accurate voting and transparency. The majority's assertion also flies in the face of well-settled precedent. As the D.C. Circuit recently reaffirmed, so long as employees are advised before the election that the unit placement of the individual voting subject to challenge has not been determined—as the 2014 rule explicitly requires they be notified (29 CFR 102.67(b) (2015))—the interest in fair and accurate voting and transparency is satisfied. See *UPS* v. *NLRB,* 921 F.3d at 257 (''Nor does . . . th[e] . . . common practice [of] permit[ting] . . . employees in disputed job classifications . . . to vote under challenge . . . imperil the bargaining unit's right to make an informed choice, so long as the notice of election—as happened here—'alert[s] employees to the possibility of change' to the definition of the bargaining unit.''). See also 79 FR 74386 & n.364, 74389–91 & n.386, 74413 (discussing cases and rejecting claims that settled practice of deferring resolution of such matters deprives employees' of ability to make an informed choice in election, deprives employers of ability to campaign against union, or deters voting).[217]

The majority's additional claim that employees permitted to vote subject to challenge are less likely to vote suffers from the same flaw. The majority cites no evidence that the turnout of employees permitted to vote subject to challenge under the 2014 rule has been lower than the turnout of unit employees generally, much less that the reason any such individuals declined to vote was because their votes would be challenged. And the 2014 rule noted that there was no evidence that voter turnout was depressed prior to the 2014 rule when employees were likewise permitted to voted subject to challenge.[218]

[213] See February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross at p.5 (reporting that for a 2 year period immediately following the 2014 rule's implementation there were 191 election agreements to vote individuals subject to challenge, while for an equivalent pre-rule period there were only 47 such cases; showing an approximate 75% increase). Nevertheless, information produced from searches in the Board's NxGen case processing software shows that in FYs 2016–2017 there were only 56 post-rule cases requiring a postelection regional director decision on determinative challenges as compared to 53 such pre-rule cases in FYs 2013–2014.

[214] Information produced from searches in the Board's NxGen case processing software shows that in FYs 2016–2017 there were 114 largely post-rule cases requiring a postelection regional director decision on objections as compared to 118 pre-rule cases in FYs 2013–2014.

[215] Information produced from searches in the Board's NxGen case processing software shows that in FYs 2016–2017 there were 61 largely post-rule (non-duplicative) cases in which regional directors directed rerun elections as compared to 59 such pre-rule (non-duplicative) cases in FYs 2013–2014.

[216] Comparing information reported on the agency's website concerning total RC elections won by unions with information reported in the agency's annual Performance Accountability Reports concerning total UC Petitions filed in the following fiscal year (to take into account time for bargaining to resolve any deferred unit placement issues) shows that in FYs 2016–2017 post-rule UC Petitions filed constituted 8.2% and 7.2% of the total number of RC elections won by unions in the previous fiscal years, as compared to equivalent pre-rule UC Petition figures of 7.3% and 8.7% in FYs 2013–2014.

[217] The majority's argument that the Board's election notice is not sufficiently clear to avoid voter confusion runs afoul of the same well-settled precedent. In any event, the very same notice about which the majority complains will continue to be used in those cases where parties exercise their right under the majority's rule to agree to avoid pre-election litigation of individual eligibility or inclusion questions (or where the regional director defers deciding such matters even though they are litigated). The very same notice will also continue to be used when the Board directs an individual to vote subject to challenge in ruling on a request for review prior to an election. The majority never bothers explaining why it has not sought to make the notice clearer if it believes the notice is insufficiently clear, instead of resorting to the ill-advised ''solution'' of opening the floodgates to irrelevant litigation.

[218] 79 FR 74390 (''The case law demonstrates that even in cases where only a single individual is

Continued

The majority's reasoning is also internally inconsistent. If avoiding pre-election litigation and resolution significantly impairs the interests in finality, certainty, efficiency, fair and accurate voting, transparency, and ballot secrecy, then it is difficult to understand several choices the majority has made. First, the majority permits the parties to agree not to litigate individual eligibility or inclusion issues at the pre-election hearing.[219] Second, the majority permits regional directors to avoid resolving such matters before the election even if they are litigated.[220] Third, the majority's amendments permit the election to go forward if the Board has not yet ruled on a request for review of a regional director's resolution of an individual eligibility or inclusion issue.[221] Fourth, the majority's amendments continue to permit the Board itself to direct an individual to vote subject to challenge in ruling on a request for review of a regional director's decision and direction of election.[222]

The majority also fails to consider important aspects of the problem of returning to the pre-2014 rule status quo and providing that parties will normally be entitled to litigate, and regional directors will normally be required to decide, individual eligibility or inclusion issues at the pre-election hearing: Namely that unless regional directors have authority to limit evidence to that which is relevant to determining whether a question of representation exists, (1) the parties and the Board will be forced to incur unnecessary expenses and delay resulting from having to respectively litigate and decide irrelevant matters; (2) elections that do not involve pre-election hearings will also be delayed; and (3) some parties will use the threat of protracted litigation to extract other concessions concerning the election details, including the definition of the unit itself, thereby disenfranchising employees. Thus, the majority utterly ignores the reality that, because bargaining takes place in the shadow of the law, the election dates employers are willing to agree to in the stipulated election agreement context are unquestionably influenced by how long it would take the Board to conduct an election if the case went to a pre-election hearing. In other words, the majority has plainly failed to consider that delaying elections in the directed election context—by providing that parties will normally litigate at the pre-election hearing, and regional directors will normally decide before the election, individual eligibility or in inclusion questions—will also inevitably delay elections in the majority of cases that occur outside that context. The majority also ignores that parties use the threat of engaging in protracted litigation at the pre-election hearing to extract other concessions regarding election details, such as the unit itself which has the effect of disenfranchising employees. 79 FR 74318, 74386–74387.

The majority essentially contends that there are no such costs, but these denials are contrary to the record before the agency and belied by the majority's own assertions. Indeed, they fly in the face the district court holding in *ABC of Texas* v. *NLRB,* 2015 WL 3609116 at *16–*17 (relying upon the Board's notation that ''the spectre of protracted pre-election litigation under the prior rule could be used to 'extract concessions' regarding the election,'' and finding that the Board adequately ''explain[ed] how the final conclusions are factually and legally supported''). See also 79 FR 74318, 74386–74387. Moreover, the majority's insistence that its amendments will not significantly expand the pre-election hearing or delay the time it takes regional directors to issue decisions and directions of elections is impossible to square with the majority's earlier complaint that deferring such matters until after the election may make it necessary to ''conduct *extensive hearings on these very issues*'' after the election has been conducted, and the fact that the 2014 rule has significantly reduced the time it takes for regional directors to issue their decisions and directions of elections.[223]

permitted to vote subject to challenge, the individual is not necessarily deterred from voting. See, *e.g., NLRB* v. *Cal-Western Transport,* 870 F.2d 1481, 1483, 1486 (9th Cir. 1989) (regional director permitted single employee to vote subject to challenge and he did so); *NLRB* v. *Staiman Brothers,* 466 F.2d 564, 565 (3d Cir. 1972) (deciding vote cast by single employee permitted to vote subject to challenge by agreement of the parties).'').

[219] See Amended 29 CFR 102.64(a) *Conduct of Hearing* (''the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election'').

[220] Thus, the majority specifically states, ''we are not requiring that regional directors resolve all disputes prior to the direction of election. As noted above, we are not at this time eliminating the discretion of the regional director to defer resolution of eligibility and inclusion issues[.]''

[221] See Amended 29 CFR 102.67(c) (''if a request for review of a decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded'').

[222] The majority's claim—that its amendments promote uniformity and transparency by providing that eligibility or inclusion issues ''normally will be litigated and decided before the election'', and are therefore superior to the 2014 rule—is misplaced. Uniformity is not inherently desirable. Making a bad practice uniform hardly constitutes a good reason for amending the Board's rules. It makes no sense for the majority to provide that parties will ''normally'' litigate, and regional directors will ''normally'' decide, matters that are not relevant to the statutory purpose of the pre-election hearing and that carry significant costs to the fair and expeditious resolution of questions of representation. In any event, as just shown, the majority's claim of uniformity is belied by the myriad ways in which these matters may not be litigated or resolved before the election under the majority's own rule.

As for transparency, the 2014 rule did provide transparency and guidance to the regional directors and the public regarding the appropriate exercise of discretion. For example, the 2014 rule explained that the Board must address whether there are any professional employees in an otherwise appropriate unit containing nonprofessionals. 79 FR 74384. The rule further explained that it expected regional directors to permit litigation of, and to resolve, individual eligibility or inclusion questions when they might significantly change the size or character of the unit. 79 FR 74390. On the other hand, the rule explained that where the issues would not affect the character of the unit, the Board strongly believed that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. 79 FR 74388. See also 79 FR 74391.

With regard to the appropriateness of the 20% figure, the 2014 Board first explained that more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not compromise the Board's ability to immediately determine election results in the vast majority of cases. 79 FR 74387. But the Board further explained why there should actually be less than 15% of all elections with determinative challenges. *Id.* at 74387 fn.370. The 2014 Board was proven correct. In fact, the 56 post-rule determinative challenge cases in FYs 2016–2017 (described in *supra* fn.213) amount to less than 2% of the total RC, RD and RM elections conducted in those years. See also *ABC of Texas* v. *NLRB,* 826 F.3d at 228 (rejecting claim that hearing amendments will delay certifications by simply shifting litigation from before the election to after the election in light of election margins of victory).

[223] See 2018 NLRB Letter (Summary Table) (reporting a 24-day median for regional directors to issue a decision and direction of election following the close of the pre-election hearing in the year immediately preceding the 2014 rule's effective date as compared to a 12-day median in the year immediately following the 2014 rule's effective date).

There is no merit to the majority's claim that permitting litigation of individual eligibility or inclusion issues will not significantly lengthen the hearing because the majority retains the statement of position and preclusion provisions of the 2014 rule. Thus, the statement of position and preclusion provisions can do nothing to prevent parties from litigating timely raised individual eligibility or inclusion issues now that the majority has expanded the scope of the pre-election hearing beyond that mandated by Congress and now that the majority has made what the courts have agreed was irrelevant to the purpose of the pre-election hearing ''relevant.'' In short, as the majority's regulatory text provides, parties will ''normally'' be permitted to litigate such matters at the pre-election

Contrary to the majority, the fact that parties continue to enter into election agreements more than 90 percent of the time hardly disproves that prior to the rule parties used the threat of litigating irrelevant matters at the pre-election hearing to extract concessions regarding election details. Thus, what matters is the terms of those agreements. And the 2014 rule has clearly resulted in a meaningful change in those terms because, as the majority concedes, the median time for conducting elections in the stipulated election context has dropped significantly since the rule went into effect,[224] and because, as shown, the number of election agreements providing for individuals to vote subject to challenge dramatically increased once employers were no longer entitled to litigate irrelevant eligibility issues at the pre-election hearing.[225]

4. The Majority's Amendment to § 102.66(h) Further Delays Elections By Entitling Parties To File Briefs Following the Close of Pre-Election Hearings

Prior to the 2014 rule, Board rules entitled parties to file briefs following the close of pre-election hearings. The 2014 rule amended § 102.66 to provide that although parties are entitled to present oral argument at the close of the pre-election hearing, parties may file post-hearing briefs only upon special permission of the regional director and within the time and addressing only the subjects permitted by the regional director. 29 CFR 102.66(h) (2015), 79 FR 74309.

The Board reasoned that given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs were not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. 79 FR 74309, 74401–74402, 74426. Indeed, the Board noted that section 11242 of the Casehandling Manual then in effect instructed hearing officers in pre-election proceedings to ''encourage the parties to argue orally on the record rather than to file briefs;'' that the drafting guide demonstrated that briefs are often of so little help that the drafters are instructed to begin drafting decisions before the briefs arrive;[226] and that the 1997 Report of Best Practices Committee—Representation Cases, prepared by a committee of primarily NLRB regional directors, deemed it a ''best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases.'' 79 FR 74427.[227] The Board also found it self-evident that by exercising the right to file briefs or even by simply declining to expressly waive the right to file briefs until the running of the 7-day period, parties may delay the issuance of a decision and direction of election and the conduct of an election unnecessarily. 79 FR 74401, 74402, 74427 fn.529.[228] And the Board found it significant that Congress had pointed to ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition in the representation case arena to justify its decision not to require the Board to permit post-hearing briefing after every pre-election hearing. 79 FR 74402, 74426.[229] Accordingly, the Board decided to grant regional directors discretion to permit the filing of post-hearing briefs only when they conclude it would be helpful. 79 FR 74427.

Today, however, the majority imposes additional delay between the close of the hearing and issuance of the decision and direction of election by granting parties an absolute right to file briefs following the close of the pre-election hearing. Here again the majority offers no good reason for changing the 2014 rule's discretionary briefing procedure—no statutory or Constitutional mandate that parties be permitted to file briefs,

hearing, and regional directors will ''normally'' decide such matters before the election.

[224] See *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election* (showing a median of 37 days to process an election agreement case from petition to election in pre-rule FYs 2013–2014, as compared to only 22 or 23 days for post-rule FYs 2016–2017).

[225] See 2018 NLRB Letter at p.5 (reporting that for a 2 year period immediately following the 2014 rule's implementation there were 191 election agreements to vote individuals subject to challenge, while for an equivalent pre-rule period there were only 47 such cases; showing an approximate 75% percent increase).

[226] See 79 FR 74427, 74449 (''In fact, the Agency's internal training program expressly instructs decision writers to begin drafting pre-election Regional directors' decisions before the briefs arrive. See 'NLRB Professional Development Program Module 5: Drafting Regional director Pre-Election Decisions, last updated May 23, 2004.' '').

[227] See G.C. Memo. 98–1, ''Report of Best Practices Committee—Representation Cases December 1997'', at 10, 28 (''It is considered a best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.'').

[228] The Board also observed that, as previously discussed, the temptation to use the threat of unnecessary litigation to gain strategic advantage is heightened by the right under the then current rules to take up to 7 days to file a post-hearing brief (with permissive extensions by hearing officers of up to 14 additional days) which is triggered automatically when a case proceeds to hearing, because every experienced participant in the Board's representation proceedings who wishes to delay the election in order to gain strategic advantage knows that under the then current rules, once the hearing opens, at least 32 days (7 days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. 79 FR 74386–74387, 74401.

[229] The 2014 rule stated in this regard (79 FR 74402):

The APA and its legislative history contain evidence of Congress's intent not to require that the Board permit post-hearing briefing after every pre-election hearing. Enacted in 1946, Section 8 of the APA, 5 U.S.C. 557(c), provides, in pertinent part, that in formal agency adjudication ''parties are entitled to a reasonable opportunity to submit . . . proposed findings and conclusions . . . and supporting reasons for the . . . proposed findings or conclusions.'' But Section 5(6) of the APA, 5 U.S.C. 554(a)(6), specifically exempts from the category of formal adjudication those cases involving ''the certification of worker representatives.'' The courts have held that this exemption applies to both pre- and post-election hearings. See *In re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971). The Senate Committee Report explained that the exemption was inserted into the APA because the Board's ''determinations rest so largely upon an election or the availability of an election.'' S. Rep. No. 752, at 202 (1945). The committee also pointed to ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

Congress did not revisit this decision in 1947 when Section 9 of the NLRA was amended, and the APA continues to exempt representation cases from its formal adjudication requirements. In fact, between 1964 and 1966, Congress considered removing all the exceptions contained in Section 5 from the APA, but decided not to do so. In 1965, the Board's Solicitor wrote to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure objecting strenuously to removal of the exemption for representation cases. The Solicitor specifically objected that ''election case handling would be newly freighted and greatly retarded by . . . [s]ubmission to the hearing officer of proposed findings of fact and conclusions of law.'' Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 88th Cong., 2d Sess. 532 (1964) (letter submitted by William Feldesman, NLRB Solicitor, May 11, 1965). The Solicitor concluded, ''After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause that bottleneck the Board has for years been attempting to prevent.'' Id. at 534. In 1966, the Senate Committee on the Judiciary reported out a bill containing a provision, not ultimately enacted, that would have removed all the exemptions. But the Committee Report carefully explained, ''It should be noted, however, that nonadversary investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within the provisions of section 5(a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board.'' S. Rep. No. 1234, 89 Cong., 2d Sess. 12–13 (1966).

This history demonstrates that Congress's intent in the APA was to ensure that written briefing was not required in representation cases because of the interest in expedition. Congress has steadfastly maintained this view, and has expressly rejected any written briefing requirement in representation cases whenever the matter has arisen. The change is therefore consistent with the requirements of the law and the intent of Congress.

no judicial invalidation of the 2014 rule's discretionary briefing provision, and no empirical evidence that the rule provision had caused problems.

The majority claims that entitling parties to file briefs with the regional director following the close of the pre-election hearing better accommodates the interests in the expeditious resolution of questions concerning representation, efficiency and uniformity. But the majority provides no evidence that the benefits of the 2014 rule's discretionary briefing procedure have come at the expense of uniformity or efficiency (or fairness or transparency). The 2014 rule *was* uniform (and transparent) with respect to briefing; thus the rule took the same standard that had long governed briefing to the hearing officer following the *post*-election hearing—no entitlement to briefing; briefing permitted only if deemed helpful by the decisionmaker—and made it equally applicable to briefing to the regional director following the close of the *pre*-election hearing. Compare 29 CFR 102.66 (h) with 102.69 (c)(1)(iii) (2015).

In claiming that its amendment promotes efficiency, the majority takes issue with the rule's conclusion that posthearing briefing is generally unnecessary because representation cases are prone to recurring and uncomplicated legal and factual issues. But the majority's conclusion is contrary to the Congressional determination not to require briefing in connection with representation case hearings because of the issues' ''simplicity'' and the need for expedition.

Although the majority agrees that the Board is not required to permit briefing to the regional director following the close of the pre-election hearing, it claims that the APA and the Act do not establish that Congress intended that the Board not permit briefing. But the 2014 rule does *not* prohibit briefing. To the contrary, the rule permitted directors to permit briefing when they concluded that such briefing would be helpful.[230]

In support of its claim that parties should be entitled to file briefs to the regional director following the close of the pre-election hearing in *all* cases, the majority argues that briefing reduces the risk that the regional director will overlook or misunderstand key arguments. But the majority cites no evidence that the quality of regional director decisions has suffered since the 2014 rule made briefing subject to special permission of the regional directors. And the circumstantial evidence is directly to the contrary. Thus, for example, there is no evidence of an increase in the number of Board grants of review or Board reversals of regional director pre-election decisions since the 2014 rule went into effect and eliminated the parties' entitlement to file post-hearing briefs with the regional director,[231] which is certainly what one would expect to see if there had been an uptick in regional directors reaching the wrong results or making prejudicial procedural errors since the 2014 rule went into effect.[232] Indeed, there is not even any evidence of an increase in requests for review of regional director decisions and directions of elections since the 2014 rule went into effect and eliminated the parties' entitlement to file post-hearing briefs with the regional director, which one would expect if parties believed that the regional director had overlooked or misunderstood key points.[233]

The majority also claims that the regional director and his or her staff will benefit from briefs in all cases because party briefing will save the region from having to conduct independent research of the law and the record, which will shorten, rather than lengthen, the time it takes for regions to issue decisions and directions of elections. But because of the recurring nature and simplicity of the issues in representation cases, regions are generally familiar with the law. And, contrary to the majority's premise, the region must always examine the record and any cited cases for itself before the decision and direction of election issues because, as every tribunal knows, parties often misstate what the record shows and/or inaccurately characterize case holdings. In any event, the majority simultaneously acknowledges that at least in some cases the regional director and his or her staff can ''largely prepare the decision while awaiting posthearing briefing.'' In these cases, therefore, briefing is not efficient and results in unnecessary costs. Moreover, in these cases at least, the majority's rule *will* unnecessarily delay the decision by requiring the regional director to delay his decision until the briefs are filed or the due date comes and with no briefs being filed. See 79 FR 74427.[234]

[230] For example, the majority points to independent contractor cases as the type of case that warrants briefing. But an analysis of the relevant data involving independent contractor cases indicates that since the 2014 rule was implemented, regional directors have been exercising their discretion to permit briefing in many independent contractor cases. See, *e.g.,* Mar. 31, 2016 Decision and Order p. 1 in *Minnesota Timberwolves Basketball, LP,* 18–RC–169231; Mar. 31, 2017 Decision and Order p.3 fn.10, Tr. 674 in *Bimbo Foods Bakeries Distribution* LLC, 01–RC–193669; May 7, 2019 Decision and Direction of Election p.2 in *Rival Entertainment LLC,* 10–RC–238340; May 7, 2019 Decision and Direction of Election p.2 in *Center Stage Management LLC,* 10–RC–238326; Tr.321 in *Green Line Group, Inc.,* 01–RC–181492; Oct. 8, 2015 Decision and Direction of Election p.2 in *Uno Digital, Corp.,* 12–RC–159482; July 30, 2015 Decision and Direction of Election p.2 in *Pennsylvania Interscholastic Athletic Association Inc.,* 06–RC–152861; May 23, 2018 Decision and Direction of Election p.1 fn.2 in *City Communications Corp.* 12–RC–218548; Sep. 18, 2018 Decision and Direction of Election p.2 in *Trustees of Columbia University,* 02–RC–225405. Significantly, however, in some independent contractor cases, parties have waived filing briefs in lieu of presenting oral argument, thereby evidencing that parties themselves recognize that post-hearing briefing to regional directors is *not* necessary in all cases involving independent contractors. See, *e.g., Porchlight Music Theatre Chicago,* 13–RC–242259 Pre-election Hearing Transcript pp.831, 854.

[231] According to a chart of requests for review of regional directors' decisions and directions of elections produced for my staff by the Board's Office of the Executive Secretary, in FYs 2016–2017 the Board only granted approximately 14% of such post-rule requests for review in which it decided the merits (11 out of 80), which constituted only 0.3% of all RC, RD and RM elections held in those fiscal years (11 out of 3,154 elections). This is consistent with the Board's granting approximately 14% of such pre-rule requests for review in which it decided the merits during FYs 2013–2014 (16 out of 111), which constituted only 0.5% of all elections held in those fiscal years (16 out of 3,157). These numbers are also consistent with pre-rule statistics relied upon by the 2014 Board showing that from FYs 2004–2013, the Board granted approximately 15% of all pre-election requests for review filed, which also constituted less than 1% of all elections held. See 79 FR 74410 fn.456.

Out of the 11 post-rule cases in which a FY 2016 or 2017 request for review was granted, only 3 regional director decisions were reversed based on applications of then-current law (and 4 regional director decisions were either dismissed, remanded or reversed based on application of new legal standards issued after the regional directors' decisions). These numbers are consistent with the 4 reversals of regional directors' pre-election decisions during FYs 2013–2014 based on applications of then-current law (and 2 remands based on application of new legal standards). These numbers are also consistent with pre-rule statistics relied upon by the 2014 Board showing that from FYs 2010–2013 there were only 14 cases in which regional director decisions were reversed. See 79 FR 74408 fn.454.

[232] Regional directors are bound to apply extant Board law. Accordingly, cases where the Board reverses a regional director by overturning existing precedent obviously cannot be cited as a basis for entitling parties to file posthearing briefs with the *regional director.* Indeed, the parties' ability to argue that precedent should be overturned was in no way impaired by the 2014 rule. Thus, as the Board noted, the rule permitted parties to file briefs with the Board in support of their requests for review in each case. 79 FR 74402.

[233] To the contrary, the same chart from the Board's Office of the Executive Secretary, *supra* fn.231, shows 99 total requests for review concerning decisions and directions of election that were processed under the 2014 rule in FYs 2016–2017, which represents an approximate 23% decrease from the 129 such pre-rule requests for review filed in FYs 2013–2014.

[234] I recognize that, in response to the Board's 2017 RFI, the regional directors requested that they be given discretion to permit the filing of briefs following the close of the pre-election hearing. However, the 2014 rule already grants regional directors such discretion (see 79 FR 74401 (the rule

The majority's additional suggestion—that briefing should be made a matter of right under this rule because regional directors will be resolving more issues now than they did under the 2014 rule—is mystifying. The majority insists that its amendments to the pre-election hearing simply constitute a return to the pre-2014 rule status quo regarding individual eligibility or inclusion issues. And that was precisely the status quo that the Board was reviewing when it concluded that briefing was not ordinarily necessary. My colleagues err to the extent they attempt to tie the 2014 Board's provision of discretion to regional directors to permit or deny pre-election briefing to the separate amendment concerning the pre-election litigation of individual eligibility issues. No such connection was made in the 2014 rule's discussion of pre-election briefing. See 79 FR 74401–74403. To the contrary, the 2014 Board expressly clarified that its amendments were severable and would have been adopted individually ''regardless of whether any of the other amendments were made[.]'' *Id.* at 74308 fn.6.

The majority also fails to consider an important aspect of the problem of returning to the pre-2014 rule status quo with respect to briefing following the close of the pre-election hearing. Specifically, they fail to acknowledge that entitling parties to file briefs in all cases not only delays elections in contested cases, but also delays elections in the stipulated election context. See *supra* fn.228.

5. The Majority's Amendments to Section 102.67 Also Create Unnecessary Delay Between Issuance of the Decision and Direction of Election and the Actual Election

a. Without Providing a Reasoned Explanation, the Majority Deletes § 102.67(b)'s Provision That Regional Directors Will Ordinarily Specify the Election Details in Their Decisions and Direction of Election

By definition, an election cannot be conducted until the details of the election are set and the Notice of Election advises the employees of when, where, and how they may vote. Prior to the 2014 rule, election details were typically addressed after the direction of election issued, which required further consultation about matters that could easily have been resolved earlier. 79 FR 74310, 74404.

The 2014 rule required that petitioners state their positions regarding election details (including the type, date(s), time(s), and location(s) of the election) in their petitions and that the nonpetitioning parties state their positions on election details in their statements of position. 29 CFR 102.61, 102.63(b)(1)(i), (b)(2)(i), and (b)(3)(i) (2015). The rule also provided that before the close of the pre-election hearing, hearing officers would solicit party positions on election details and solicit the contact information of the employer's on-site representative to whom the notice of election should be transmitted if an election is directed. See 29 CFR 102.66(g)(1), (2) (2015).

Accordingly, the Board concluded that, because the parties will have already (twice) stated their positions on the election details, the regional director ordinarily will not need to solicit their positions on the election details yet again after issuing the direction of election, and therefore ordinarily will be able to specify the election details in the direction of election. 79 FR 74404. And, because the director ordinarily will be able to specify the election details in the direction of election, the director ordinarily will be able to issue the Notice of Election for the employer to post and distribute simultaneously with the direction, thereby enabling a more expeditious election. *Id.* Accordingly, § 102.67(b) of the 2014 rule provided that election directions ''ordinarily'' will specify the type, date(s), time(s) and location(s) of the election and the eligibility period and that the regional director will ''ordinarily'' transmit the Notice of Election ''simultaneously with the direction of election.'' 29 CFR 102.67(b) (2015). In sum, the 2014 Board concluded that by enabling the regional director to conduct the election without unnecessary delay, the amendments would help the Board to more expeditiously resolve questions concerning representation. 79 FR 74404. The Board also concluded that the change would obviate the need for a wasteful post-decision consultation process in favor of more efficient consultations during the hearing itself. Given that all parties would be present at the pre-election hearing, it was eminently reasonable to solicit party positions then, rather than have the Board agent attempt to solicit input individually after the direction issues. *Id.* at 74405.

However, the rule left the director free to consult with the parties again after directing an election if necessary. *Id.* For example, if the regional director directs an election in a unit significantly different from the petitioner's proposed unit and the employer's alternative unit, the regional director should consult with the parties concerning the election details. *Id.*

Today, however, the majority amends § 102.67 to eliminate the provision that regional directors ''ordinarily'' will specify the election details in their direction of election, and instead rewords the language of that section to provide that the direction ''may'' specify the election details. Here again the majority provides no reasoned explanation for the amendment—no statutory inconsistency, no judicial invalidation of the 2014 rule provision at issue, and no empirical evidence that the rule provision has caused any administrative problems. Neither the GC nor the regional directors have requested the change made by the Board today, presumably reflecting their position that regional directors ordinarily need *not* consult for a *third* time with parties regarding election details, because the parties will have already stated their positions both before and during the pre-election hearing. Indeed, the majority does not, and cannot, cite a single submission (in response to the 2017 RFI) questioning this rule provision.

The majority's reasoning in support of this amendment is also internally inconsistent. On the one hand, the majority states (emphasis added) that the amendment ''represents a shift in emphasis, rather than substance'' and that it ''fully agree[s]'' that the regional director ''*should ordinarily* be able to specify the election details in the direction, thus avoiding any delay in issuing the Notice of Election.'' If the majority is sincere in this regard, then the majority's amendment is clearly less transparent than the 2014 rule because it substitutes the word ''may'' for the word ''ordinarily.'' And it is certainly unnecessary to change the 2014 rule to make it clear that regional directors do not have to specify the election details in their decision and direction of election because, as shown, the regulatory text of the rule did not require the regional directors to always specify the election details in the direction of the election. Moreover, the preamble clearly provided that directors retain discretion to consult with the parties yet again after issuing a direction

''vest[s] the regional director with discretion to grant a request to file a post-hearing brief'')), and regional directors have been exercising that discretion to permit briefing in cases where they judge it would be helpful. See *supra* fn.230 (listing independent contractor cases where post-2014 rule briefing has been allowed); see also 2018 NLRB Letter (Summary Table) (reporting both pre-rule and post-rule median and mean time periods between the filing of briefs following the close of pre-election hearings and the issuance of regional directors' decisions and directions of elections). In any event, the regional directors did not request the change made today, whereby the majority grants parties an absolute entitlement to file briefs, no matter how simple or routine the case.

of election if the director concludes that it is appropriate to do so.

On the other hand, the majority appears to take the position that its amendment *will change* the status quo ante by claiming that it will promote efficiency to ''place *more emphasis* on the discretion regional directors have in this regard'' because ''engag[ing] the parties in post-hearing discussion'' of election details ''will likely lead . . . to consensus.'' (emphasis added). Accordingly, to the extent that my colleagues are signaling regional directors to avoid setting election details in their directions of election, such additional post-hearing consultations will delay elections and unnecessarily impose costs on the parties and the Board. The majority provides no reasoned explanation for placing more emphasis on regional director discretion. Consensus regarding electing details has never been required, and the majority provides no reason to think that consensus is more likely to be reached under its amendment than under the 2014 rule provisions. The majority's claim—that its amendment decreases the chances that a party may seek review of a regional director's decision to specify election details after a decision and direction of election issues, because its amendment makes clear that any such request for review will be ''in vain''—is unfounded. The majority fails to point to a single such request for review filed since the 2014 rule went into effect. And that should not be surprising because, as shown, the regulatory text of the rule did not require the regional director to always specify the details in the decision: The phrase ''ordinarily will'' clearly indicates that there will be occasions when the director will not specify the election details in his decision, as the preamble explicitly provides. In any event, the majority's argument ignores that even when a decision maker has discretion to act in a certain way, parties may still argue that the decision maker abused that discretion. Accordingly, the majority's ill-advised and unnecessary amendment will not even accomplish its purported purpose.

b. The Majority's Amendment to § 102.67(b) Creates an Unnecessary Month-Long Delay in Conducting Elections by Imposing a 20-Business Day (or 28 Calendar Day) Waiting Period Between Issuance of the Decision and Direction of Election and the Election

i. Background

Before the 2014 rule, parties were required to request Board review of a regional director's decision and direction of election prior to the election or be deemed to have forever waived any arguments that were or could have been made concerning rulings at the pre-election hearing or in the decision and direction of election. 79 FR 74309, 74407. And before the rule, the Board's statement of procedures imposed a stay of 25 days following any direction of election to allow time for the Board to rule on any request for review that might be filed. See 79 FR 74309–74310; 29 CFR 101.21(d) (2011). The Board's rules and regulations also provided for a second stay, whereby if a pending request for review had not been ruled upon or had been granted, the election would proceed but ballots whose validity might be affected by the final Board decision would be segregated, and all ballots would be impounded and remain unopened pending such decision. See 29 CFR 102.67(b) (2011). As a result of that provision, no ballots could be counted until the Board ruled on the request for review. See 79 FR 74309, 74409.

The 2014 rule made three changes to this procedure that are relevant today. First, the rule relaxed the due date for filing requests for review and eliminated the requirement that parties file requests for review of the decision and direction of election prior to the election. 79 FR 74309, 74408–74409. Thus, the rule provided that parties may request review of a regional director decision to direct an election either before or after the election. *Id.* at 74408. The Board reasoned that the former practice of requiring parties to seek such review of directions of election before the election—or be deemed to have waived their right to appeal the decision and direction of election—not only encouraged, but required unnecessary litigation. The Board noted that many pre-election disputes are either rendered moot by the election results or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending elections are removed from consideration.[235] *Id.* The Board concluded that the former rules thereby imposed unnecessary costs on the parties by requiring them to file pre-election requests for review in order to preserve issues. *Id.* The Board further concluded that the amendment, which relieves parties of the burden of requesting pre-election review in order to preserve issues that may be mooted by the election results, would further the goal of reducing unnecessary litigation because rational parties ordinarily will wait to file their requests for review until after the election, to see whether the election results have mooted the basis for such an appeal. *Id.* The Board also concluded that the amendment would reduce the burdens on the other parties to the case and the agency, by avoiding the need for the other parties to file responsive briefs and for the Board to rule on issues which could well be rendered moot by the election results. *Id.*

The 2014 rule also eliminated the mandatory 25-day waiting period. *Id.* at 74309–74310. The Board reasoned that the 25-day waiting period was not only not provided for in the statute, but that the 25-day waiting period—which effectively stays the election in every contested case for 25 days—was in tension with Congress' instruction in Section 3(b) of the Act that the grant of review of a regional director's action ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' 29 U.S.C. 153(b). 79 FR 74410.

The Board further reasoned that elimination of the 25-day waiting period would eliminate an unnecessary barrier to the fair and expeditious resolution of questions concerning representation, because, by definition, the waiting period delays the election, which is designed to answer the question of representation. 79 FR 74410. Although the 25-day waiting period by its terms only applied to contested cases, the waiting period also had the effect of delaying elections in stipulated-election cases. Thus, the Board noted that bargaining takes place in the shadow of the law, and that, as the administrative record confirmed, some parties use the threat of insisting on a pre-election hearing—and the resulting 25 day waiting period—to extract concessions concerning election details, such as the date of the election and the unit itself. *Id.*

The Board further concluded that the 25-day waiting period also served little purpose under the pre-existing rules. *Id.* at 74310, 74410. The stated purpose of the 25-day period was merely ''to permit the Board to rule on any request for review which may be filed.'' 29 CFR 101.21(d) (2014), 79 FR 74410.

[235] For example, as the Board explained (79 FR 74408), if the regional director rejected an employer's contention that a petitioned-for unit was inappropriate and directed an election in the unit sought by the union, rather than in the alternative unit proposed by the employer, the Board's pre-2014 rules required the employer to request review of that decision prior to the election or be precluded from contesting the unit determination at any time thereafter. But if the union ends up losing an election, even though it was conducted in the union's desired unit, the employer's disagreement with the regional director's resolution becomes moot (because the employer will not have to deal with the union at all), eliminating the need for litigation of the issues at any time.

However, such requests were filed in a small percentage of cases, were granted in an even smaller percentage, and resulted in orders staying the conduct of elections in virtually no cases at all. 79 FR 74410. Thus, if the Board had not yet ruled on the request at the time of the election, as was not infrequently the case, the election was held and the ballots impounded until the Board could rule. *Id.* Even if the Board granted the request, the Board almost never stayed the election and the same vote-and-impound procedure was used. *Id.* Finally, the Board explained that there would be even less reason for the waiting period under the 2014 rule, which should (and did) reduce the number of requests for review filed before elections by permitting parties to file such requests after the election. *Id.*

The Board also eliminated the automatic ballot impoundment procedure so that the voting and counting of ballots would proceed notwithstanding a request for review, unless the Board specifically ordered otherwise pursuant to a party's motion for segregation and/or impoundment of the ballots. *Id.* at 74409. By requiring that all ballots be impounded until the Board ruled on the request for review, the pre-2014 rule provisions actually required the Board to decide matters that could be rendered moot by the election results. The Board reasoned that elimination of the automatic impound procedure, which appeared nowhere in the statute, was consistent with Section 3(b)'s purpose to prevent delays in the Board's processing from impacting regional Section 9 proceedings. *Id.* The Board noted that impoundment, standing alone, could not and did not prevent rerunning elections, and that the possibility of reruns was minimized further because the Board rarely reversed the regional director. *Id.*

ii. The Majority Provides No Good Reasons for Amending § 102.67(b) and (c) To Institute a Month-Long Waiting Period and Automatic Impound Procedure

Although the majority retains the 2014 rule amendment that eliminates the requirement that parties request review of a regional director's decision to direct an election before the election to avoid waiving the right to contest that decision, the majority nevertheless imposes a 20-business day (or 28-calendar day) waiting period before an election can be held following issuance of a decision and direction of election. The majority further provides for the impoundment of all ballots if a party files a request for review within 10 business days of the decision.[236]

The majority provides no reasoned explanation for these amendments that, by definition, will delay elections and certifications—no statutory or constitutional requirement for either a 20-business day waiting period or for ballot impoundment, no judicial invalidation of the 2014 rule request-for-review amendments,[237] and no empirical evidence of any administrative problems caused by the amendments. Instead, the majority asserts: (1) That its waiting period and impoundment procedure serve the same variety of purposes—including finality, certainty, fair and accurate voting, transparency, and uniformity—that the pre-2014 waiting period served; (2) that these purposes ''outweigh[ ] the significance'' of delaying the election and the tally of ballots; and (3) that contrary to the 2014 rule, there is no tension between its waiting period/ballot impoundment provisions and the Act. But these explanations ignore the text of the majority's own regulatory language, the stated purpose of the pre-2014 rule waiting period, and the relevant statutory language. The majority has also failed to analyze the relevant data, and failed to consider important aspects of the problems, rendering arbitrary and capricious its conclusion that the benefits of its amendments outweigh their costs.

The majority has plainly failed to engage in reasoned decisionmaking. First, the regulatory text of the majority's waiting period amendment does *not* state that the waiting period has a variety of purposes. Instead, it lists just one purpose—providing the Board with an opportunity to rule on a request for review.[238] Accordingly, it is by no means clear why in analyzing the need for the amendment, anything other than providing the Board with an opportunity to rule on a request for review should be considered.

Second, the majority is simply wrong in claiming that the pre-2014 Board recognized that a waiting period of 25 days served a variety of important purposes beyond providing the Board with an opportunity to rule on a request for review that might be filed, and that those were the actual purposes of the pre-2014 rule 25-day waiting period. Put simply, as the Board repeatedly noted in adopting the 2014 rule, the *only* stated purpose of the 25-day waiting period articulated in the Board's statement of procedures prior to the 2014 rule was to give the Board an opportunity to rule on any request for review that might be filed. 79 FR 74409, 74410.[239]

Third, the majority likewise errors in claiming that there is no tension between its 20-business day waiting period and the Act because the waiting period does not amount to a stay of the regional director's authority to direct and conduct an election. The Act requires the regional director (as a result of the Board's delegation to regional directors of its authority to conduct elections and certify the results thereof pursuant to Section 3(b) of the Act) to direct an election if he or she concludes, based on the pre-election hearing, that a question of representation exists. 29 U.S.C. 159(c)(1)(B), 29 U.S.C. 153(b). But the majority's amendment prevents the director from conducting the election for 20 business days. That plainly is in tension with Congress' express provision in Section 3(b) that although the Board may review any action of the regional director at the request of a party, such review ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' But for the majority's amendment today, regional directors could direct and conduct elections in far fewer than 20 business days from their directions of election, which is precisely what the regional directors have regularly done since the 2014 rule amendments went

[236] The majority mistakenly claims that the 2014 rule's elimination of the 25-day waiting period was ''controversial.'' Yet, the rule noted that very few comments specifically objected to the proposed elimination of the 25-day waiting period, and that there was near consensus that this period serves little purpose. 79 FR 74410 & fn.458. Moreover, the Board received only 3 submissions critical of that amendment in response to its 2017 RFI.

[237] See, *e.g., ABC of Texas* v. *NLRB,* 826 F.3d at 227 (noting that the Act does not mandate a specified waiting period prior to the election).

[238] Thus, the majority amends Section 102.67(b) to state, ''The Regional Director shall schedule the election for the earliest date practicable, but unless a waiver is filed, *the Regional Director will normally not schedule an election before the 20th business day* after the date of the direction of election, *to permit the Board to rule on any request for review which may be filed* pursuant to paragraph (c) of this section.'' (emphasis added).

[239] Thus, 29 CFR 101.21(d) (2011) provided: The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. . . . The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, *unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed.* (emphasis added).

into effect.[240] Indeed, the majority concedes elsewhere that its automatic impound procedure *does* amount to a stay of the regional director's power to count the ballots and certify the results.[241]

There are additional serious flaws with the majority's reasoning.[242] As noted, the majority concludes that the benefits resulting from the 2014 rule's elimination of the 25-day waiting period and the automatic impound procedure have come at the expense of, and are outweighed by, the interests in finality, certainty, fair and accurate voting, transparency, and uniformity.[243] But saying this does not make it so. Once again, the majority has failed to analyze the relevant data before asserting its conclusion. Indeed, the majority's explanation for instituting the waiting period and automatic impound procedure run counter to the evidence before the agency, and the rule is therefore arbitrary and capricious for this reason as well. See *State Farm,* 463 U.S. at 43. The relevant data reveals that the 2014 rule's elimination of the 25-day waiting period and automatic impound procedure have not caused elections to become less final or certain and have not impaired the interests in fair and accurate voting and transparency.

As shown above, my analysis of the agency's own data indicates remarkable stability in every relevant statistical measure since the 2014 rule went into effect, proving that agency elections have been no less final, certain, fair, accurate, transparent or uniform. The obvious gains in expeditious case processing from the 2014 rule's elimination of the 25-day waiting period caused none of the majority's claimed unwelcome side effects. The number of Board reversals of regional director decisions and directions of elections has remained stable,[244] as has the number of cases involving post-election objections [245] or determinative challenges.[246] Thus, the benefit of moving cases from petition to election much more expeditiously (without the 25-day waiting period) has not been accompanied by any countervailing costs; *i.e.,* there has been no trend of more cases being dragged out following the election due to the need to resolve objections or determinative challenges, or because a regional director's pre-election decision must be reversed. Similarly, the number of rerun elections has shown equal stability.[247] And the majority is unable to point to a single case since the 2014 rule went into effect where the Board or the courts have set aside an election because employees were ''confused'' as a result of the Board's failing to decide pre-election—without the help of the 25-day stay—a small percentage of individual eligibility or inclusion issues.[248] Thus, the more expeditious post-2014 rule elections have been just as final and certain, just as fair and accurate, and just as uniform as were the pre-2014 rule elections in resolving questions of representation. (Moreover, due to the post-2014 rule's abstaining from automatically impounding ballots, those elections were *more* transparent than were their pre-2014 counterparts, and more transparent than the elections will be under the rule announced today.) In any event, absolute certainty and finality are not possible under the statutory scheme because even if the Board could review every regional director decision and direction of election the second it issued, the Board decision would still be subject to reversal in the court of appeals in a technical 8(a)(5) proceeding. See 79 FR 74334, 74389.

Moreover, the majority's rule is internally inconsistent. If, as the majority contends, ''the Board should strive to maximize the opportunity for the *election* to provide finality'' particularly with regard to individual eligibility or inclusion issues and if a final Board determination of pre-election issues is necessary to preserve fair and accurate voting and transparency, then it is difficult to understand why the majority permits parties to wait until *after* the election to file their requests for review. It is also difficult to understand why the majority provides that the election will go forward (with ballot impoundment) if the Board has not ruled on the request for review by the date of the election, and why the election will go forward (without ballot impoundment) in cases where the pre-election request for review is filed more than 10 business days from the date of the decision's issuance.[249]

[240] Information produced from searches in the Board's NxGen case processing software shows post-rule medians of 11 to 12 calendar days from issuance of a decision and direction of election to the election itself in FYs 2016–2017.

[241] Thus, the majority acknowledges that it ''amends § 102.67(h) to state that ''[t]he grant of a request for review shall not, *outside of the provision for impoundment set forth in paragraph (c) of this section,* stay the Regional Director's action unless otherwise ordered by the Board'' (emphasis added).

[242] There is likewise a serious flaw in the majority's legal citation to a 1977 **Federal Register** entry to draw a disingenuous connection between the ''1961 institution of [the waiting] period'' and the 1977 amendments to § 102.67 that the Board emphasized were ''designed to facilitate consideration and disposition of requests for review of regional directors' decisions, thereby further contributing to the prompt resolution of representation issues.'' 42 FR 41117. As is patently clear from the 1977 Board's own words, its references to the ''prompt resolution of representation cases'' was aimed at its amendments of 102.67(d) permitting ''the Board to examine the record in evaluating a request for review'' and 102.67(g) permitting ''the Board to rule upon the issues on review at the same time it grants the request. Such action will avoid the delay associated with the briefing time after a grant of review when the issues are clear and readily resolved.'' 42 FR 41117. The waiting period was not discussed, and the majority can find no support in the quoted language.

[243] The majority insists that its amendments serve those interests by enabling the Board to definitely resolve individual eligibility or inclusion issues prior to the election. The majority asserts in this regard that these amendments to Section 102.67 work ''hand-in-hand'' with its amendments to the pre-election hearing providing for the parties to litigate, and for *regional directors* to decide, individual eligibility or inclusion issues at the pre-election hearing.

[244] See *supra* fn.231 (showing consistency of 3 post-rule reversals based on extant law during FYs 2016–2017, with 4 pre-rule reversals based on extant law during FYs 2013–2014).

[245] See *supra* fn.214 (showing 114 largely post-rule cases requiring a postelection regional director decision on objections in FYs 2016–2017 as compared to 118 such pre-rule cases in FYs 2013–2014).

[246] See *supra* fn.213 (showing 56 post-rule cases requiring a postelection regional director decision on determinative challenges in FYs 2016–2017 as compared to 53 such pre-rule cases in FYs 2013–2014).

[247] See *supra* fn.215 (showing 61 largely post-rule rerun election cases during FYs 2016–2017 as compared to 59 such pre-rule rerun election cases in FYs 2013–2014).

Nor has there been any significant increase in parties filing unit clarification (UC) petitions after a union election victory for the Board to determine unit placement issues that were not decided pre-election. See *supra* fn.216 (showing stability in the rate of UC petitions filed in relation to the number of union election wins in the prior fiscal year for post-rule FYs 2016 (8.2%) and 2017 (7.2%) as compared to pre-rule FYs 2013 (7.3%) and 2014 (8.7%)).

[248] To the contrary, the D.C. Circuit has rejected the majority's premise that such a situation would cause confusion when, as the 2014 rule requires (29 CFR 102.67(b) (2015)), the notice of election alerts employees of the possibility of change to the unit definition. See *UPS* v. *NLRB,* 921 F.3d at 257 (''the Acting Regional Director did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications . . . were part of the bargaining unit'' because it did not ''imperil the bargaining unit's right to make an informed choice'' given that the election notice '' 'alert[ed] employees to the possibility of change' to the definition of the bargaining unit.'').

[249] Moreover, as discussed in connection with the majority's amendments to the pre-election hearing, if the election should provide finality regarding individual eligibility or inclusion issues, and if final Board resolution of pre-election issues is necessary to preserve fair and accurate voting and transparency, then it is also difficult to understand why the majority makes several additional decisions that run counter to its articulated goals. First, it permits the parties to agree not to litigate individual eligibility or inclusion issues at the pre-election hearing. Second, it permits regional directors to avoid resolving such matters before the election even if they are litigated. Third, it permits

The majority also errs in assessing the costs of its 20-business day waiting period and automatic impoundment procedure. To be sure, the majority concedes, as it must, that the 20-business day (28-calendar day) period will delay elections in the directed election context by approximately one month. But the majority attempts to minimize the delay by claiming that the waiting period will *only* delay directed elections, which constitute a small subset of the elections the Board conducts each year.

Once again, however, the majority has entirely ignored important aspects of the problem and has thereby acted arbitrarily and capriciously. See *State Farm,* 463 U.S. at 43. Thus, the majority utterly ignores the reality that, because bargaining takes place in the shadow of the law, the election dates employers are willing to agree to in the stipulated election agreement context are unquestionably influenced by how long it would take the Board to conduct an election if the case went to a pre-election hearing. By instituting a month-long pre-election waiting period in the directed election context, the majority not only delays elections in the less than ten percent of representation cases that are contested at pre-election hearings, but it also delays elections in the more than ninety percent of representation cases in which the parties stipulate to an election. In addition to ignoring that its amendments will delay all elections, the majority also ignores that the delay occasioned by the waiting period will be used to extract concession regarding election details and the unit, including disenfranchising certain individuals.[250] The automatic impound procedure also imposes costs on the Board by requiring it to decide issues that may be, and regularly are rendered moot by election results,[251] and imposes costs on the parties by inevitably delaying certifications (by delaying the tally of the ballots).

The majority complains that the regulatory text of the 2014 rule did not set forth a minimum time between the direction of election and the election, and argues that imposing a minimum time between the direction of the election and the election serves the interests in uniformity and transparency and therefore is preferable. But, contrary to the majority's suggestion, the critical period is not between the direction of election and the actual conduct of the election. Rather, the critical period is between the petition and the election. And in the lengthy history of the Act, neither Congress nor the Board has ever mandated a minimum timeline in which to conduct elections. See 79 FR 74422. The majority does not do so either. It provides no timeline to process cases from *petition* to election. (While the majority does impose a 20-business day waiting period between the pre-election *decision* and the conduct of the election, the majority allows parties to waive it.)

Given that the majority provides no petition-to-election timeline in the directed election context, and given that the majority makes it so much easier for parties to obtain extensions and postponements, the majority's suggestion that its rule is more transparent than the 2014 rule is utterly mystifying. The public and agency employees certainly have not been operating in the dark regarding the median times for conducting elections in both the directed election and stipulated election contexts under the 2014 rule, because the GC has been publishing those median times on an annual basis, just as prior GCs have done for decades, when there was also no minimum timeline provided in the Board's rules and regulations.

In any event, whether uniformity is ''preferable'' depends on what is being made uniform. Although imposition of the 20-buiness day waiting period will indeed delay all elections, not just directed elections, the waiting period is not preferable because it will serve little purpose under the majority's rule just as it served little purpose prior to the 2014 rule. Put simply, delaying all elections so the Board can rule on a request for review serves no possible purpose in those cases where a request for review is not filed before the election. And those are the overwhelming majority of cases.[252]

The waiting period will serve very little purpose under the majority's rule even if one looks just at the directed election context. Thus, delaying all directed elections so the Board can rule on a request for review serves no possible purpose in those directed election cases where a request for review is not filed prior to the election. The majority of regional director decisions and directions of election are never the subject of a request for review.[253] And even considering only the minority of instances when parties have filed requests for review of decisions and directions of election since the 2014 rule went into effect, an even smaller minority of them have

the Board itself to direct an individual to vote subject to challenge in ruling on a request for review of a regional director's ruling on an individual eligibility question. These unexplained inconsistencies highlight the arbitrary nature of my colleagues' choices.

It is also impossible to square the majority's claim—that ''the Board should strive to maximize the opportunity for *the election* to provide finality'' with the position the majority has taken in the blocking charge rulemaking. Recall that in the blocking charge rulemaking, 84 FR 39930, 39938, 39948 (Aug. 12, 2019), the majority has taken the opposite position—namely that nothing is more important than having employees vote promptly, and therefore it should conduct elections before assessing whether employees can exercise free choice in the election in the face of blocking charges. And it has taken that position in the face of evidence showing that 67 percent of the elections that are conducted in the face of blocking charges are unlikely to count and thus will not be final. The majority nowhere explains the inconsistency.

[250] The majority's contention that there is no objective evidence that parties use the threat of unnecessary litigation and delay that comes with it to extract concessions regarding election details—flies in the face of the district court's holding in *ABC of Texas* v. *NLRB,* 2015 WL 3609116 *16–*17 (Board noted the spectre of protracted pre-election litigation under the prior rule could be used to 'extract concessions' regarding the election . . . . The Board's [rule] . . . explain[ed] how the final conclusions are factually and legally supported.''). See 79 FR 74318, 74386–87); and further ignores its reliance on gamesmanship as justification for one if its amendments and the concession that good lawyers use procedures to their clients' advantage.

[251] According to my staff's review of a list of cases involving requests for review of decisions and directions of election, produced by the Board's Office of the Executive Secretary, 29% (11 out of 38 post-rule cases) of the requests for review that were filed before the election in FYs 2016–2017 were ultimately rendered moot by the results of the elections or withdrawal of the petitions.

[252] Indeed, in FY 2013, only 4.2% of all RC, RD and RM elections (66 out of 1,557) involved requests for review of a regional director's decision and direction of election, while in FY 2014, only 3.9% of such elections (63 out of 1,600) involved such requests for review. Since the 2014 rule went into effect, the percentage of elections involving requests for review of regional directors' decisions and directions of election has been even lower. In FY 2016, only 3.5% of elections (56 out of 1,594) involved such requests for review, while in FY 2017, only 3.1% of elections (49 out of 1,560) involved such requests for review. See Office of Executive Secretary's Chart (listing requests for review of regional directors' decisions and directions of election for FYs 2013–2017); *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections.* In other words, in the two full fiscal years both before and after the 2014 rule, more than 95% of elections involved no requests for review of decisions and directions of election whatsoever, and the majority offers no reason to believe that this trend will not continue.

[253] Considering data from the same two full fiscal year periods both before and after the 2014 rule's implementation shows a steady increase (from approximately 52% to 62%) of directed election cases in which no request for review is filed. In other words, in FY 2013, only 47.4% of all RC, RD and RM directed elections (66 out of 139) involved such requests for review, and that percentage fell in each subsequent fiscal year. (FY 2014—44.3% (63 out of 142 pre-rule cases); FY 2016—42.4% (56 out of 132 largely post-rule cases); FY 2017—37.9% (49 out of 129 largely post-rule cases). See Office of Executive Secretary's Chart; *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election* (past versions of this chart reported directed election percentages for past fiscal years as follows: FY 2017—8.3%; FY 2016—8.3%; FY 2014—8.9%; and FY 2013—8.9%).

been filed before the election.[254] (Thus, as shown, most parties act rationally and wait until they see the election results so they know whether the results have mooted the basis of their appeal). There certainly is no reason to think that this will change after today because, under the majority's rule, the waiting period applies regardless of whether a party files a request for review before the election, and the majority retains the 2014 rule provision permitting parties to wait until after the election to request review of the regional director's pre-election decision. In short, the waiting period serves little purpose even if one looks just to its application in the directed election context because parties typically do not file requests for review before the election. Moreover, as the 2014 Board noted (79 FR 74410), the comparable pre-2014 rule waiting period served little purpose, because even in the small percentage of cases in which the Board granted review, the Board almost never stayed the election and the election proceeded as scheduled. In other words, despite the presence of the waiting period, the Board was typically unable to render a decision on the underling merits until *after* the waiting period had elapsed and the election *had* been held.[255] The majority plainly foresees this continuing to be the case because it provides that if the Board has not ruled on the request for review, the election *will* proceed as scheduled, and the majority continues to provide for the filing of briefs in cases where it grants review, which inevitably means that the election will occur before the Board has ruled on the request for review of the regional director's pre-election decision. Of course, even if the Board were somehow magically able to decide the underlying merits of every request for review within 20 business days, the waiting period would still not justify delaying all elections because the Board only rarely reverses the regional director's pre-election decisions.[256]

The majority's argument—that the Board should definitively resolve individual eligibility or inclusion issues before any ballots are counted (even if the Board cannot definitively resolve the issues before the election) because it enables the Board to summarily resolve challenges after the election—serves only to confirm that despite imposing a month-long waiting period, the Board will still not be able to definitely resolve these issues before the *election* (because if the Board had resolved the issues prior to the election, those individuals would not have cast challenged ballots). And it makes little sense to expend the resources necessary for the Board to regularly decide those matters before the ballots are counted, because, as shown, the election results could moot the need to do so, and in any event, the Board is unlikely to reverse the regional director. The majority's claim—that its waiting period and ballot impoundment procedure promote ''orderly litigation''—is stranger still. Those provisions are in aid of the pre-election request for review procedure that amounts to an interlocutory appeal, and interlocutory appeals have long been generally disfavored as wasteful, piecemeal litigation. See 79 FR 74407 and authority cited therein.

Although the majority offers a few additional arguments specifically in support of its automatic impound procedure, they suffer from similar shortcomings. For example, the majority offers the specious argument that all the ballots should be impounded pending the Board's rulings on requests for review because employees or parties may be confused if the Board nullifies the results of the election. Again, reversals are possible in any legal regime which permits appeals, and the possibility of reversal will continue to exist under the majority's rule. The majority fails to cite a single case demonstrating such employee confusion, much less one where employees were so confused by a Board reversal of a regional director decision that they were unable to cast an informed vote in a subsequent election.

Although the majority claims that its impoundment procedure serves a variety of other interests, that procedure cannot possibly serve any interest in most directed election cases. As the majority concedes, its ballot impoundment procedure applies only if a request for review is filed before the election and within 10 business days of the decision and direction of election. But again, only a minority of regional director decisions and direction of election are appealed at all. And in the minority of instances when those decisions have been appealed since the 2014 rule's implementation, an even smaller minority have been filed before the election. Even when ballot impoundment is triggered, it will not serve the claimed interests in a significant number of cases because, as previously discussed, the Board so rarely reverses the regional director. The majority's response to that bottom line—''We also place little weight on th[at] fact''—is no response at all.

The majority ignores how its amendments will work in practice in claiming that impoundment promotes uniformity (and voter secrecy) by ensuring that, ''for the most part'' all ballots are counted at the same time in directed elections. To repeat, most decisions and directions of election are never the subject of a request for review, and the automatic impoundment procedure is triggered under the majority's rule only if a request for review is filed prior to the election and within 10 business days of the decision and direction of election. This makes it quite likely that in the vast majority of directed election cases in which people vote subject to challenge, it will be only their ballots that are impounded, while all other ballots are opened and counted immediately at the close of the election. Thus, as shown, the majority's rule permits the parties to ''agree [at the pre-election hearing] to permit disputed employees to vote subject to challenge,'' (see amended § 102.64(a)), in which event only the ballots cast by those particular individuals will be impounded (in addition to any election day surprise challenges), while the remaining ballots are opened and counted immediately at the close of the election. As also shown, regional directors can direct individuals to vote subject to challenge even if their eligibility or inclusion was litigated at the hearing, in which event, only the ballots cast by those individuals will be impounded while the remaining ballots are opened and counted immediately at the close of the election. And just as was the case prior to the 2014 rule, in

[254] As noted, the 2014 rule eliminated the requirement that parties file their requests for review of decisions and directions of elections before the elections, and granted parties the freedom to request review either before or after elections. The Office of Executive Secretary's Chart shows that only 39% (38 out of 99) of the requests for review concerning decisions and directions of election that were processed under the 2014 rule in FYs 2016–2017 were filed before the election, which constituted only 1.2% of all RC, RD and RM elections held (38 out of 3,154) during those fiscal years.

[255] For example, the underlying NxGen case files concerning the 16 cases in which the Board granted review in FYs 2013–2014, shows that only once did the Board issue an order disposing of the merits before the election was held. See *Armstrong County Memorial Hospital d/b/a ACMH Hospital,* 06–RC–112648 (Dec. 9, 2013) (ordering that the intervenor union's name should be corrected on the ballots of the election scheduled for Dec. 12, 2013); see also Office of Executive Secretary's Chart.

[256] See *supra* fn.231 (Showing in FYs 2016–2017 only 3 reversals of regional director decisions based on applications of then-current law (and 4 regional director decisions that were either dismissed, remanded or reversed based on application of new legal standards issued after the regional directors' decisions). These numbers are consistent with pre-rule statistics relied upon by the 2014 Board showing that from FYs 2010–2013 there were only 14 cases in which regional director decisions were reversed. See 79 FR 74408 fn.454.).

response to a request for review, the Board is free to direct that only particular individuals vote subject to challenge, in which event only their ballots are impounded while the remaining ballots are opened and counted. The majority's willingness to sanction these practices belies its claims of uniformity and undermines its claim that failure to definitively resolve individual eligibility or inclusion issues before the election impairs voter secrecy.

6. The Majority's Amendments to § 102.69 Also Create Unnecessary Delay Between the Election and the Certification of Election Results

a. The Majority Upsets the Pre-2014 Rule Status Quo by Amending § 102.69(c)(1)(iii) To Entitle Parties To File Briefs With the Hearing Officer Following the Close of the Post-Election Hearing

By definition, certification of the results of a Board conducted election or a certification of representative following an election cannot issue until determinative challenges or election objections are resolved. Determinative challenges and election objections are sometimes set for a hearing before a hearing officer, who then is charged with issuing a decision addressing those matters and making recommendations regarding proper disposition of them to the regional director. Prior to the 2014 rule, parties had no right to file briefs with the hearing officer following the close of the *post*-election hearing.[257] The 2014 rule made *no* change in that regard. Thus, both before and after the 2014 rule, hearing officers had discretion to deny party requests to file post hearing briefs when he or she determined that briefing was unnecessary.

Today, however, the majority entitles parties to file post-hearing briefs with the hearing officer following the *post*-election hearing in all cases, no matter how simple. The majority's amendment can obviously delay final resolution of the question of representation because the hearing officer will not be able to issue a decision until briefs are filed or the time for filing briefs has expired. It also raises the cost of litigation by encouraging parties to file their own briefs on the assumption their counterparts will do so and by requiring the hearing officer to spend time and resources digesting the briefs. The majority offers the same reasons for entitling parties to file briefs to hearing officers following the close of the *post*-election hearing that it offers in support of its amendment entitling parties to file briefs to the regional director following the close of the *pre*-election hearing, and its arguments fail for the same reasons. Moreover, the majority glosses over the fact that under the 2014 rule, parties had a right to file briefs with the regional director when they filed exceptions to the hearing officer's recommended disposition of post-election objections and determinative challenges.[258] And, of course, under the 2014 rule, parties also had a right to file written briefs with the Board in support of any request for review of the regional director decision on objections and determinative challenges. 29 CFR 102.67(e), 102.69(c)(2) (2015). The majority offers no good reason for granting parties *three* opportunities to file briefs. And the majority makes matters even worse by making it substantially easier for parties to obtain extensions. Thus, the majority provides that extensions should be granted merely for good cause, whereas before today, the casehandling manual provided that extensions should *not* be granted ''except under the most unusual circumstances.'' See Casehandling Manual Section 11430 (January 2017).

b. The majority's Amendments to § 102.69(b), (c)(1) and (2) Further Delay Resolution of Questions of Representation by Stripping Regional Directors of the Power to Timely Certify Unions

The majority today makes an additional change which will further delay resolution of questions of representation by stripping regional directors of the power to certify victorious unions as collective bargaining representatives. In section 3(b) of the Act, Congress authorized the Board to delegate the power to certify election results to regional directors subject to discretionary Board review.[259]

Consistent with the express language of the statute, the 2014 rule empowered regional directors to resolve all post-election matters and to issue certifications of results and representatives, subject to discretionary Board review. 29 CFR 102.69(b), (c); 79 FR 74310, 74331–74335, 74412–74414.[260] The 2014 Board reasoned that the amendment would make the process of obtaining Board review of regional directors' dispositions of *post*-election disputes parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes and concluded that the amendment would enable it to more expeditiously resolve questions of representation. *Id.* at 74331–74332, 74412. The Board explained that it perceived no reason why pre- and post-election dispositions should be treated differently in this regard. *Id.* at 74332. The Board noted that just as regional directors have expertise regarding determining the appropriate unit in which to conduct elections, so too do regional directors have expertise regarding post-election matters. For example, the Board observed that regional directors make decisions concerning whether to prosecute charges of unfair labor practices under the Act; those prosecutorial decisions often involve supervisory status questions and determinations whether certain conduct is unlawful, both of which often parallel questions that arise in post-election representation proceedings; and the courts have recognized that regional directors have expertise in determining what constitutes objectionable conduct.[261] The Board further observed that it affirms the vast majority of post-election decisions made at the regional level, and that many present no issue meriting full consideration by the Board. *Id.* The Board noted that in FY 2013, for example, parties appealed to the Board in only one third of the 98 total cases involving regional post-election decisions concerning objections or determinative challenges, and the Board reversed the regional decision to set aside or uphold election results in only 3 cases. *Id.* at fn.106. The Board

[257] See 79 FR 74402 (quoting the 2003 Hearing Officer's Guide: ''In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should not be permitted.'').

[258] See 29 CFR 102.69(c)(1)(iii) (2015) (''Any party may, within 14 days from the date of issuance of [the hearing officer's] report, file with the regional director . . . exceptions to such report, with a supporting brief if desired. * * * [A] party opposing the exceptions may file an answering brief with the regional director.'').

[259] Section 3(b) provides in relevant part: The Board is also authorized to delegate to its regional directors its powers . . . to direct an election . . . and certify the results thereof, except that upon the filing of a request therefor with the Board . . . the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

[260] Even prior to the 2014 rule, regional directors could issue certifications in certain cases, notwithstanding the possibility of Board Review. This included cases where objections were resolved by a hearing officer and appealed to a regional director, as opposed to the Board. In these cases, the casehandling manual has long specifically instructed that the certification ''should not be delayed until after the expiration of the time for filing a request for review.'' See, *e.g.,* Casehandling Manual Section 11472.3(b)(1) (August 2007).

[261] See 79 FR 74332, 74334 & fn.125 (citing *NLRB* v. *Chicago Tribune Co.,* 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992)).

also found support for the amendment in the Supreme Court's opinion in *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137 (1971). In that case, the employer filed a request for review of the regional director's decision and direction of election holding that certain individuals were properly included in the unit. The Board denied the petition on the ground that it did not raise substantial issues. In the subsequent ''technical 8(a)(5)'' unfair labor practice proceeding, the employer asserted that ''plenary review by the Board of the regional director's unit determination is necessary at some point,'' *i.e.,* before the Board finds that the employer committed an unfair labor practice based on the employer's refusal to bargain with the union certified as the employees' representative in the representation proceeding. 401 U.S. at 140–41. However, the Court rejected the contention that Section 3(b) requires the Board to review regional directors' determinations before they become final and binding. Citing Congress's authorization of the Board to delegate decision-making in this area to its regional directors and the use of the clearly permissive word ''may'' in the clause describing the possibility of Board review, the Court held, ''Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.'' *Id.* at 142. Consistent with the purpose of the 2014 rule amendment authorizing the Board to delegate to regional directors the power to resolve post-election matters, the Supreme Court quoted Senator Goldwater, a Conference Committee member, explaining that section 3(b)'s authorization of the Board's delegation of its decision-making authority to the regional directors was to ''expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.'' 79 FR 74333.

Today, however, the majority stands section 3(b) on its head and deprives regional directors of the power to issue certifications until the time for filing requests for review of both the regional director's pre-election decision and direction of election and the regional director's post-election decision disposing of election objections and/or determinative challenges has come and gone, or the Board has ruled on any requests for review that have been filed. This will plainly delay certifications of election results and certifications of representatives, even where no requests for review are ultimately filed, while regional directors wait for the time for filing to run. Such uniform and unnecessary delay is especially egregious given that requests for review of regional director determinations are so rarely filed and so rarely result in a reversal of the regional director.[262] The majority offers no reasoned explanation for doing so—no statutory or constitutional prohibition against regional directors issuing certifications which are subject to requests for review, no judicial invalidation of the 2014 rule amendment, and no empirical evidence that the amendment caused the parade of horribles predicted by the critics, such as reducing the rate of stipulated election agreements and increasing the number of technical 8(a)(5) proceedings and court reversals of certification decisions.

The majority argues that whatever interests are served by permitting regional directors to issue certifications prior to the Board's rulings on requests for review of regional director decisions, they are substantially outweighed by the interests in transparency, finality, efficiency and uniformity. But the majority merely states that this is so without any empirical support.[263]

At bottom, the majority argues that it does not make sense to subject employers to liability for refusing to bargain with a union when it is possible that the Board might reverse the regional director's certification decision. But the possibility of an erroneous certification decision cannot be completely eliminated given the statutory scheme and will continue under the amendments that the majority makes today. Thus, even under the majority's amendments, employers still face the possibility of erroneous bargaining obligations because a reviewing court can always reverse a certification decision made by the Board itself in a technical 8(a)(5) proceeding. See 79 FR 74414. And Congress has already determined that it does make sense to permit the regional directors to do so notwithstanding that the regional director's certification decisions will be subject to Board review, because it speeds certifications.[264] And it clearly does speeds certifications by enabling the regional directors to, for example, issue a certification without having to wait to see whether a request for review will be filed.

The evidence before the agency confirms the soundness of the congressional judgment. Thus, the Agency's experience is that parties rarely request review of regional director *post*-election determinations, and that even when parties do request review of regional director post-election determinations, the Board only rarely reverses the regional director's post-election determinations. Thus, in the two fiscal years following the 2014 rule's implementation, parties requested review of regional director post-election determinations in only 2.2 percent of RC, RD and RM elections (69 requests for review as compared to 3,154 elections), and the Board reversed the regional director in only 8 cases.[265] And, as noted previously, most *pre*-election decisions are not the subject of requests for review either, and the Board rarely reverse regional directors' pre-election decisions even when they are the subject of requests for review.

The 2014 rule amendment clearly promotes the practice and procedure of collective bargaining. While an employer acts at its peril in making unilateral changes between the time of the election and the issuance of a certification,[266] the Board has long been of the view that an employer is under no obligation to bargain with a union that has won an initial certification election over the terms of a first contract

[262] See *supra* fns.252 and 231 (together showing that both before and after implementation of the 2014 rule, requests for review of regional directors' pre-election decisions were filed in less than 5% of elections conducted each fiscal year, they were granted in less than 1% of elections conducted each fiscal year, and regional directors' pre-election decisions have been reversed, on average, in fewer than 4 cases per fiscal year).

Agency data shows that appeals and reversals of regional director post-election decisions are just as rare. Thus, during FYs 2016–2017, only 2.2% of elections involved requests for review to the Board concerning regional directors' post-election decisions (69 cases as compared to 3,154 RC, RD and RM elections), and the Board only granted review in 8 cases to reverse any part of those decisions. (Data produced from searches in the Board's NxGen case processing software concerning regional director post-election decisions and from the Board's Office of the Executive Secretary concerning post-election requests for review).

[263] For example, the majority here repeats its curious argument that employees or parties may be confused if the Board reverses a regional director's certification of results or representative. But the possibility of such reversals exists in any legal regime that provides for an appeal process, and the majority cites no evidence of any confusion that lingers.

[264] The majority is simply wrong in claiming that the 2014 rule's amendment—authorizing regional directors to issue certifications that are subject to review—was controversial. Thus, neither the GC nor the regional directors have requested the change made by the majority today, nor did a single response to the Board's 2017 RFI. Moreover, the majority concedes that that the 2014 amendment is permissible. See also *Chamber* v. *NLRB,* 118 F.Supp.3d at 216 (rejecting challenges to 2014 rule amendments requiring regional directors to issue certifications subject to discretionary Board review).

[265] See *supra* fn.262.

[266] See *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974).

until that union has been certified.[267] Accordingly, under the majority's rule, an employer's refusal to commence negotiations for an initial contract with a victorious (but yet to be certified) union will not be unlawful where, for example, the employer has filed election objections, even if the employer has no plans to challenge the regional director's decision overruling those objections. Delaying certification thus delays the commencement of negotiations over the employees' terms and conditions of employment, and deprives employees of the benefits of that bargaining. Given that employers are presently under no obligation to bargain prior to the union being certified, given that most employers never appeal regional director determinations to the Board, and given that most employers agree to commence bargaining once certifications issue (as evidenced by the small number of technical refusal to bargain cases), it is clear that enabling regional directors to issue certifications of representatives (when, for example, they overrule election objections) is likely to result in most employers agreeing to bargain sooner than if certifications are withheld until the time for filing requests for review have come and gone.

I also note that Chairman Ring has expressed reservations about *Mike O'Connor Chevrolet* and signaled that the Board should considering overruling that case.[268] In the event of such a legal change, employers would be free to make unilateral changes between the date the union wins the election and the date the certification issues, which would have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued.[269] The Chairman's signal—that the Board may add *Mike O'Connor Chevrolet* to the long list of established precedent that the current majority has overruled—provides yet another reason to maintain the 2014 amendment that speeds certifications by enabling regional directors to issue certifications, (notwithstanding that they are subject to Board review as provided by the Act).[270]

7. The Majority's Election Observer Amendment to § 102.69(a)(5) Is Also Poorly Justified

I also cannot agree to the majority's change to the Board's treatment of election observers. The 2014 rule did not make any changes regarding who a party could select as its election observers. Yet today, without engaging in notice and comment and outside the adjudicatory process and without any briefing, the majority admittedly overrules precedent and codifies language that changes the status quo ante by providing that observers should be current unit employees, and that when current unit employees are unavailable, observers should be current nonsupervisory employees of the employer of the unit employees at issue.

Although the majority contends that its language is to some extent consistent with prior casehandling manuals, those manuals, of course, were not binding on the Board, and prior Boards had explicitly declined to interpret them in the manor favored by the majority today, at least partly on policy grounds. Thus, before today, unions were permitted to select potential discriminatees as their observers and it was not per se objectionable for parties to select as observers individuals who were not employees of the employer.[271]

By narrowing the pool of observers, the majority threatens a union's ability to obtain observers, which threatens both the objective integrity and the perceived legitimacy of Board conducted elections.[272] Moreover, by narrowing the pool of potential observers, the majority increases the chances that the parties will have an unequal number of observers, which creates the impression among employees that the Board favors the party with the greater number of observers, which reasonably tends to interfere with the fairness and validity of the election.[273] It is certainly possible that a union would be unable to obtain an observer from the unit for reasons other than those suggested by the majority today. At a minimum, the majority has not persuaded me that the Board's current case-by-case approach is so patently unreasonable that we should rush to codify a different approach without first hearing from interested parties. The majority's claim—that the current state of Board law is ''riddled with inconsistencies''—certainly counsels in favor of a more deliberative approach.[274]

VII. Other Statutory Requirements

Paperwork Reduction Act

The amended regulations are exempt from the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.* See 44 U.S.C. 3518(c); 79 FR 74468–74469. Accordingly, the final rule does not contain information collection requirements necessitating the approval of the Office of Management and Budget under the PRA.

Final Rule

This rule is published as a final rule. As discussed in the preamble, the National Labor Relations Board considers this rule to be a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of ''agency organization, procedure, or practice.''

[267] See *G.H. Bass Caribbean, Inc.,* 306 NLRB 823, 825 (1992) ('''an ostensible union victory in an initial certification election does not activate an employer's duty to bargain with a union. An 8(a)(5) violation resulting from an employer's postelection unilateral changes, once the union is certified, is actually an exception to the rule that election results are final on certification, an exception used solely to safeguard a union's future bargaining position.''') (citation omitted).

[268] See *Ozburn-Hessey Logistics, LLC,* 366 NLRB No. 177, slip op 16 fn.1 (2018).

[269] See *Mike O'Connor Chevrolet,* 209 NLRB at 703 (''To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending'').

[270] The majority complains that there has been a steady stream of requests to stay regional director certifications under the 2014 rule, and that stripping regional directors of the power to timely certify unions will eliminate any basis to request stays of certifications, which will avoid needless litigation. That will certainly come as news to the attorneys who litigate on behalf of the Board in technical 8(a)(5) proceedings before the courts of appeals. Thus, employers sometimes file requests to stay certifications even after a court of appeals has agreed with the Board's underlying certification decision (pending their appeals to the Supreme Court).

[271] See, *e.g., Kellwood Company,* 299 NLRB 1026, 1029 (1990) (alleged discriminatees are entitled to serve as election observers) enfd. 948 F.2d 1297 (11th Cir. 1991); *NLRB* v. *Black Bull Carting Inc.,* 29 F.3d 44, 45–46 (2d Cir. 1994) (upholding Board's decision that union did not engage in objectionable conduct by using as its election observer a union official who was not employed by the employer of the unit employees at issue, because there was no showing that the union official engaged in improper conduct while acting in that capacity); *Embassy Suites Hotel, Inc.,* 313 NLRB 302, 302 (1993) (Board ''will not find the use of a nonemployee as an observer to be objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer.'').

[272] See *Longwood Security Services, Inc.,* 364 NLRB No. 50, slip op. at 4 (2016) (''By their presence, observers help to assure the parties and the employees that the election is being conducted fairly.'') (citation omitted); *Newport News Shipbuilding & Dry Dock Co.,* 239 NLRB 82, 85–86 (1978) (election misconduct and errors in checking off and/or challenging voters that may not be noticed by the Board agent are often brought to his or her attention by an alert observer) remanded on other grounds 594 F.2d 218 (4th Cir. 1979).

[273] *Longwood Security Services, Inc.,* 364 NLRB No. 50, slip op. at 4; *Browning-Ferris Industries of California, Inc.,* 327 NLRB 704, 704 (1999).

[274] However, I note that at least some of the alleged inconsistencies appear to stem from the majority's mistaken view that the use of union officials as observers has the same potential to interfere with employee free choice as does the employer's use of its supervisors (or other individuals closely identified with management) as observers. See, *e.g., Longwood Security Services, Inc.,* 364 NLRB No. 50, slip op at 2–4.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 102 as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

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

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

Subpart A—Definitions

■ 2. In § 102.1, add paragraph (i) to read as follows:

§ 102.1 Terms defined in Section 2 of the Act.

* * * * *

(i) *Business day.* The term *business day* means days that Agency offices are open normal business operating hours, which is Monday through Friday, excluding Federal holidays. A list of Federal holidays can be found at *www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/.*

Subpart B—Service and Filings

■ 3. In § 102.2, revise paragraph (a) to read as follows:

§ 102.2 Time requirements for filings with the Agency.

(a) Time computation. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it does not fall on a business day, in which event the period runs until the next Agency business day. When the period of time prescribed or allowed is less than 7 days, only business days are included in the computation. Except as otherwise provided, in computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date.

* * * * *

Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

■ 4. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

(a) *Petition for certification or decertification.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition by facsimile pursuant to § 102.5(e) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.5(c) need not file an original. Except as provided in § 102.72, such petitions shall be filed with the Regional Director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the Regional Director when the petition is filed. Along with the petition, the petitioner shall serve the Agency's description of the procedures in representation cases and the Agency's Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) *Petition for clarification of bargaining unit or petition for amendment of certification.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

■ 5. Revise § 102.61 to read as follows:

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) *RC petitions.* A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and

accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

(b) *RM petitions.* A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date(s).

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. However, no proof of representation on the part of the labor organization claiming a majority is required and the Regional Director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(9) The type, date(s), time(s) and location(s) of the election sought.

(c) *RD petitions.* Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in Section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(11) The type, date(s), time(s) and location(s) of the election sought.

(d) *UC petitions.* A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) *AC petitions.* A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) *Provision of original signatures.* Evidence filed pursuant to paragraph (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the Regional Director no later than 2 business days after the facsimile or electronic filing.

■ 6. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list; Notice of Election.

(a) *Consent-election agreements with final Regional Director determinations*

of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the Regional Director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(b) *Stipulated election agreements with discretionary Board review.* Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the Regional Director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70.

(c) *Full consent election agreements with final Regional Director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the Regional Director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66, and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the Regional Director shall issue a decision. The rulings and determinations by the Regional Director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the Regional Director shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(d) *Voter list.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 5 business days after the approval of an election agreement pursuant to paragraph (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ''cell'' telephone numbers) of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the agreement or direction respectively within 5 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) *Notice of Election.* Upon approval of the election agreement pursuant to paragraph (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the Regional Director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with § 102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

■ 7. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by Regional Director; Notice of Hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of Notice of Hearing.

(a) *Investigation; Notice of Hearing; notice of petition for election.* (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 14 business days from the date of service of the notice. The Regional Director may postpone the hearing upon request of a party showing good cause. A copy of the petition, a description of procedures in representation cases, a ''Notice of Petition for Election,'' and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion.

(2) Within 5 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b) Statements of Position—(1) *Statement of Position in RC cases.* If a petition has been filed under § 102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) *Employer's Statement of Position.* (A) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(B) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(C) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(ii) *Petitioner's Statement of Position.* Following timely filing and service of an employer's Statement of Position, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the employer's Statement of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement of Position in a timely manner for good cause.

(2) *Statement of Position in RM cases.* If a petition has been filed under § 102.61(b) and the Regional Director has issued a Notice of Hearing, each individual or labor organization named in the petition shall file with the Regional Director and serve on the other parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if

it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* The employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received no later than noon 3 business days before the hearing. The Employer's Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; and respond to the issues raised in any Statement of Position timely filed and served pursuant to paragraph (b)(2)(i) of this section. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases*—(i) *Employer's and Representative's Statements of Position.* (A) If a petition has been filed under § 102.61(c) and the Regional Director has issued a Notice of Hearing, the employer and the certified or recognized representative of employees shall file with the Regional Director and serve on the parties named in the petition their respective Statements of Position such that they are received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be no later than noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(B) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(C) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(D) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(ii) *Petitioner's Statement of Position.* Following timely filing and service of any Statement(s) of Position filed pursuant to paragraph (b)(3)(i) of this section, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the other Statement(s) of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement of Position in a timely manner for good cause.

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein; or take other appropriate action. If a Notice of Hearing is served, it shall be accompanied by a copy of the petition. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion. All hearing and post-hearing procedure under this paragraph (c) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the Regional Director's action shall be final, and the provisions for review of Regional Director's

decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

■ 8. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The primary purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed. However, the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a Hearing Officer and shall be open to the public unless otherwise ordered by the Hearing Officer. At any time, a Hearing Officer may be substituted for the Hearing Officer previously presiding. Subject to the provisions of § 102.66, it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.

(c) The hearing shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. The Regional Director may, in the director's discretion, adjourn the hearing to a different place by announcement thereof at the hearing or by other appropriate notice.

■ 9. Revise § 102.65 to read as follows:

§ 102.65 Motions; intervention; appeals of Hearing Officer's rulings.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. The Motion shall immediately be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the Regional Director, except that motions made during the hearing shall be filed with the Hearing Officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. Extra copies of electronically-filed papers need not be filed. The Regional Director may rule upon all motions filed with him/her, causing a copy of the ruling to be served on the parties, or may refer the motion to the Hearing Officer, except that if the Regional Director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The Hearing Officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to the Hearing Officer as hereinabove provided, except that the Hearing Officer shall rule on motions to intervene and to amend the petition only as directed by the Regional Director, and except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the Regional Director or the Board, as the case may be. All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(f).

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The Regional Director, or the Hearing Officer, at the specific direction of the Regional Director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the Regional Director may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) Rulings by the Hearing Officer shall not be appealed directly to the Regional Director, except by special permission of the Regional Director, but shall be considered by the Regional Director when the director reviews the entire record. Requests to the Regional Director for special permission to appeal from a ruling of the Hearing Officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the Regional Director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the Regional Director. No party shall be precluded from raising an issue at a later time because it did not seek special permission to appeal. If the Regional Director grants the request for special permission to appeal, the Regional Director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall stay the proceedings unless otherwise ordered by the Regional Director. As stated in § 102.67, the parties may request Board review of Regional Director actions.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any Regional Director or Hearing Officer with respect to any matter which could have been but was not raised pursuant to any other section of these Rules except that the Regional Director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence

which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 10 business days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a Regional Director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

■ 10. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation and the other issues in the case that have been properly raised. The Hearing Officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) *Statements of Position.* Issues in dispute shall be identified as follows: After a Statement of Position is received in evidence and prior to the introduction of further evidence, all other parties shall respond on the record to each issue raised in the Statement. The Regional Director may permit any Statement of Position to be amended in a timely manner for good cause, in which event the other parties shall respond to each amended position. The Regional Director may also permit responses to be amended in a timely manner for good cause. The Hearing Officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the Regional Director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the Regional Director determines that record evidence is necessary.

(c) *Offers of proof.* The Regional Director shall direct the Hearing Officer concerning the issues to be litigated at the hearing. The Hearing Officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received. But in no event shall a party be precluded from introducing relevant evidence otherwise consistent with this subpart.

(d) *Preclusion.* A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in § 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

(e) *Objections.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(f) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the Hearing Officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the Hearing Officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the Regional

Director who may either rule upon it or refer it for ruling to the Hearing Officer except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the Hearing Officer. Notice of the filing of petitions to revoke shall be promptly given by the Regional Director or Hearing Officer, as the case may be, to the party at whose request the subpoena was issued. The Regional Director or the Hearing Officer, as the case may be, shall revoke the subpoena if, in his/her opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Regional Director or the Hearing Officer, as the case may be, shall make a simple statement of procedural or other grounds for his/her ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(g) *Election details.* Prior to the close of the hearing, the Hearing Officer will:

(1) Solicit the parties' positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the Regional Director should transmit the Notice of Election in the event the Regional Director directs an election;

(3) Inform the parties that the Regional Director will issue a decision as soon as practicable and that the director will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(4) Inform the parties what their obligations will be under these Rules if the director directs an election and of the time for complying with such obligations.

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party desiring to submit a brief to the Regional Director shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.

(i) *Hearing Officer analysis.* The Hearing Officer may submit an analysis of the record to the Regional Director but shall make no recommendations.

(j) *Witness fees.* Witness fees and mileage shall be paid by the party at whose instance the witness appears.

■ 11. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the Regional Director; further hearing; action by the Regional Director; appeals from actions of the Regional Director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(a) *Proceedings before Regional Director.* The Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining as provided in § 102.64(a), and to direct an election, dismiss the petition, or make other disposition of the matter. A decision by the Regional Director upon the record shall set forth the director's findings, conclusions, and order or direction.

(b) *Directions of elections.* If the Regional Director directs an election, the direction may specify the type, date(s), time(s), and location(s) of the election and the eligibility period, but the Regional Director retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election. The Regional Director shall schedule the election for the earliest date practicable, but unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election, to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The Regional Director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), whether transmitted simultaneously with the direction of election or separately thereafter. If the direction of election provides for individuals to vote subject to challenge, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as they have been permitted to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

(c) *Requests for Board review of Regional Director actions.* Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a Regional Director delegated to him/her under Section 3(b) of the Act except as the Board's Rules provide otherwise. The request for review may be filed at any time following the action until 10 business days after a final disposition of the proceeding by the Regional Director. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director, except that if a request for review of a decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision. A party retains the right to file a request for review of a decision and direction of election more than 10 business days after that decision issues, but the pendency of such a request for review shall not require impoundment of the ballots.

(d) *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(e) *Contents of request.* A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the Regional Director.

(f) *Opposition to request.* Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

(g) *Finality; waiver; denial of request.* The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(h) *Grant of review; briefs.* The grant of a request for review shall not, outside of the provision for impoundment set forth in paragraph (c) of this section, stay the Regional Director's action unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 10 business days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the Regional Director and/or other briefs which shall be limited to the issues raised in the request for review. No reply briefs may be filed except upon special leave of the Board. Where review has been granted, the Board may provide for oral argument or further hearing. The Board will consider the entire record in the light of the grounds relied on for review and shall make such disposition of the matter as it deems appropriate. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(i) *Format, Service, and Extensions*—(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof and any motions under paragraph (j) of this section; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed pursuant to the procedures set forth in § 102.2(c). Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited. A party may combine a request for review of the Regional Director's decision and direction of election with a request for review of a Regional Director's post-election decision, if the party has not previously filed a request for review of the pre-election decision. A party may not, however, file more than one request for review of a particular action or decision by the Regional Director. Repetitive requests will not be considered.

(2) *Service.* The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. A certificate of service shall be filed with the Board together with the document.

(3) *Extensions.* Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed pursuant to § 102.2(c) with the Board or the Regional Director, as the case may be, except that no extension of time will be granted to circumvent the impoundment provisions set forth in paragraph (c) of this section. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

(j) *Requests for extraordinary relief.* (1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief:

(i) Expedited consideration of the request;

(ii) A stay of some or all of the proceedings, including the election; or

(iii) Impoundment and/or segregation of some or all of the ballots.

(2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the Regional Director will be altered in any fashion.

(k) *Notice of Election.* The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically to all eligible voters (including individuals permitted to vote subject to challenge) if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. For the purposes of this subpart, the term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(l) *Voter list.* Absent extraordinary circumstances specified in the direction

of election, the employer shall, within 5 business days after issuance of the direction, provide to the Regional Director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ''cell'' telephone numbers) of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the direction respectively within 5 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

■ 12. Revise § 102.68 to read as follows:

§ 102.68 Record in pre-election proceeding; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, Notice of Hearing with affidavit of service thereof, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the Regional Director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the Regional Director or to the Board, and the decision of the Regional Director, if any. Immediately upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board.

■ 13. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the Regional Director; hearings; Hearing Officer reports on objections and challenges; exceptions to Hearing Officer reports; Regional Director decisions on objections and challenges.

(a) *Election procedure; tally; objections.* (1) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.

(2) All elections shall be by secret ballot.

(3) Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit.

(4) A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit.

(5) When the election is conducted manually, any party may be represented by observers of its own selection; whenever possible, a party shall select a current member of the voting unit as its observer, and when no such individual is available, a party should select a current nonsupervisory employee as its observer. Selection of observers is also subject to such limitations as the Regional Director may prescribe.

(6) Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded.

(7) Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

(8) Within 5 business days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to § 102.5(e) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.5(e) or (c). The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b) *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a)(8) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, and if no request for review filed pursuant to § 102.67(c) is pending, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board.

(c) *Regional director's resolution of objections and challenges*—(1) *Regional director's determination to hold a hearing*—(i) *Decisions resolving objections and challenges without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges. If no

request for review filed pursuant to § 102.67(c) is pending, and no request for review is timely filed pursuant to paragraph (c)(2) of this section, the Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing on objections and challenges.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election, and raise substantial and material factual issues, the Regional Director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a Notice of Hearing before a Hearing Officer at a place and time fixed therein. The Regional Director shall set the hearing for a date 15 business days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the Regional Director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an Administrative Law Judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the Administrative Law Judge shall, after issuing a decision, sever the representation case and transfer it to the Regional Director for further processing.

(iii) *Hearings; Hearing Officer reports; exceptions to Regional Director.* The hearing on objections and challenges shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The Hearing Officer may rule on offers of proof. Any party desiring to submit a brief to the Hearing Officer shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Upon the close of such hearing, the Hearing Officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 10 business days from the date of issuance of such report, file with the Regional Director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director. Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. Extra copies of electronically-filed papers need not be filed. The Regional Director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case, save that the Regional Director shall not issue a certification of results and/or representative if a request for review previously filed subject to § 102.67(c) remains pending, or if a request for review is timely filed pursuant to paragraph (c)(2) of this section prior to the issuance of the certification of results and/or representative.

(2) *Regional Director decisions and Board review.* The decision of the Regional Director disposing of challenges and/or objections shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the Regional Director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the Administrative Law Judge's decision, and a request for review of the Regional Director's decision and direction of election shall be due at the same time as the exceptions to the Administrative Law Judge's decision are due. If no request for review is timely filed pursuant to this paragraph, and no request for review filed pursuant to § 102.67(c) is pending, the Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.

(d) *Record for objections and challenges.* (1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the Regional Director, any requests for review, and the record previously made as defined in § 102.68. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the Regional Director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings, or orders of the Regional Director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a Regional Director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the Regional Director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) *Revised tally of ballots.* In any case under this section in which the Regional Director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 5 business days after the revised tally of ballots has been made available, the Regional Director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

(f) *Format of filings with Regional Director.* All documents filed with the Regional Director under the provisions of this section shall be filed double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Regional Director by motion, setting forth the reasons therefor, filed pursuant to the procedures set forth in § 102.2(c). Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) *Extensions of time.* Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed pursuant to § 102.2(c) with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

(h) *Final disposition.* For the purposes of filing a request for review pursuant to § 102.67(c) or paragraph (c)(2) of this section, a case is considered to have reached final disposition when the Regional Director dismisses the petition or issues a post-election decision that will result in the issuance of a certification of results (including, where appropriate, a certification of representative) absent the filing of a request for review.

■ 14. Revise § 102.71 to read as follows:

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the Regional Director.

(a) If, after a petition has been filed and at any time prior to the close of hearing, it shall appear to the Regional Director that no further proceedings are warranted, the Regional Director may dismiss the petition by administrative action and shall so advise the petitioner in writing, setting forth a simple statement of the procedural or other grounds for the dismissal, with copies to the other parties to the proceeding. Any party may obtain a review of such action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A request for review from an action of a Regional Director pursuant to this subsection may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The request for review is accompanied by documentary evidence previously submitted to the Regional Director raising serious doubts as to the Regional Director's factual findings, thus indicating that there are factual issues which can best be resolved upon the basis of the record developed at a hearing.

(4) The Regional Director's action is, on its face, arbitrary or capricious.

(5) The petition raises issues which can best be resolved upon the basis of a record developed at a hearing.

(b) Where the Regional Director dismisses a petition or directs that the proceeding on the petition be held in abeyance, and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices, and the Regional Director, upon request, has so notified the parties in writing, any party may obtain a review of the Regional Director's action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A review of an action of a Regional Director pursuant to this subsection may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The Regional Director's action is, on its face, arbitrary or capricious.

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the Regional Director and copies served on all the other parties within 10 business days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall contain a complete statement setting forth facts and reasons upon which the request is based. The request shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. The request must comply with the formatting requirements set forth in § 102.67(i)(1). Requests for an extension of time within which to file the request for review shall be filed pursuant to § 102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests.

(d) Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Direction and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in § 102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to § 102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

Dated: December 10, 2019.

Roxanne L. Rothschild,

Executive Secretary.

[FR Doc. 2019–26920 Filed 12–13–19; 8:45 am]

BILLING CODE 7545–01–P

FEDERAL REGISTER

Vol. 84 Wednesday,

No. 243 December 18, 2019

Part IV

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 224

Tribal Energy Resource Agreements; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 224

RIN 1076–AF47

[192D0102DR/DS5A300000/DR.5A311.IA000118]

Tribal Energy Resource Agreements

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is amending its regulations governing Tribal Energy Resource Agreements (TERAs) between the Secretary of the Interior (Secretary) and Indian Tribes. Tribes, at their discretion, may apply for TERAs. TERAs allow Tribes to enter into leases, business agreements, and rights-of-way for energy resource development on Tribal land without the Secretary's review and approval. This final rule updates the regulations to incorporate changes recently made by Congress to the Act authorizing TERAs. This rule also establishes how, as an alternative to entering into a TERA, a Tribe may obtain certification of a Tribal Energy Development Organization (TEDO).

DATES: This rule is effective on December 18, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273–4680; *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Responses to Comments on the Proposed Rule
A. General Comments
B. Comments on Consultation and Public Meetings
C. Section-by-Section Comments
III. Overview of Final Rule
IV. Summary of Changes Made to the Proposed Rule
V. Procedural Requirements
A. Regulatory Planning and Review (E.O. 12866, 13563, and 13771)
B. Regulatory Flexibility Act
C. Small Business Regulatory Enforcement Fairness Act
D. Unfunded Mandates Reform Act
E. Takings (E.O. 12630)
F. Federalism (E.O. 13132)
G. Civil Justice Reform (E.O. 12988)
H. Consultation with Indian Tribes (E.O. 13175)
I. Paperwork Reduction Act
J. National Environmental Policy Act
K. Effects on the Energy Supply (E.O. 13211)

I. Background

The Secretary is issuing these regulations under the authority of the Indian Tribal Energy Development and Self-Determination Act of 2005, as amended by the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, 25 U.S.C. 3501–3504, Public Law 115–325, and 25 U.S.C. 2 and 9.

In 2005, Congress passed a law authorizing Tribes, at their discretion, to apply for and enter into TERAs with the Secretary. *See* the Indian Tribal Energy Development and Self-Determination Act of 2005, Title XXVI, Section 2604 of the Energy Policy Act (Pub. L. 109–58). Upon Secretarial approval of a TERA, the Tribe may enter into energy-related leases, business agreements, and rights-of-way on Tribal lands without the Secretary's review and approval. The BIA finalized regulations to implement this authority in 2008 at 25 CFR part 224. *See* 73 FR 12807 (March 10, 2008).

TERAs further the Federal Government's policy of providing enhanced self-determination and economic development opportunities for Indian Tribes by promoting Tribal oversight and management of energy resource development on Tribal lands. TERAs provide another avenue, in addition to the Indian Minerals Development Act and the Indian Mineral Leasing Act, under which Tribes may develop their mineral resources. TERAs also support the national energy policy of increasing utilization of both renewable and nonrenewable domestic energy resources.

Congress updated provisions authorizing TERAs in the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (2017 Amendments). The 2017 Amendments update the procedures and conditions for the Secretary's approval of TERAs, authorize Tribes to enter into leases and business agreements that pool a Tribe's energy resources with other energy resources and, among other things, establishes that energy-related leases, business agreements, and rights-of-way between a Tribe and certified TEDO do not require the Secretary's approval.

On July 2, 2019, the BIA published a proposed rule to incorporate changes made by the 2017 Amendments into the TERA regulations. *See* 84 FR 31529. The public comment period ended on September 3, 2019.

II. Responses to Comments on the Proposed Rule

BIA received input from Tribes at a listening session on June 24, 2019 in Sparks, Nevada, at the National Congress of American Indians Mid-Year Conference and at Tribal consultation sessions on July 11, 2019, in Catoosa, Oklahoma; July 16, 2019, in Ignacio, Colorado; July 18, 2019, in New Town, North Dakota; and July 23, 2019, by teleconference. BIA also received 14 written comment submissions. (To view all comments, search by Docket Number ''BIA–2019–0002'' in *https://www.regulations.gov.*) The following discussion addresses each topic raised by the comments.

A. General Comments

Comment: Several commenters, including six Tribes and one Tribal organization, stated their overall support of the revisions. A few individual commenters stated their opposition or expressed concern that TERAs in general may weaken protections for individual Indian landowners or minerals rights holders.

Response: The changes to the TERA regulations reflect statutory changes and are intended to encourage Tribes to enter into TERAs in support of Tribal self-governance. The regulation explicitly preserves the Department's trust responsibilities. *See* § 224.40.

B. Comments on Consultation and Public Meetings

Comment: One Tribe stated that BIA should have consulted with Tribes prior to publication of the proposed rule. An individual commenter requested a 90-day extension of the public comment period to obtain more input from individuals.

Response: BIA was unable to consult prior to publication due to statutory timing constraints. Likewise, BIA is unable to accommodate the request for an extension of the public comment period. The 2017 Amendments require publication of updates to the TERA regulations not later than December 18, 2019 (one year after the date of enactment of the 2017 Amendments). *See* Public Law 115–325, section 103(b).

Comment: A few individual commenters requested BIA hold additional public meetings at the Fort Berthold Reservation in New Town, North Dakota, to provide majority trust landowners the opportunity to provide comment. One individual requested BIA hold both a special information session in Pawhuska, Oklahoma, and an election of the Osage headright owners to vote on whether they would like the Tribe to move forward with a TERA or TEDO before BIA approves any TERA or TEDO application from the Osage Nation.

Response: The TERA regulations provide the opportunity for public comment before any TERA or TEDO application is approved. *See* § 224.67. Those provisions in the existing TERA regulations are unchanged by this final rule.

C. Section-by-Section Comments

1. Definitions (§ 224.30)

Comment: One commenter suggested clarifying that ''decision deadline'' is a point in time rather than a period of time.

Response: The final rule makes this change.

Comment: One Tribe requested that ''energy resources'' be broadly defined to include growing crops or trees for biomass.

Response: The existing regulation's definition of ''energy resources'' is broadly defined and includes biomass as an example.

Comment: Several Tribes supported the definition of ''qualified Tribe'' in lieu of the requirement for the Secretary to determine Tribal capacity. One Tribe had several questions regarding what would meet the requirement for ''substantial experience'' in the second option. Another commenter asked whether ''substantial experience'' in the definition of ''qualified Tribe'' may include experience related to an agreement regarding resources on Tribal land that are developed elsewhere (*e.g.,* an agreement to obtain oil on Tribal land and transport to a refinery off Tribal land).

Response: The determination of what is ''substantial experience'' or ''substantial participation'' in the administration, review, or evaluation of energy resource leases or agreements depends on the scope of the proposed TERA. There is no standard for the number of energy-related leases or agreements that a Tribe must have experience with, but the type of experience or substantial participation should be relevant. For example, experience in agreements regarding oil and gas wells, which involves significant front-end work, will differ from experience in agreements related to wind and solar farms, which involves significant back-end work on power purchase agreements. Other experience, such as treatment as a State status under the Clean Air Act may also be relevant. The definition of ''qualified Tribe'' allows two alternative means to qualify. Each requires a nexus to Tribal land. The second alternative would encompass experience with agreements regarding energy resources on Tribal land that are developed elsewhere.

Comment: One individual commenter opposed deletion of the Tribal capacity requirements and stated opposition to removing environmental review.

Response: The deletion of Tribal capacity requirements conforms to changes in the 2017 Amendments. The final rule does not remove environmental review.

Comment: One commenter requested changing language in the definition of ''Tribe'' from ''because of their status as Indians'' to ''because of their status as sovereign governments.''

Response: While BIA recognizes that Tribes are sovereign governments, the wording of the definition referring to ''Indians'' comes from the original TERA statute, using the definition of ''Tribe'' from Public Law 93–638, which BIA is retaining here for consistency. *See* 25 U.S.C. 3504(e).

Comment: A few commenters requested clarification that the Osage minerals estate falls within the phrase ''interests in land'' in the definition of ''Tribal land.''

Response: BIA agrees that the definition of ''Tribal land'' includes the Osage minerals estate in its reference to ''interests in land,'' but for brevity declines to amend the definition to list every individual Tribal surface and/or mineral estate it covers.

Comment: A Tribal organization commented that the definition of ''TEDO'' contains inaccurate statutory citations and suggested adding language stating that the TEDO is organized under Tribal law and subject to Tribal jurisdiction, laws, and regulatory authority.

Response: The final rule includes references to the correct citations, which are sections in the 2017 Amendments. The additional language is not necessary in the definition of TEDO because the Tribal law and Tribal jurisdiction language is provided in existing § 224.201(b) and (d).

2. Trust Responsibility (§ 224.40)

Comment: Several commenters sought confirmation that the Secretary's trust responsibility and provisions of other statutes are unaffected by the TERA regulations or expressed concern that they will lose the trust responsibility protections of the Secretary if a Tribe enters into a TERA or TEDO.

Response: The TERA regulations explicitly preserve the Secretary's trust responsibility. *See* § 224.40. The TERA regulations do not affect who is considered a trust beneficiary, the 1906 Osage Allotment Act, or the ability of beneficiaries to elect to maintain their trustee for collection and disbursement of funds.

Comment: A Tribe requested clarification on what actions the Secretary will or will not take to maintain his or her trust responsibility.

Response: The existing TERA regulations set out what activities the Department will continue to perform after approval of a TERA. *See* § 224.82. Additionally, the application consultation meeting between the Tribal applicant and Secretary will identify the specific services consistent with the Secretary's ongoing trust responsibility and available resources that the Department would provide to the Tribe. *See* § 224.58(c). These existing sections are unchanged by this final rule.

3. Pre-Application Consultation (§ 224.51)

Comment: One commenter objected to the proposed change from the Director of IEED to the Secretary as participating in pre-application consultation because the Secretary's heavy schedule could cause delays.

Response: The regulations' definition of ''Secretary'' includes the Secretary's designee. *See* § 224.30. In the Departmental Manual, the Secretary delegates authority to the Assistant Secretary—Indian Affairs, and the Assistant Secretary is able to re-delegate down to other officials. *See* 209 DM 8. Using the term ''Secretary'' affords the Department the flexibility to delegate authorities to the most appropriate official at any given time.

Comment: Two Tribes suggested adding a deadline, beginning when the Department receives the Tribe's pre-application, by which the Secretary must provide the required consultation to the Tribe. One of these commenters suggested a 30-day deadline.

Response: A 30-day deadline for the entire pre-application consultation process may be unrealistic if there are scheduling challenges with the Department's and Tribe's schedules. Instead, the final rule incorporates a 30-day deadline for contacting the Tribe to schedule a pre-application consultation. *See* § 224.51(b). This new deadline for coordination meets the spirit of the comment by ensuring that the Department will not delay responding to a pre-application and the process moves forward.

Comment: A Tribe noted that BIA could provide additional legal and technical assistance beyond the pre-application consultation to include assistance in drafting the application and speeding up the approval process. This commenter also suggested the Department provide a template TERA.

Response: The Department is available to provide assistance to Tribes,

beyond the formal pre-application consultation, in preparing a TERA. No templates are available at this time because it is not yet clear what standard approach would be most helpful without inadvertently limiting creative approaches.

4. Application Contents (§ 224.53)

Comment: A Tribe and Tribal organization expressed support for removing requirements related to a determination of Tribal capacity.

Response: The final rule finalizes this change.

Comment: A Tribe pointed out that the proposed rule would require Tribes to submit information that the Department likely already has: A statement that the Secretary recognizes the Tribe and has Tribal land (proposed § 224.53(a)(2)); a brief description of the Tribe's form of government (proposed § 224.53(a)(3)); or documentation that the Tribal governing body has authority to enter into leases, rights-of-way, and business agreements (proposed § 224.53(b)).

Response: The final rule deletes these provisions in response to this comment.

Comment: The same Tribe also suggested the requirement for a map and description of Tribal land the Tribe intends to include in the TERA (§ 224.53(a)(5)) is duplicative with the requirement at § 224.53(c)(2).

Response: The final rule retains both of these provisions because one provision requires a map and description of the Tribal land, while the other requires the Tribe to specify which energy resources or categories of energy-related leases, business agreements, or rights of way it intends to include in the TERA.

Comment: The same Tribe stated that the provision at § 224.53(d)(1), requiring the Tribe to describe the scope of its plan for administration and management of activities, duplicates the provision at (d)(3), requiring the Tribe to describe the regulatory activities it desires to assume in the geographical area with respect to leases, business agreements, and rights-of-way that exist when a TERA is approved.

Response: The first provision requires the Tribe to state its intent, if applicable, to regulate activities and describe a plan for administration and management, while the second provision requires the Tribe to describe which particular permitting, approval, or monitoring activities it plans undertake in the geographical areas it defines.

Comment: One commenter requested that the Secretary require a forensic audit of all Tribal funds as a ''stress test'' before accepting a TERA or TEDO.

Response: The final rule does not include a requirement for a forensic audit; including such a requirement would be inconsistent with other changes in the 2017 Amendments that limit the Secretary's examination of Tribal capacity to enter into a TERA.

5. How a Tribe Submits an Application (§ 224.54)

Comment: A commenter suggested specifying only one means of submitting a TERA, clarifying that electronic submissions must be in searchable portable document format (PDF), and clarifying that the time period begins upon the Secretary's receipt of a submission in that form, to eliminate confusion on when the date of receipt occurred.

Response: The final rule incorporates these suggestions by establishing email as the means of submission and requiring submissions be in PDF in § 224.54. The electronic submission will provide certainty for both the Tribe and the Department as to the date of receipt. The final rule also makes this change to the TEDO section at § 224.202 for the same reason.

Comment: A commenter requested the rule clarify that a submission is not technically an ''application'' if it does not include all the required documents and information.

Response: The requested clarification is not necessary because the existing regulations already specify that an application must be ''complete'' and, if the application is not complete, then the Secretary must specify to the Tribe what additional information is required to make the application complete. *See* § 224.56 and § 224.57.

6. Disclosure to Third Parties (§ 224.55)

Comment: One Tribe stated that information submitted by Tribes should not be subject to disclosure to third parties under the Freedom of Information Act (FOIA) and that the procedures for identifying and justifying that information should be withheld as confidential or sensitive are burdensome.

Response: Information submitted by Tribes to Interior is subject to disclosure to third parties under FOIA. *U.S. Department of the Interior* v. *Klamath Water Users Protective Ass'n,* 532 U.S. 1 (2001). The procedures in § 224.55 for identifying and justifying that information should be withheld are standard FOIA Exemption 4 procedures that are in the existing regulation and are not being changed as a part of this rulemaking.

Comment: A few commenters from one Tribe requested more disclosure of documents related to oil and gas production on their reservation and asked whether the Tribe could take over the responsibility to maintain custody of those records.

Response: The individual terms of the TERA will determine what responsibilities a Tribe takes over; however, even if a Tribe were to take over as custodian of the records, the records would continue to be Federal records with proprietary information subject to withholding under FOIA exemptions.

7. Receipt of Complete Application (§ 224.56)

Comment: A few commenters noted the 270-day deadline for the Secretary to issue a decision: Some stated that the time period is long and should be shortened, and others stated that the time period is reasonable considering all the steps that need to occur.

Response: The 270-day timeline is in the existing regulations and was established by statute. This rule does not change that timeline.

Comment: Two commenters stated that there is no statutory authority to allow a TERA to take effect prior to the 271st day or extend the deadline. Two other commenters suggested imposing a maximum on any extension to the 270-day period for making a decision.

Response: In response to these comments, the final rule deletes provisions allowing for an extension of the deadline. This change will simplify the regulation to clearly provide that the TERA takes effect on the 271st day unless the Secretary disapproves it or approves it before that deadline. *See, also,* §§ 224.62, 224.74. While a strict reading of the statute would mean that the TERA could take effect only on the 271st day and no earlier, such a strict reading would undermine the clear purposes of the statute (to streamline energy development and promote Tribal self-determination) by preventing a TERA from taking effect earlier. *See, e.g.,* S. Rept. 115–84. *See, also,* §§ 224.62, 224.74.

8. Financial Assistance (§ 224.57)

Comment: One commenter stated that the new language providing that the Secretary will include, in the notice of a complete application, a notice of any available financial assistance duplicates the required TERA provision addressing financial assistance in § 224.63(h).

Response: The notice to the Tribe of available financial assistance may ultimately be different from what the Tribe and Secretary agree to include as part of the TERA, so these provisions are not duplicative.

9. Application Consultation Meeting (§ 224.58)

Comment: One commenter stated that the application consultation meeting should take place no later than 195 days after the Secretary receives the TERA application.

Response: The Department agrees with this commenter's calculation that the meeting should take place by that time, but is not including this benchmark in the rule in order to retain the flexibility afforded in the existing regulation, which provides that the meeting will occur as at the earliest practicable time. *See* § 224.58(a).

Comment: A commenter stated that the Department should be required to consult with other Federal agencies that may be impacted by a proposed TERA and resolve any conflicting requirements.

Response: Paragraph (d) of this section provides that the Secretary will discuss the relationship of the Tribe to other Federal agencies with responsibilities for leases, business agreements, or rights-of-way. In practice, the Department will strive to use this opportunity to resolve any conflicting requirements with other Federal agencies.

Comment: A commenter also stated that paragraph (e), regarding a discussion of the Tribe's relationship to State and local governments and non-Indians who may be affected by a TERA, should not hinder or halt a TERA approval.

Response: Discussion regarding those who may be affected by a TERA will not hinder or halt approval of the TERA because the final rule limits the grounds upon which a TERA may be disapproved. *See* § 224.71.

10. Review of Final TERA Proposal (§ 224.62)

Comment: A Tribe stated that the regulation refers to a ''final proposed TERA'' without defining what that is. This commenter expressed concern that having both an original proposed TERA version and a final proposed TERA version would cause delays.

Response: A final proposed TERA may differ from an original proposed TERA in a limited number of ways, as enumerated in § 224.62. The final proposed TERA is the version of the TERA that the Tribe submits after the application consultation meeting, which may address any recommendations provided by the Secretary in the report provided after the application consultation meeting. *See* § 224.60. The 270-day deadline for a decision on a TERA begins to run from the time the Department receives the original proposed TERA, so there is no risk of delay. *See* § 224.62.

Comment: Two commenters again noted that the statute does not provide the Secretary discretion to extend the 270-day review period.

Response: The final rule deletes provisions allowing for an extension of the deadline. This change will simplify the regulation to clearly provide that the TERA takes effect on the 271st day unless the Secretary disapproves it or approves it before that deadline. *See, also,* §§ 224.62, 224.74.

11. Required TERA Provisions (§ 224.63)

Comment: One Tribe stated that certain paragraphs (*e.g.,* paragraph (c)(1), regarding public opportunity to comment) should not be construed to mean that public comment or non-Tribal entities may impact TERA application approval or continuation.

Response: This section will impact TERA application approval or continuation only to the extent that the listed provisions must be included in a TERA for the Department to approve the TERA.

Comment: One commenter stated that the provision requiring the environmental review process to identify and evaluate significant environmental effects and proposed mitigation measures should not be deleted because deletion will degrade trust land, water, and air quality.

Response: The final rule retains provisions informing the public of the opportunity to comment on environmental impacts and provides for Tribal responses to relevant and substantive public comments before approval of the lease, right-of-way, or business agreement. The specific references to significant environmental effects and proposed mitigation were deleted in the proposed and final rule to conform to changes to the statute at 25 U.S.C. 3504(e)(2)(C).

12. Assuming Management of Different Resources Under TERAs (§ 224.64)

Comment: Tribes and Tribal organizations supported these revisions.

Response: The final rule retains the proposed revisions.

13. Assuming Additional Activities Under TERA (§ 224.65)

Comment: One Tribe requested that this section include a definite timeframe for Secretarial approval of an amendment to assume additional activities.

Response: Because the Department has not yet developed any experience in reviewing TERA amendments by which to judge what timeframe would be most appropriate for such a review, the final rule does not include a definite timeframe at this point.

14. Reducing the Scope of TERAs (§ 224.66)

Comment: One Tribe requested that this section include a definite timeframe for Secretarial approval of an amendment to reduce the scope of a TERA.

Response: Because the Department has not yet developed any experience in reviewing TERA amendments by which to judge what timeframe would be most appropriate for such a review, the final rule does not include a definite time frame at this point.

Comment: The Osage Minerals Council stated that, in the case of the Osage Nation, there is no single Tribal governing body that can unilaterally decide to reduce the scope of a TERA related to the Osage mineral estate, because both the Osage Minerals Council and the Osage Nation Congress and Chief would have to agree.

Response: No change is made to the rule to address this comment because the regulation continues to define ''Tribal governing body'' to be a Tribe's governing entity, such as Tribal council or Tribal business committee, as established under Tribal or Federal law and recognized by the Secretary. *See* § 224.30. In the case of the Osage, the Osage Minerals Council is ''an independent agency within the Osage Nation . . . with no legislative authority for the Osage Nation government.'' Osage Const., Art. XV § 4. *See also, Boone* v. *Osage Nation of Oklahoma,* No. SCV–2015–01 (Supreme Court of the Osage Nation; September 9, 2016). Thus, under the Osage Constitution and a decision of the Osage Supreme Court, the ''Tribal governing body'' as defined in the TERA regulations is the Chief and Osage Nation Congress, not the Osage Minerals Council. The Department will not insert itself into the internal consultation process of the Osage Nation government.

15. Public Notification and Comment (§§ 224.67–224.68)

Comment: Two Tribes expressed concern that allowing for comment from the public, States, or local governments on a TERA would derail the Tribe's plans and requested adding language to protect Tribes from undue influence.

Response: The Tribe and Secretary may mutually agree to make changes to the TERA based on comments from the public, States, or local governments, but those comments cannot alone provide the basis for approving or disapproving

a TERA because the final rule restricts the basis for disapproving a TERA to three reasons. *See* § 224.68 and § 224.71.

Comment: One Tribe suggested that Tribes provide a robust plan for public involvement and participation in Tribal projects under TERAs.

Response: The Department defers to Tribes on the extent to which they involve their members and the public in Tribal projects under TERAs.

16. Standards To Approve a TERA (§ 224.71)

Comment: All the comments received on this section supported the revisions in limiting grounds for disapproval.

Response: The final rule retains these revisions.

17. Timing of Approval (§ 224.74)

Comment: A commenter stated that there is no statutory authority to allow a TERA to take effect prior to the 271st day or extend the deadline.

Response: The final rule deletes provisions allowing for an extension of the deadline. This change will simplify the regulation to clearly provide that the TERA takes effect on the 271st day unless the Secretary disapproves it or approves it before that deadline. *See, also,* §§ 224.56, 224.62. The rule does delete the provision allowing for an earlier effective date because of the reasons stated in response to the comments on § 224.56, above.

18. Action Upon Approval or Disapproval (§ 224.75)

Comment: One Tribe expressed concern that the Department may wait until the last day to disapprove an application and require the Tribe to revise and resubmit the application multiple times. This Tribe suggested that the final rule limit the Secretary to one revision encompassing all needed changes or show cause for failing to request such changes the first time.

Response: The final rule is designed to avoid the need for multiple resubmissions by first allowing the opportunity for a ''thorough discussion of the Tribe's application'' at the application consultation meeting (§ 224.58(b)) and then, after submission of the final proposed TERA, by requiring the Secretary to specify the changes or other actions required to address each reason for the disapproval (§ 224.75(b)).

Comment: A Tribal organization suggested adding a requirement that the Secretary include notification in the approval that the Tribe may request non-expended amounts.

Response: Section 224.79 provides notice of this opportunity.

Comment: One commenter noted that the new approach that provides Tribes with the opportunity to revise and resubmit a TERA and requiring the Department to provide technical assistance to Tribes is consistent with contracting and compacting approvals under the Indian Self-Determination and Education Assistance Act (ISDEAA).

Response: The final rule includes these provisions.

19. Resubmission of TERA (§ 224.76)

Comment: A commenter noted that the statute does not provide the Secretary discretion to agree with the Tribe to extend the period for resubmission review period or the period for a decision.

Response: Provisions allowing for extensions have been deleted; see response to the last comment regarding § 224.56.

20. Appeals of Secretary's Decision on TERA (§ 224.77)

Comment: One Tribe stated that this section should be revised to allow a TEDO to appeal a Secretary's decision.

Response: The final rule does not incorporate this suggested change because this section addresses appeals related to TERAs and a Secretary's decision on a TERA would not affect a TEDO, as the TEDO is an alternative to a TERA. The final rule does account for a TEDO's ability to appeal Departmental decisions or inaction in § 224.181, however.

21. How Long a TERA Is in Effect (§ 224.78)

Comment: A Tribe expressed support for the proposed changes providing that the TERA remains in effect unless and until the Tribe rescinds or the Secretary reassumes activities because these provisions provide certainty.

Response: These provisions are included in the final rule.

22. Providing Unexpended Amounts to Tribe (§ 224.79)

Comment: One Tribe stated that TEDOs should also have the opportunity to obtain unexpended amounts.

Response: No change has been made to address this comment because the statute limits the availability of unexpended amounts to Tribes with a TERA. Additionally, because TEDOs do not take over any Departmental activities, there would be no unexpended amounts associated with a TEDO.

Comment: A few Tribes stated that the rule should include more detail on how the Secretary will calculate the amount of unexpended funds to provide to Tribes.

Response: The rule provides a basic framework for accounting because the accounting depends on the scope and breadth of activities each Tribe undertakes in its TERA. The Department will, by necessity, analyze on a case-by-case basis the particular functions undertaken, the funding available for those functions, and the extent to which there will be unexpended funds remaining when the Tribe takes over the functions. The accounting will be too specific to each TERA to provide a detailed breakdown of how the Department will calculate unexpended funds across the board.

Comment: One commenter asked that this section clarify that unexpended funds are available based on the availability of appropriations.

Response: While it is true that the availability of appropriations will affect the amount of unexpended funds that are available, the Department declines to specify this in the final rule because this fact applies nearly universally.

23. When a Tribe May Grant a Right-of-Way (§ 224.84)

Comment: One Tribe supported revisions to this section that broaden the types of rights-of-way that may be included in a TERA.

Response: The final rule includes these revisions.

Comment: One commenter suggested making a technical edit to delete the word ''renewable'' from the parenthetical description in paragraph (a) because the regulatory definition of ''energy resources'' includes both renewable and nonrenewable.

Response: The final rule does not make this edit because the term ''renewable energy resources'' is an example of a source of electricity production, rather than a restriction on the source of electricity production. This example is included in the statute and carried into the regulation because it appears that Congress intended to emphasize that an electric production facility includes one that produces electricity from renewable energy resources. *See* 25 U.S.C. 3504(g).

24. When a Tribe May Enter Into a Lease or Business Agreement (§ 224.85)

Comment: A commenter suggested, in paragraph (d) (which addresses pooling, unitization, or communitization of energy mineral resources), deleting the word ''mineral'' from ''energy mineral resources'' and adding the word ''mineral'' at the end of the sentence to read ''or other mineral resources''.

Response: The Department did not make these edits because the wording included in the rule currently matches the wording in the statute. In particular, the rule does not delete the word ''mineral'' specifying that pooling, unitization, or communitization is for ''energy mineral resources'' because it appears Congress intended this paragraph to apply only to mineral resources.

25. Interested Party Petitions (§ 224.101) and Requirements Before Filing a Petition (224.107)

Comment: One Tribe suggested defining the phrase ''substantial evidence'' in this section, which requires persons or entities to demonstrate with substantial evidence that they have sustained or will sustain, an adverse environmental impact as a result of a Tribe's failure to comply with a TERA.

Response: The Department declines to define ''substantial evidence'' in order to allow for a case-by-case analysis.

Comment: Two individual commenters objected to limiting who is considered an interested party to those able to demonstrate the adverse environmental impact with substantial evidence, and to the requirement that an interested party exhaust all Tribal remedies. A Tribe supported limiting who is considered an interested party and requiring exhaustion of all Tribal remedies before filing a petition with the Secretary as affirming Tribal self-determination and acknowledging that Tribes are responsible for managing the TERA.

Response: The final rule incorporates changes made by Congress to limit who is an interested party and require exhaustion of ''all'' Tribal remedies before filing a petition. *See* 25 U.S.C. 3504(e)(7)(A).

Comment: A Tribe stated that the provisions regarding interested party petitions may be unduly burdensome and interfere with Tribal business because in the past, non-Tribal comments have derailed proposed actions of Tribes. This commenter suggested adding language to protect Tribes from undue influence.

Response: The public comment procedures included in the regulation are established by statute. The revisions include protections for Tribes by limiting who is considered an interested party, requiring interested parties to first exhaust all Tribal remedies, and by limiting the grounds on which the Secretary may disapprove of a TERA. *See* §§ 224.101, 224.107, and 224.71, respectively.

26. Action To Ensure Compliance (§ 224.120)

Comment: A Tribe stated that, when the Secretary reassumes activities under a TERA, Tribes should have the opportunity for a hearing and the Secretary should have the burden of proving by clear and convincing evidence the grounds for the reassumption.

Response: Later provisions in the regulation set out the processes for the Secretary to notify the Tribe of noncompliance, including the opportunity for a hearing, and the process for the Secretary to reassume functions. *See* §§ 224.115 through 224.121, and 224.136 through 224.161. This rulemaking does not change these processes.

27. Appeal of Secretary's Decision on Tribal Compliance With a TERA (§ 224.121)

Comment: One commenter suggested technical edits to clarify that the Secretary's designees will be carrying out the regulation because, otherwise, it appears odd for the Principal Deputy Assistant Secretary—Indian Affairs to be the arbiter of actions taken by the ''Secretary.''

Response: The regulation refers to ''Secretary'' in order to provide the Secretary with the maximum flexibility as to who to designate to act on his or her behalf. *See* response to comment regarding delegation under ''3. Pre-Application Consultation (§ 224.51), above.

28. Appeals of Departmental Decisions (§§ 224.181–224.185)

Comment: One individual commenter objected to the regulations' limit on who may appeal to only those who are adversely affected, as limiting the ability of a Tribal member to appeal and to limiting the basis of the appeal to those issues raised in prior participation in the petitioning process. Another commenter requested adding a paragraph to clarify that the person may petition under the First Amendment to the U.S. Constitution.

Response: The Department did not propose any changes to the rights of an interested party to appeal, and is not making any changes in the final rule to an interested party's right to appeal. To the extent someone would have the right to petition under the First Amendment to the U.S. Constitution notwithstanding Congress's limitations on appeals as reflected in this rule, that right would exist regardless of whether the Department makes the right explicit in the rule.

29. TEDOs (Subpart J)

Comment: Several Tribes expressed their strong support of provisions allowing for TEDOs, stating that these provisions promote Tribal self-determination and Tribal economic development and provide additional opportunities for Tribes to develop their energy resources. One Tribe requested clarification that a TEDO may consist of more than one Tribe.

Response: The final rule includes the proposed provisions for certification of TEDOs as an alternative to TERAs. Paragraph (2) of the definition of ''TEDO'' already allows for two or more Tribes to organize as a TEDO. *See* § 224.30.

Comment: A Tribe requested clarification regarding whether a Tribe could enter into a TEDO with another entity if the other entity has a refinery that is not on Tribal land.

Response: The regulations would allow a Tribe to enter into a TEDO with another entity if the other entity has a refinery not on Tribal land, as long as the Tribe owns and controls the majority of the interest in the TEDO and owns the Tribal land being developed (*i.e.,* the energy resources being developed for transfer to the refinery are on Tribal land). *See* § 224.201(c).

Comment: A Tribe requested clarification on whether a joint venture organized under State laws (*e.g.,* a Delaware limited liability company) could be certified as a TEDO.

Response: Both the statute and regulations provide that the joint venture must be organized under the Tribe's law to be certified as a TEDO. *See* 25 U.S.C. 3504(h)(2)(B), and 25 CFR 224.201(b).

Comment: One commenter asked whether a Tribe could do both a TEDO and a TERA and what the difference between the two is.

Response: The TEDO is an alternative to a TERA that allows a Tribe to create its own entity as a TEDO or enter into a joint venture with other Tribes or non-Tribal entities as a TEDO and then, once the Secretary certifies the TEDO, the Tribe can enter into leases, rights-of-way, and business agreements with the TEDO without the Secretary's approval. A TERA, on the other hand, is an agreement between the Tribe and the Secretary that allows the Tribe to enter into leases, rights-of-way, and business agreements with any other entity or person (not just a TEDO). It would be possible for a Tribe to create a TEDO and also have a TERA with the Secretary.

Comment: A commenter suggested a technical edit to clarify that the Tribe

must exercise sovereign authority over the Tribal land being developed by a TEDO.

Response: The current language ''the Tribal land of which is being developed'' appears in several sections of the regulation and was not proposed for change; therefore, the final rule retains this language. *See, e.g.,* §§ 224.201(c), (d), and 224.205(a)(2), (4).

Comment: An individual commenter stated that the intent of this language is to withhold trust responsibilities of the Federal government, especially when an individual Tribal member's energy resources are included in a TEDO, and that this does not comply with the Federal government's trust responsibility to individual Tribal members.

Response: While a lease of individual Tribal member energy resources could be included in a Tribe's pooling, unitization, or communitization agreement with a TEDO, the usual requirements for landowner consent would still apply. Additionally, the regulation states that the Act preserves the Secretary's trust responsibilities relating to trust resources. *See* § 224.40.

D. Inherently Federal Functions

Comment: Several Tribes and other commenters expressed the need to define ''inherently Federal functions'' to clarify what functions are not available for Tribes to undertake in a TERA. According to these Tribes, a definition is necessary for several reasons, including to address issues, provide certainty, and ensure consistency in interpretation. A few requested that the definition exclude basic minerals development functions, like applications for permits to drill, thereby allowing Tribes to undertake these functions through TERAs. A Tribal organization commenter requested consultation with Tribes before the Department defines the term.

Response: The Department has undertaken efforts to define ''inherently Federal functions'' based on years of Tribal input and anticipates releasing a list of functions that it has determined to be ''inherently Federal'' in the near future.

E. Other Comments

Comment: Two Tribes requested that the TERA regulations address dual taxation by clarifying that Tribes are the exclusive sovereign authority to tax improvements and activities on lands and energy development under TERAs.

Response: The leasing and right-of-way regulations at 25 CFR part 162 and 169, respectively, each include provisions that address taxation; these provisions apply to surface leases and rights-of-way under TERAs.

Comment: One commenter stated that the rule will adversely affect property rights.

Response: The rule does not affect property rights in any way because the Tribe is requesting the right to approve agreements related to Tribal land. In cases where an individual's land may be affected through pooling, unitization, or communitization, the requirements to obtain the consent of individual landowners remain.

Comment: A few commenters asked how the National Environmental Policy Act (NEPA) applies to the rule and to actions taken under a TERA. One commenter stated the rule will be a major Federal action significantly affecting the quality of the human environment.

Response: The rule will not significantly affect the quality of the human environment, because no action is being taken with a TERA except that the Tribe takes over for the Department as approving authority for individual leases, rights-of-way, and business agreements on Tribal land. The regulation requires the TERA to include an environmental review process for the individual leases, business agreements, and rights-of-way entered into under the TERA. *See* § 224.63(c). The regulation also requires the Secretary to issue a notice advising the public when it receives a final proposed TERA of any NEPA review it is conducting related to approval of the final proposed TERA. *See* § 224.67(a)(2).

Comment: Two commenters asked for economic analysis of how the rule could impact different Tribes or how much it costs to administer mineral estates.

Response: Any economic effect of the TERA regulations on Tribes would be too speculative to estimate at this point because the economics will depend on whether any Tribe enters a TERA and what functions each Tribe chooses to undertake. To date, no Tribe has entered into a TERA, so there is no baseline for estimating what potential economic impacts may be.

Remaining comments addressed issues specific to one individual Tribe, advocated for funding, were out of scope, or addressed implementation, rather than the regulation itself.

III. Overview of Final Rule

This rule addresses the requirements of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (2017 Amendments). Wherever possible, BIA has interpreted these statutory changes in a manner that will impose the least burden on Tribes. As described in more detail, below, the rule: (1) Reduces the information Tribes must provide in TERA applications; (2) imposes timelines on the Secretary for review and approval of TERAs; (3) limits the grounds on which the Secretary may disapprove a TERA and require an explanation of each of the grounds; (4) establishes a process for amending a TERA; (5) narrows who may be considered an interested party and procedures for petitioning and for the Secretary's handling of interested party petitions; (6) addresses how BIA will provide unexpended funds to Tribes; (7) establishes a process and criteria for certifying TEDOs ; and (8) makes various technical nomenclature and other technical edits.

A. Information Required in Applications for TERAs

The 2017 Amendments deleted a requirement for the Secretary to consider the capacity (experience in managing natural, financial and administrative resources) of a Tribal applicant to carry out a TERA. *See* Section 103(a) of the 2017 Amendments. To reflect this deletion, the rule deletes several TERA application items and several required TERA provisions.

B. Timelines

The rule incorporates timelines established by the 2017 Amendments to ensure that the TERA application process moves forward in a timely manner. Specifically, the rule:

- Requires the Secretary to contact the Tribe within 30 days of receiving a pre-application consultation request;
- Requires the Secretary to do the following within 30 days of a Tribe submitting a TERA:
  - Notify the Tribe as to whether the agreement is complete or incomplete;
  - If the agreement is incomplete, notify the Tribe of what information or documentation is needed to complete the submission; and
  - Identify and notify the Tribe of the financial assistance, if any, to be provided by the Secretary to the Tribe to assist in the implementation of the TERA, including the environmental review of individual projects.
- Establishes that a TERA takes effect 271 days after the Secretary receives the TERA, unless the Secretary approves the TERA to take effect on an earlier date, or the Secretary disapproves the application before the 271st day.
- Establishes that a revised TERA takes effect 91 days after the Secretary receives the TERA, unless the Secretary and the Secretary approves the revised TERA to take effect on an earlier date,

or the Secretary disapproves it before the 91st day.

The rule also incorporates statutory requirements that the TERA remains in effect to the extent any provision is consistent with applicable Federal law (including regulations), unless the Secretary reassumes the authority by necessity to protect the physical trust asset or the Tribe voluntarily rescinds the TERA pursuant to the regulations.

C. Grounds for Disapproval of a TERA

The rule promotes certainty in the TERA application process by limiting the grounds upon which the Secretary may disapprove a TERA. Specifically, the rule establishes that the Secretary may disapprove a TERA only if:

- The Tribe does not meet the definition of a ''qualified Tribe;''
- A provision of the TERA violates applicable Federal law, regulations, or a treaty; or
- The TERA fails to include certain provisions.

In addition, the rule provides that, where the Secretary does disapprove a TERA application, the Secretary must provide the Tribe with a detailed, written explanation of each reason for a disapproval, specify the revisions or changes to the TERA necessary to address each reason, and offer the Tribe an opportunity to revise and resubmit the TERA.

D. Amendments to TERAs

The rule provides more flexibility to the Tribe, in that it establishes a process to amend an approved TERA to assume authority for approving leases, business agreements, or rights-of-way for development of another energy resource that is not already covered, without requiring the Tribe to apply for a new TERA.

E. Petitions by Interested Parties

The rule updates the existing current regulatory process for ensuring that the public is informed of, and has reasonable opportunity to comment on, environmental impacts by:

- Limiting who is considered an interested party to those able to demonstrate their interest with substantial evidence;
- Requiring exhaustion of all remedies provided under Tribal law before an interested party may submit to the Secretary a petition to review Tribal compliance with the TERA;
- Requiring the Secretary to determine whether the petitioner is an interested party and whether the Tribe is not in compliance with the TERA as alleged in the petition;
- Limiting the Secretary to taking only such action as the Secretary determines is necessary to address the noncompliance claims; and
- Requiring the Secretary to dismiss a petition if the Tribe and interested party who filed the petition reach a resolution of the petition's claims.

F. Unexpended Amounts

The rule broadly sets out the manner in which the Secretary will provide to a requesting Tribe the amounts that the Secretary would have spent carrying out activities the Tribe carries out in the TERA (unexpended amounts), and will provide the Tribe with an accounting of those unexpended amounts.

G. Certification of TEDOs

The rule establishes a process for the TEDOs to obtain certification from the Secretary so that they may enter into leases, business agreements, and rights-of-way with Tribes on Tribal land without Secretarial approval. *See* Section 103(b) of the 2017 Amendments.

H. Nomenclature and Technical Changes

The rule also makes changes to:

- Capitalize ''Tribe'' consistent with the Government Printing Office Manual;
- Add reference to the annual list of federally recognized Tribes in the definition of ''Tribe;''
- Replace ''Director'' of the Office of Indian Energy & Economic Development (IEED) with ''Secretary'' to indicate the Secretary of the Interior and maintain delegation flexibility, except where necessary to provide for administrative appeal options; and
- Add an address for receipt of TERA applications and requests for TEDO certifications.

IV. Summary of Changes Made to Proposed Rule

The Department made the following changes to the proposed rule in response to comments, as described above:

- In § 224.30, updated the definition of ''decision deadline'' to refer to an end date rather than a period of time, and corrected U.S.C. citations in the definition of ''Tribal energy development organization (TEDO)'';
- In § 224.51, added a requirement for the Secretary to contact the Tribe within 30 days of receiving a request for pre-application consultation;
- In § 224.53, deleted requirements for the TERA application to include a statement that the Tribe is federally recognized and has Tribal land, a brief description of the Tribe's form of government, and documents such as a Tribal constitution;
- In §§ 224.54 and 224.202, eliminated the need to submit a hard copy application and instead required Tribes and TEDOs to email a searchable, portable document format (PDF);
- In §§ 224.56, 224.62, 224.74, and 224.76, deleting provisions allowing the Secretary to extend time periods; and
- In § 224.181, adding that a TEDO may appeal Departmental decisions or inaction.

The Department also made an additional conforming edit to the proposed rule, which now appears in the final § 224.59 to delete reference to a determination of the Tribe's capacity.

V. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866, 13563, and 13771)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

E.O. 13771 of January 30, 2017, directs Federal agencies to reduce the regulatory burden on regulated entities and control regulatory costs. OIRA has determined that this rule is deregulatory because the updates will reduce the requirements and annual burden hours imposed on Tribes seeking to enter into a TERA.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more because it merely codifies eligibility requirements that were already established by past practice and a Federal District Court ruling.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because this rule affects only individuals' eligibility for certain education contracts.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects agreements between Tribes and the Department to allow Tribes to authorize individual leases, business agreements, and rights-of-way on Tribal land

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a monetarily significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only agreements entered into by Tribes and the Department. A federalism summary impact statement is not required.

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

This rule complies with the requirements of Executive Order 12988. Specifically, this rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because the rule affects the criteria, process, and effectiveness of agreements Tribes may enter into with the Department of the Interior to develop energy resources. The Department hosted consultation sessions with Tribes and individually notified each federally recognized Tribe of those opportunities to consult.

I. Paperwork Reduction Act

OMB Control No. 1076–0167 currently authorizes the collections of information contained in 25 CFR part 224, with an expiration of January 31, 2020. With this rulemaking, we are seeking to renew this information collection. The current authorization totals an estimated 3,968 annual burden hours. This rule decreases the annual burden hours by an estimated 1,008 hours, due to: A decrease in the information requested as part of the TERA application process in §§ 224.53 and 224.63, and the streamlined process for seeking expansion of an existing TERA to cover additional Tribal land, energy resources, or categories of energy-related leases, business agreements, or rights-of-way in § 224.64. Also, under § 224.64, a Tribe now may submit an amendment, rather than applying for a new TERA. These revisions reduce the hour burden, as a result of a program change made through regulatory updates to implement a new statute, and so require a revision to an approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* for which we are requesting OMB approval.

OMB Control Number: 1076–0167.

Title: Tribal Energy Resource Agreements, 25 CFR 224.

Brief Description of Collection: Submission of this information is required for federally recognized Indian Tribes to apply for, implement, reassume, or rescind a TERA that has been entered into under 25 U.S.C. 3501 *et. seq.,* and 25 CFR 224. This collection also requires the Tribe to notify the public of certain actions and allows a petition from the public to be submitted to Interior to inform of possible noncompliance with a TERA.

Type of Review: Revision of a currently approved collection.

Respondents: Federally recognized Indian Tribes and the public.

Number of Respondents: 1 on average (each year).

Number of Responses: 11 on average (each year).

Frequency of Response: On occasion.

Estimated Time per Response: Varies from 32 hours to 432 hours.

Estimated Total Annual Hour Burden: 2,960 hours.

Estimated Total Non-Hour Cost: $18,100.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 224

Agreement, Appeals, Application, Business Agreements, Energy Development, Interested Party, Lease, Record keeping requirements, Reporting requirements, Right-of-Way, Tribal Energy Resource Agreements, Tribal capacity, Tribal lands, Trust, Trust asset.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 224 in Title 25 of the Code of Federal Regulations as follows:

PART 224—TRIBAL ENERGY RESOURCE AGREEMENTS UNDER THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF DETERMINATION ACT

■ 1. Revise the authority citation for part 224 to read as follows:

Authority: 25 U.S.C. 2 and 9; 25 U.S.C. 3501–3504; Pub. L. 109–58; Pub. L. 115–325.

■ 2. In part 224:
■ a. Throughout the part, remove the words ''tribe'', ''tribe's'', ''tribes'', and ''tribal'', wherever they appear, and add in their place the words ''Tribe'', ''Tribe's'', ''Tribes'', and ''Tribal'', respectively.
■ b. In subparts B through H, remove the words ''Director'' and ''Director's'', wherever they appear, and add in their place the words ''Secretary'' and ''Secretary's'', respectively.

■ 3. Amend § 224.30 by:
■ a. Revising the definitions of ''Act'', ''Decision Deadline'', and ''Designated Tribal Official'';
■ b. Adding in alphabetical order definitions for ''Qualified Tribe'' and ''Tribal energy development organization''; and
■ c. Revising the definition of ''Tribe''.

The revisions and additions read as follows:

§ 224.30 What definitions apply to this part?

Act means the Indian Tribal Energy Development and Self-Determination Act of 2005, as promulgated in Title V of the Energy Policy Act of 2005, Public Law 109–58, 25 U.S.C. 3501–3504, and as amended by the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Public Law 115–325.

* * * * *

Decision Deadline means the end of the 120-day period within which the Secretary will make a decision about a petition submitted by an interested party under subpart E. The Secretary may extend this deadline for up to 120 days.

* * * * *

Designated Tribal Official means the official designated in a Tribe's pre-application consultation request, application, or agreement to assist in scheduling consultations or to receive communications from the Secretary to the Tribe regarding the status of a TERA or activities under a TERA.

* * * * *

Qualified Tribe means a Tribe with Tribal land that has—

(1) For a period of not less than 3 consecutive years ending on the date on which the Tribe submits the application, carried out a contract or compact relating to the management of tribal land or natural resources under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*) without material audit exception (or without any material audit exceptions that were not corrected within the 3-year period); or

(2) Substantial experience in the administration, review, or evaluation of energy resource leases or agreements or has otherwise substantially participated in the administration, management, or development of energy resources located on the Tribal land of the Indian Tribe.

* * * * *

Tribal energy development organization or *TEDO* means:

(1) Any enterprise, partnership, consortium, corporation, or other type of business organization that is engaged in the development of energy resources and is wholly owned by a Tribe, including but not limited to an organization incorporated under section 17 of the Indian Reorganization Act, 25 U.S.C. 5124 or section 3 of the Oklahoma Indian Welfare Act, 49 Stat, 1967, chapter 831; and

(2) Any organization of two or more entities, at least one of which is a Tribe, that has the written consent of the governing bodies of all Tribes participating in the organization, to apply for a grant, loan, or other assistance under 25 U.S.C. 3502 or to enter into a lease or business agreement with, or acquire a right-of-way from, a Tribe under 25 U.S.C. 3504(a)(2)(A)(ii) or (b)(2)(b).

* * * * *

Tribe means any Indian Tribe, band, nation, or other organized group or community that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, except a Native Corporation as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. 1602, as evidenced by inclusion of the Tribe on the list of recognized Tribes published by the Secretary under 25 U.S.C. 5131.

* * * * *

§ 224.51 [Amended]

■ 4. Amend § 224.51 by:
■ a. Removing the words ''Office of Indian Energy and Economic Development'' in paragraph (a);
■ b. Adding the words ''within 30 days'' after the words ''Designated Tribal Official'' in paragraph (b).

■ 5. Amend § 224.53 by:
■ a. Removing paragraphs (a)(2), (3), (4), (7), (8), (10);
■ b. Redesignating paragraphs (a)(5) and (6) as (a)(2) and (3), respectively;
■ c. Adding a new paragraph (a)(4);
■ d. Redesignating paragraph (a)(9) as paragraph (a)(5);
■ e. In newly redesignated paragraph (a)(5), removing the words ''paragraph (e)'' and adding the words ''paragraph (d)'' in their place;
■ f. Redesignating paragraphs (a)(11) and (12) as paragraphs (a)(6) and (7), respectively.
■ g. Removing paragraph (b);
■ h. Redesignating paragraph (c) and paragraph (b);
■ i. Removing paragraphs (d) and (f);
■ j. Redesignating paragraph (e) as paragraph (c);
■ k. In newly redesignated paragraph (c) introductory text, removing the words ''paragraph (a)(9)'' and adding the words ''paragraph (a)(5)'' in their place; and
■ l. In newly redesignated paragraph (c)(1), removing the phrase ''in sufficient detail for the Secretary to determine the Tribe's capacity to administer and manage the regulatory activity(ies)''.

The addition reads as follows:

§ 224.53 What must an application for a TERA contain?

(a) * * *

(4) Documentation that the Tribe meets the definition of ''qualified Tribe'' in § 224.30;

* * * * *

■ 6. Revise § 224.54 to read as follows:

§ 224.54 How must a Tribe submit an application?

A Tribe must submit an application and all supporting documents in a searchable portable document format (PDF) to *TERA@bia.gov.*

■ 7. Revise § 224.56 to read as follows:

§ 224.56 What is the effect of the Secretary's receipt of a qualified Tribe's complete application?

The Secretary's receipt of a qualified Tribe's complete application begins a 270-day statutorily mandated period during which the Secretary must approve or disapprove a proposed TERA. The TERA takes effect upon the 271st day after the Secretary's receipt of a complete application from a qualified Tribe, unless the Secretary approves the TERA to take effect on an earlier date, or the Secretary disapproves the application before that date.

■ 8. Amend § 224.57 by redesignating paragraph (a)(3)(i)(B) as paragraph (a)(3)(i)(C) and adding a new paragraph (a)(3)(i)(B).

The addition reads as follows:

§ 224.57 What must the Secretary do upon receipt of an application?

(a) * * *

If the Director determines that . . .	Then the Director must . . .
(i) * * *	(B) Identify in the written notice any financial assistance available from the Secretary to assist in implementing the TERA, including environmental review of individual projects; and

(3) * * *

* * * * *

■ 9. Revise § 224.59 to read as follows:

§ 224.59 How will the Secretary use the results of the application consultation meeting?

The Secretary will use the information gathered during the application consultation meeting in conjunction with information provided through §§ 224.53 and 224.63 to determine whether to recommend any revisions to the proposed TERA.

■ 10. Revise § 224.62 to read as follows:

§ 224.62 May a final proposed TERA differ from the original proposed TERA?

The final proposed TERA may or may not contain provisions that differ from the original proposed TERA submitted with the application. In either case, the 270-day review period will begin to run on the date the original complete application was received (under § 224.57).

■ 11. Amend § 224.63 by:

■ a. Removing paragraphs (c)(1) and (2);

■ b. Redesignating paragraphs (c)(3) through (6) as (c)(1) through (4);

■ c. Removing paragraphs (d)(1) and (5);

■ d. Redesignating paragraphs (d)(2) through (4) as paragraphs (d)(1) through (3);

■ e. Redesignating paragraphs (d)(6) through (14) as paragraphs (d)(4) through (12); and

■ f. Adding paragraph (m).

The addition reads as follows:

§ 224.63 What provisions must a TERA contain?

* * * * *

(m) At the option of the Tribe, identify which functions, if any, the Tribe intends to conduct to authorize any operational or development activities pursuant to a lease, business agreement, or right-of-way approved by the Tribe.

■ 12. Revise § 224.64 to read as follows:

§ 224.64 How may a Tribe assume management of development of different types of energy resources?

(a) In order for a Tribe to assume authority for approving leases, business agreements, and rights-of-way for the development of another energy resource that is not included in the TERA, a Tribe must submit to the Secretary:

(1) An amendment to the TERA that specifies and describes the additional Tribal land, energy resources, or categories of energy-related leases, business agreements, or rights-of-way that the Tribe intends to include in the TERA; and

(2) A copy of the resolution or formal action of the Tribal governing body, or Tribal governing bodies if the land is held for the benefit of more than one Tribe, that approves submission of the TERA amendment.

(b) Submission of the documents in paragraph (a) of this section will trigger the public notice and opportunity for comment consistent with § 224.67.

(c) The Secretary will process the amendment in accordance with §§ 224.67 through 224.78.

(d) Each Tribal governing body that is party to the TERA must sign the TERA amendment upon approval.

§ 224.65 [Amended]

■ 13. In § 224.65, remove the last sentence.

§ 224.68 [Amended]

■ 14. In § 224.68, remove the last sentence in paragraph (d).

■ 15. Revise § 224.71 to read as follows:

§ 224.71 What standards will the Secretary use to decide to approve a final proposed TERA?

The Secretary must approve a final proposed TERA unless:

(a) The Tribe does not meet the definition of a ''qualified Tribe'' in § 224.30;

(b) A provision of the TERA violates applicable Federal law (including regulations) or a treaty applicable to the Tribe; or

(c) The TERA fails to include the provisions required by § 224.63.

§§ 224.72 and 224.73 [Removed and Reserved]

■ 16. Remove and reserve §§ 224.72 and 224.73.

■ 17. Revise § 224.74 to read as follows:

§ 224.74 When must the Secretary approve or disapprove a final proposed TERA?

The Secretary must approve or disapprove a final proposed TERA within 270 days of the Secretary's receipt of a complete application for a TERA. If the Secretary fails to approve or disapprove a final proposed TERA within 270 days, the TERA takes effect on the 271st day after the Secretary's receipt of a complete application from a qualified Tribe.

■ 18. In § 224.75, revise paragraph (b) to read as follows:

§ 224.75 What must the Secretary do upon approval or disapproval of a final proposed TERA?

* * * * *

If the Secretary's decision is . . .	Then the Secretary will . . .
* * * * * * *	
(b) To disapprove the final proposed TERA.	Send the Tribe a notice of disapproval that must include: (1) A detailed written explanation of each reason for the disapproval; (2) The changes or other actions required to address each reason for the Secretary's disapproval; (3) An opportunity to revise and resubmit the TERA: and (4) A statement that the decision is a final agency action and is subject to judicial review.

■ 19. In § 224.76, revise the introductory text to read as follows:

§ 224.76 Upon notification of disapproval, may a Tribe re-submit a revised final proposed TERA?

Yes, within 45 days of receiving the notice of disapproval, or a later date as the Secretary and the Tribe agree to in writing, the Tribe may re-submit a revised final proposed TERA, approved by the Tribal governing body and signed by the Tribe's authorized representative, to the Secretary that addresses the Secretary's concerns. The Secretary must approve or disapprove the revised final proposed TERA within 90 days of the Secretary's receipt of the revised final proposed TERA. If the Secretary does not approve or disapprove the revised proposed TERA within that time, it will take effect on the 91st day. Within 10 days of the Secretary's approval or disapproval of a revised final proposed TERA, the Secretary must notify the Tribal governing body in writing and take the following actions:

* * * * *

■ 20. Add § 224.78 to subpart C to read as follows:

§ 224.78 How long will a TERA remain in effect?

A TERA that takes effect under this part remains in effect to the extent any provision of the TERA is consistent with applicable Federal law (including regulations), unless and until either:

(a) The Secretary reassumes all activities included within a TERA without the consent of the Tribe under Subpart G; or

(b) The Tribe rescinds a TERA under Subpart H.

■ 21. Add § 224.79 to subpart C to read as follows:

§ 224.79 Will the Secretary make non-expended amounts available to the Tribe?

Upon written request of a Tribe for whom an approved TERA is in effect, the Secretary will provide to the Tribe those amounts that the Secretary would otherwise have expended to carry out any program, function, service, or activity (or portion thereof) that the Secretary does not expend as a result of the Tribe carrying out the activities under a TERA. The Secretary will provide the Tribe with a full accounting of the amounts as calculated based on the specific terms of the TERA, the scope of the contracted functions, and applicable circumstances.

§ 224.80 [Amended]

■ 22. In § 224.80, add the word ''Federal'' before the word ''authorities''.

■ 23. Revise § 224.84 to read as follows:

§ 224.84 When may a Tribe grant a right-of-way?

A Tribe may grant a right-of-way under a TERA if the grant of right-of-way is over tribal land and the right-of-way serves:

(a) An electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on tribal land;

(b) A facility located on tribal land that processes or refines energy resources; or

(c) The purposes, or facilitates in carrying out the purposes, of any lease or agreement entered into for energy resources development on tribal land.

■ 24. Revise § 224.85 to read as follows:

§ 224.85 When may a Tribe enter into a lease or business agreement?

A Tribe may enter into a lease or business agreement for the purpose of energy resource development for:

(a) Exploration for, extraction of, or other development of the Tribe's energy mineral resources on tribal land including, but not limited to, marketing or distribution;

(b) Construction or operation of an electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on tribal land;

(c) Construction or operation of a facility to process or refine energy resources, at least a portion of which have been developed on tribal land; or

(d) Pooling, unitization, or communitization of the energy mineral resources of the Indian tribe located on tribal land with any other energy mineral resource (including energy mineral resources owned by the Indian tribe or an individual Indian in fee, trust, or restricted status or by any other persons or entities) if the owner, or, if appropriate, lessee, of the resources has consented or consents to the pooling, unitization, or communitization of the other resources under any lease or agreement.

■ 25. Revise § 224.101 to read as follows:

§ 224.101 Who is an interested party?

For the purposes of this part, an interested party is a person or entity that the Secretary determines has demonstrated with substantial evidence that an interest of the person or entity has sustained, or will sustain, an adverse environmental impact as a result of a Tribe's failure to comply with a TERA.

■ 26. Revise § 224.107 to read as follows:

§ 224.107 What must a petitioner do before filing a petition with the Secretary?

Before a petitioner may file a petition with the Secretary under this subpart, the petitioner must have exhausted all tribal remedies by participating in any tribal process under § 224.106, and available under the laws, regulations, or procedures of the Tribe, including any tribal appeal process.

■ 27. In § 224.110 revise paragraph (b) to read as follows:

§ 224.110 What must a petition to the Secretary contain?

* * * * *

(b) Specific facts demonstrating that the petitioner is an interested party under § 224.101, including identification of the affected interest;

* * * * *

■ 28. In § 224.115, revise the introductory text to read as follows:

§ 224.115 When in the petition process must the Secretary investigate a Tribe's compliance with a TERA?

The Secretary must investigate the petitioner's claims of the Tribe's noncompliance with a TERA only after making a threshold determination that the petitioner is an interested party and:

* * * * *

■ 29. Revise § 224.116 to read as follows:

§ 224.116 What is the time period in which the Secretary must investigate a Tribe's compliance with a TERA?

(a) If the Secretary determines under § 224.115 that one of the threshold determinations in § 224.114 has been met, then within 120 days of the Secretary's receipt of a petition, the Secretary must determine:

(1) Whether the petitioner is an interested party; and

(2) If the petitioner is an interested party, whether or not a Tribe is in compliance with the TERA as alleged in the petition;

(b) The Secretary may extend the time for the Tribe making the determinations in paragraph (a) of this section for up to 120 days in any case in which the Secretary determines that additional time is necessary to evaluate the claims in the petition and the Tribe's written response, if any. If the Secretary decides to extend the time, the Secretary must notify the petitioner and the Tribe in writing of the extension.

■ 30. In § 224.119, revise paragraph (b)(1) and add paragraph (c) to read as follows:

§ 224.119 What must the Secretary do when making a decision on a petition?

* * * * *

(b) * * *

(1) Include findings of fact and conclusions of law with respect to each claim made in the petition in the written decision to the Tribe; and

* * * * *

(c) The Secretary will dismiss any petition if the interested party who filed the petition has agreed with the Tribe to a resolution of the claims presented in the petition.

■ 31. In § 224.120, revise the introductory text to read as follows:

§ 224.120 What action may the Secretary take to ensure compliance with a TERA?

If the Secretary decides that a Tribe is not in compliance with a TERA, the Secretary may take only such action as the Secretary determines to be necessary to address the claims of noncompliance made in the petition including:

* * * * *

■ 32. In § 224.181 revise paragraphs (a) and (c) to read as follows:

§ 224.181 Who may appeal Departmental decisions or inaction under this part?

* * * * *

(a) A Tribe or TEDO that is adversely affected by a decision of or inaction by an official of the Department of the Interior under this part;

* * * * *

(c) An interested party who is adversely affected by a decision or inaction by the Secretary under subpart E of this part, provided that the interested party may appeal only those issues raised in its prior participation under subpart E of this part and may not appeal any other decision rendered or inaction under this part.

■ 33. In § 224.182, revise paragraph (a) to read as follows:

§ 224.182 What is the Initial Appeal Process?

* * * * *

(a) Within 30 days of receiving an adverse decision by the Director or similar level official within 30 days after the time period within which the Secretary is required to act under subpart E, a party that may appeal under this subpart may file an appeal to the Principal Deputy Assistant Secretary—Indian Affairs;

* * * * *

■ 34. Add subpart J, consisting of §§ 224.200 through 224.206, to read as follows:

Subpart J—Alternative to TERAs: Tribal Energy Development Organization (TEDO) Certification

Sec.

224.200 What is the purpose of this subpart?
224.201 What must an application for certification as a Tribal energy development organization (TEDO) include?
224.202 How must a TEDO submit an application for certification?
224.203 What must the Secretary do upon receipt of an application for certification as a TEDO?
224.204 What criteria will the Secretary use to determine whether to approve an application for certification of a TEDO?
224.205 What must the Secretary do upon approval of an application for certification?
224.206 What is the effect of a TEDO receiving certification?

§ 224.200 What is the purpose of this subpart?

The purpose of this part is to establish a process by which an entity may be certified as an Tribal energy development organization (TEDO) that may enter into a lease or business agreement with an Indian Tribe without Secretarial review under 25 U.S.C. 3504(a)(2) or right-of-way with an Indian Tribe without Secretarial review under 25 U.S.C. 3504(b)(2)(B) and without a TERA.

§ 224.201 What must an application for certification as a Tribal energy development organization (TEDO) include?

An application for certification as a TEDO must include documentation of the items listed in paragraphs (a) through (d) of this section.

(a) The Tribe has carried out a contract or compact under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*) for a period of not less than 3 consecutive years ending on the date on which the Tribe submits the application, and the contract or compact:

(1) Has been carried out by the Tribe without material audit exceptions (or without any material audit exceptions that were not corrected within the 3-year period); and

(2) Has included programs or activities relating to the management of Tribal land;

(b) The TEDO is organized under the Tribe's laws;

(c) The majority of the interest in the TEDO is owned and controlled by the Tribe (or the Tribe and one or more other Tribes) the Tribal land of which is being developed; and

(d) The TEDO's organizing document:

(1) Requires the Tribe with jurisdiction over the land to maintain, at all times, the controlling interest in the TEDO;

(2) Requires the Tribe (or the Tribe and one or more other Tribes the Tribal land of which is being developed) to own and control, at all times, a majority of the interest in the TEDO; and

(3) Includes a statement that the TEDO is subject to the jurisdiction, laws, and authority of the Tribe.

§ 224.202 How must a TEDO submit an application for certification?

A TEDO must submit an application and all supporting documents in a searchable portable document format (PDF) to *TERA@bia.gov.*

§ 224.203 What must the Secretary do upon receipt of an application for certification as a TEDO?

Within 90 days of receiving an application for certification as a TEDO, the Secretary must approve or disapprove the application.

§ 224.204 What criteria will the Secretary use to determine whether to approve an application for certification of a TEDO?

The Secretary will approve the application for certification upon determining that the application contains the documentation required in § 224.201.

§ 224.205 What must the Secretary do upon approval of an application for certification?

If the Secretary approves an application for certification, the Secretary must do the following within 10 days of making the determination under § 224.203:

(a) Issue a certification stating that:

(1) The TEDO is organized under the laws of the Tribe and subject to the Tribe's jurisdiction, laws, and authority;

(2) The majority of the interest in the TEDO is owned and controlled by the Tribe (or the Tribe and one or more other Tribes) and the Tribal land of which is being developed;

(3) The TEDO's organizing document requires the Tribe with jurisdiction over the land to maintain, at all times, the controlling interest in the TEDO;

(4) The TEDO's organizing document requires the Tribe (or the Tribe and one or more other Tribes the Tribal land of which is being developed) to own and control, at all times, a majority of the interest in the TEDO;

(5) The certification is issued under 25 U.S.C. 3504(h); and

(6) Nothing in the certification waives the sovereign immunity of the Tribe.

(b) Deliver a copy of the Certification to the applicant Tribe (or Tribes, as applicable); and

(c) Publish the certification in the **Federal Register**.

§ 224.206 What is the effect of a TEDO receiving certification?

Upon receiving certification under this subpart, a TEDO may enter into a lease, business agreement, or right-of-way with an Indian Tribe without Secretarial approval as long as:

(a) The scope of the lease or business agreement does not exceed that of a TERA as established in § 224.85 of this part.

(b) The scope of a right-of-way does not exceed that of a TERA as established in § 224.84 of this part.

(c) The term of a lease, business agreement, or right-of-way does not exceed that of a TERA as established in § 224.86 of this part.

Dated: November 15, 2019.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2019–27399 Filed 12–17–19; 8:45 am]

BILLING CODE 4337–15–P

Reader Aids

Federal Register

Vol. 84, No. 243

Wednesday, December 18, 2019

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, DECEMBER

65907–66062 2
66063–66280 3
66281–66560 4
66561–66812 5
66813–67168 6
67169–67342 9
67343–67656 10
67657–67826 11
67827–68018 12
68019–68324 13
68325–68780 16
68781–69294 17
69295–69616 18

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
9968 66281
9969 66283
9970 66286
9971 67657
9972 68323
Executive Orders:
13898 66059
13899 68779

5 CFR

Proposed Rules:
1630 68815
1632 68815
1650 68815

7 CFR

2 69295
273 66783
990 69295
1410 66813
1466 69272
Proposed Rules:
66 68816
205 67242
1216 65929

8 CFR

Proposed Rules:
103 67243
106 67243
204 67243
211 67243
212 67243
214 67243
216 67243
223 67243
235 67243
236 67243
240 67243
244 67243
245 67243
245a 67243
248 67243
264 67243
274a 67243
301 67243
319 67243
320 67243
322 67243
324 67243
334 67243
341 67243
343a 67243
343b 67243
392 67243

9 CFR

Proposed Rules:
56 66631
145 66631
146 66631
147 66631

10 CFR

1 66561
2 .....66561, 68781
37 66561
40 66561
50 66561
51 66561
52 .....66561, 68781
55 66561
71 66561
72 .....66561, 67827
73 .....66561, 67659
74 66561
100 66561
140 66561
150 66561
Proposed Rules:
429 67106
430 .....67106, 68060
431 66327

12 CFR

1 69296
3 68019
5 69296
23 69296
24 69296
32 69296
34 69296
209 68325
217 68019
324 68019
327 66833
351 66063
624 68326
Ch. VII 65907
702 68781
703 69298
Proposed Rules:
217 67381
252 67381
303 68353
308 68353
331 66845
1005 67132
1238 68350

13 CFR

120 66287
121 66561
Proposed Rules:
124 66647

14 CFR

25 67828
39 .....66063, 66579, 66582, 66838, 67169, 67171, 67174, 67176, 67179, 67830, 67832, 67834, 67837, 67851, 67854, 68034, 68037, 68326

71 .....66066, 67858, 67860, 68039, 68041, 68330
91.....67659, 67665
97.....67862, 67864
Proposed Rules:
39 .....65931, 65935, 66080, 66082, 67246, 67248, 67251, 68060, 68063, 68363, 68365, 68368, 68370, 68374, 68376, 68817, 68819, 68822, 68824
71 .....67381, 67383, 67385, 67880, 67881, 67884, 67886, 68379, 68381, 68383, 68385, 68827, 69346

15 CFR
744.....66840, 69298
902.....67183

17 CFR
4.....67343, 67355
13.....68787
200.....68550
240.....68550
249.....68550
Proposed Rules:
275.....67518
279.....67518
240.....66458, 66518

18 CFR
Proposed Rules:
1304.....67386

20 CFR
404.....69298
416.....69298
Proposed Rules:
404.....67394
416.....67394
617.....67681
618.....67681

21 CFR
310.....68331
807.....68334
812.....68334
814.....68334
1301.....68340
Proposed Rules:
814.....68829

22 CFR
51.....67184

25 CFR
224.....69602

26 CFR
1 .....66968, 67370, 68042, 68790, 69022, 69305
Proposed Rules:
1 .....65937, 67046, 68833, 69124
301.....69124

29 CFR
102.....69524
548.....68736
778.....68736
1910.....68794
4022.....68043
4044.....67186, 68043
Proposed Rules:
10.....67681
90.....67681
103.....66327, 67682
401.....68842
516.....67681
531.....67681
578.....67681
579.....67681
580.....67681
1614.....67683

30 CFR
902.....66296
950.....66309

32 CFR
775.....66586

33 CFR
52.....68342
100.....67375, 68044
165 .....66069, 66840, 67187, 67375, 68343, 69326, 69328
Proposed Rules:
147.....69348
165.....68858, 68860

34 CFR
5.....67865
Proposed Rules:
Ch. III.....67395
674.....67778
675.....67778
676.....67778
682.....67778
685.....67778
686.....67778
690.....67778
692.....67778
694.....67778

37 CFR
2.....68045, 69330
7.....69330
Proposed Rules:
Ch. II.....66328

38 CFR
17.....68046
51.....67868
Proposed Rules:
1.....68065

39 CFR
20.....66072
Proposed Rules:
3010.....67685
3020.....67685
3050.....67402, 67685
3055.....67685

40 CFR
9.....66591, 66599
52 .....66074, 66075, 66316, 66612, 67189, 67191, 67196, 67378, 67873, 68049, 68050, 69331
70.....67200
80.....69335
180 .....66616, 66620, 66626
260.....67202
261.....67202
264.....67202
265.....67202
268.....67202
270.....67202
272.....67875
273.....67202
721.....66591, 66599
Proposed Rules:
1.....66084
22.....66084
23.....66084
49.....66084
51.....68069
52 .....66084, 66096, 66098, 66103, 66334, 66345, 66347, 66352, 66361, 66363, 66366, 66853, 68097, 68863, 69349
55.....65938, 66084
60.....68069
61.....68069
63 .....67889, 68069, 68870, 69182
71.....66084
78.....66084
124.....66084
222.....66084
257.....65941
372.....66369
721.....66855
1604.....67899

44 CFR
64.....65924, 68346

45 CFR
1115.....66319

47 CFR
1 .....66078, 66716, 66843
9.....66716
12.....66716
20.....66716
22.....66716
25.....66716
54.....67220
64.....66716
76.....69342
Proposed Rules:
27.....69351

48 CFR
Ch. I.....68314, 68319
4.....68314
52.....68314
1419.....69343

49 CFR
10.....67671
382.....68052
383.....68052
384.....68052
1152.....66320
Proposed Rules:
24.....69466
Ch. III.....68386

50 CFR
300.....68057
622 .....67236, 67674, 68058
648 .....66630, 68348, 68797, 68798
660 .....65925, 65926, 67674, 68799
679.....65927, 67183
Proposed Rules:
17.....67060
218.....67404
600.....68389
648.....68871
679 .....66109, 66129, 67421

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 17, 2019

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.